

CONTRACTS

Arthur L. Corbin

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CASES
ON
THE LAW OF CONTRACTS

SELECTED FROM DECISIONS OF
ENGLISH AND AMERICAN COURTS
WITH EXTENSIVE CRITICAL NOTES

By ARTHUR L. CORBIN
PROFESSOR OF LAW EMERITUS, YALE UNIVERSITY

THIRD EDITION

AMERICAN CASEBOOK SERIES
ERWIN N. GRISWOLD

ST. PAUL, MINN.
WEST PUBLISHING CO.
1947

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PREFACE

A GOOD many cases contained in the second edition have been omitted, and new cases are included. Some of the latter represent a recent variation in legal development; most of the omissions represent only a new compromise with space and time. There has been no change in the view that a casebook is merely an introduction; that no decision, no stated rule, and no scholar's criticism can be accepted as final, however persuasive; and that the value of an opinion, either as to what the courts are likely to do in the future or as to the social policies that underlie their action, is directly dependent upon the breadth and depth of case study behind it. There is no substitute (although there are many interesting supplements) for the comparative study of reported cases, the critical consideration of judicial action in the conflicts of life. Cases are included herein to afford an opportunity to study the facts of life in those transactions that involve bargaining, promising, agreeing. They are not chosen to support a preconceived thesis, either in the form of a "rule" of law or in the form of an opinion on social policy.

The law is in constant process of evolutionary change; the judges being the principal selecting agents in the variation. The changes in the expressed rules are induced by changes in the mores of society and in the customs and practices of men in the transactions of life. In the absence of cataclysm, the fundamental mores remain unchanged over long periods of time; the smaller customs and practices are subject to much more rapid variation, with differences of some importance even between local communities. The lawyer and the judge must know this varying background of the expressed rules of law. Generally, but not always, the litigated cases quickly reflect changes in the practices and mores of the people; indeed, they constitute the most convincing and the most readily available evidence of what the practices and mores are and of the process of change therein.

An entirely new chapter has been included on the subject of "Interpretation." The process that is described by that term is more complex and variable than is generally supposed. It is involved in every contract case, the assumption often being that words and conduct have only one reasonable "meaning" and that any one can find it. Every student, lawyer, and judge needs to give the matter some sustained thought, stimulated by a comparative study of cases and of

PREFACE

juristic opinion. In such a study the so-called "objective" and "subjective" theories of contract are involved; so also is the so-called "parol evidence rule."

The chapter on "Remedies for Breach" has been cut down by omitting the cases on "Restitution" and "Specific Performance;" those on "Damages" being retained. This is solely on the ground that there are only 60 minutes in an hour. Some notes, very inadequate indeed, have been added respecting the matters omitted.

The cases on "Impossibility" have been separated, those dealing with "Excuse of Conditions" being found under that heading in Chapter 6. The greater number of them are now in a separate section in Chapter 9, "Discharge of Contractual Duties;" along with these, special attention is given to decisions employing the phrase "Frustration of Contract."

The number of "Questions" following the reported cases has been somewhat increased. Their sole purpose is to give the student some suggestive points of attack in his own analysis and comparative study of the cases before any discussion with his instructor. Unless the student makes such an original attack, with an effort to construct suggestive generalizations for his assistance in meeting new problems in examinations and in law practice, the study of cases becomes as mechanical and almost as lifeless as is the study of a digest or a treatise.

In no case should one be content to accept another person's answer to a single question. The matter of chief importance is not knowledge of the "answer"; it is the process of answering. Moreover, the question may have no answer. The process of answering must, of course, include the comparison and discussion of many answers.

In this edition there is a large increase in the explanatory and analytical notes. Many of these are "Introductory Notes," to direct the student's steps as he enters the maze of a new group of cases; but they are intended also to afford him subject matter for his criticism after acquiring opinions of his own. The "foot notes" of the former edition have been wholly rewritten and have been lifted on the page.

Without doubt, the editor's "Notes" will arouse differences of opinion; they are intended to afford both instructor and student an opportunity for their correction and for discussion. They are usually not intended to answer questions that careful study of the cases would answer; but the editor has not been afraid to give aid where the complexity of a problem makes it desirable, to state a little explanatory history, or to give some supplementary information.

PREFACE

The temptation to reprint sections of the Restatement of the Law of Contracts by the American Law Institute has been resisted except in a few instances. The "Restatement" will no doubt be in the hands of every student. References to it will be found at every point, so that it, like the editor's "Notes," may serve as a suggestion, a basis for comparison, and a subject for attack. The courts have already made much use of the Restatement; and in some instances it has changed the current of decision. He must indeed be a poor legal scholar who can not find sections in the Restatement that are already in need of revision and who can not construct such a revision after an intensive study of the relevant judicial and extra-judicial background. In the "Notes" herein, some such sections have been pointed out. Nevertheless, the Restatement is worthy of the attention that it is getting.

The editor would have liked to reduce the size of the volume; and he is aware that more cases are included than can be well discussed in the time usually available. But not more have been included than can be carefully read by the student. Possibly enough have been included to point out the way by which he may become competent to criticise the decisions and doctrines of others and to make some just and convincing ones of his own.

ARTHUR L. CORBIN.

YALE UNIVERSITY SCHOOL OF LAW
JULY, 1947.

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CASES

ON THE

LAW OF CONTRACTS

CHAPTER 1

BARGAINS—OFFER AND ACCEPTANCE

INTRODUCTORY NOTE

In the study of the law of contracts the central question is "What promises will be enforced by the courts?"

Our existing economic system is a "credit" system; and it is largely by the making and the keeping of promises that we live and prosper. Most promises that men make are kept and performed without the necessity of actual judicial enforcement; but each one who makes a contractual promise and is tempted to break it knows that the force of society (the rest of us) is ready to prevent the breach or to compel reparation if a breach occurs.

It is not every promise, however, that the courts will enforce. That the given word should be made good is a part of our existing mores; but those mores do not require that every promise shall be kept. Some promises are better broken than kept; and in some instances the law recognizes valid excuses for not performing a promise that was legally binding when it was made. There is no infallible test for determining whether or not a promise will be enforced. But by a careful comparative study of judicial decisions one can construct a series of tentative working rules by which the enforceability of a promise may be determined and advice given on which men may act with a reasonable degree of confidence. This is all that is done in a law treatise or in a Restatement by a Law Institute. It is what every judge, lawyer, and student must be prepared to do for himself.

Our legal system is based upon, and is a part of, the mores of men. The rules and doctrines of which this system is composed are commonly stated, and restated, so as to appear somewhat more specific

and definite than are those of the mores from which they come; but the attempt to apply them in actual cases shows that they constitute no infallible test of what the courts will do, one by which answers can be found by a purely logical or mechanical process. The principles, rules, doctrines of the law are at best "working rules", subject to constant evolutionary change along with the rest of our civilization. They require frequent restatement in order to keep them useful and up to date; and no judge, lawyer, or student can safely rely on anybody's stated rule without a knowledge of the cases that constitute its inductive basis.

A rule is not to be scorned because it is a "working rule." It is the only kind of rule we have; and each man must study the sources from which such rules come, testing and criticizing and remaking them as may be found necessary. A "working rule" is to be scorned only when it does not "work." The difference between a good lawyer and a poor one, between a good scholar and a weak one, is that the former can construct rules that "work", can apply them to a case after making a clear analysis of its facts, can give advice that a client may act upon with a reasonable assurance of safety, and by brief and argument can convince a court that his stated rule is sound and his advice correct.

Bargains. What is a "bargain"? This casebook does not begin with a series of definitions, although definitions are necessary and useful. No definition is ever the one and only "correct" one; but some definitions are better than others for a particular purpose. There are "working definitions" as well as working rules. Some such definitions may be found in the Restatement of the law of Contracts. Section 4 of that Restatement reads: "A bargain is an agreement of two or more persons to exchange promises or to exchange a promise for a performance." This definition excludes a transaction that is commonly called a "barter", an exchange of physical objects such as a pocket knife and a silver dollar, a string of beads and a pair of moccasins. The exclusion does no harm in a treatise that is dealing with the enforcement of promises. Even in such bartering transactions there is often an "implied" warranty or other accompanying promise.

The bargaining transactions of our own community generally include one or more promises to render some performance in the future. Both ends of the bargain may be promises, in which case it is convenient to describe the resulting contract as "bilateral." Or one end of the bargain may be a promise and the other one a performance that involves no promise, in which case the resulting contract may be described as "unilateral."

It takes two to make a bargain. The exchange is effected by expressions of agreement, usually in the form of an offer by one party

and an acceptance by the other. There may be more or less "haggling" or "dickering" before agreement is reached. One who in the process of bargaining makes an offer to another creates in that other a power to close the deal by accepting, thus consummating the bargain contract. In order that an offer may be operative to create this power of acceptance it must state the terms of the proposed bargain, the two subjects of the proposed exchange; and the offeree gets no power of acceptance other than by assent to this exchange. No attempted acceptance is effective unless it complies in manner and substance as the offer prescribes.

To describe a contract as "unilateral" means that only one party has made a promise and has a duty to render a future performance. A common example is a promissory note given in exchange for cash advanced. To describe a contract as "bilateral" means that both parties have made promises and have mutual rights against each other and mutual duties to each other. The cases herein will present a series of illustrations.

As will appear in subsequent sections, there are many "unilateral" contracts that are not the result of any bargain. A promise made by one party may be enforceable even though there is no equivalent agreed upon or given in exchange for it. Such a contract is not made by any bargaining process or by an offer made by one and accepted by the other. But the far greater number of business transactions are bargains; and the great majority of enforceable promises are those that are made as part of a bargain.

In a bargaining transaction the agreed equivalent of a promise is said to be the "consideration" for that promise. If the contract is bilateral, the "consideration" for each promise is the other promise. If in making a bargain one party offers his promise to the other, the acceptance of the offer constitutes the giving of the requested "consideration"; in no other way can an "agreement" be reached or the offer accepted. If in making a bargain a party requests a promise in exchange for his offer, it is the offer that constitutes the "consideration" for the acceptor's promise.

It is not every bargain that creates a valid contract with one or more enforceable promises. There is no bargain at all unless the exchange is agreed upon and given; but there are "considerations" which, even though agreed upon and given, the courts will not recognize as sufficient to make a promise enforceable.

The accuracy of such introductory general observations as these is for the student to determine as he makes his inductive study of cases and acquires "experience." They do not tell him how to analyze the facts of a case, or how to decide a litigated issue or to advise a client. They do not tell him whether a promise has been made or whether a promise if made is enforceable.

SECTION 1.—PROMISES UNDERSTOOD NOT TO BE ENFORCEABLE

INTRODUCTORY NOTE

This Section consists of a few cases illustrating statements that are promissory in form, but are made with the understanding that they are not intended to be legally enforceable. In some cases actual performance may be intended, and reliance by the promisee may be reasonable, even though there is no legal sanction.

It is not every statement of intention that is a promise. Whether a promise has been made is a question dependent on interpretation of words and conduct. This process of interpretation is involved in every litigated case. At a later point a short chapter will be devoted to cases that deal specifically with the process of interpretation.

WEEKS v. TYBALD.

In the King's Bench, 1605. Noy, 11.

In an *assumpsit* the plaintiff alleges, that whereas there was a communication of marriage between the plaintiff and the daughter of the defendant, that the defendant upon speech between the father of the plaintiff and the defendant, for free liberty to the plaintiff to come to the house of the defendant to woo his daughter, the defendant then and there affirm'd and publish't that he would give £100 to him that should marry his daughter with his consent, &c. By the court the action doth not lye, for *asseruit et publicavit* doth not make words that include a promise.

It is not aver'd nor declar'd to whom the words were spoken, and it is not reason that the defendant should be bound by such general words spoken to excite suitors.

NOTE

For a definition of "promise," see American Law Institute, *Restatement of the Law of Contracts*, §§ 2, 5.

As to whether the defendant made a promise or an operative offer, see *Restatement, Contracts*, §§ 20-25.

KELLER v. HOLDERMAN.

Supreme Court of Michigan, 1863. 11 Mich. 248, 83 Am. Dec. 737.

Action by Holderman against Keller upon a check for \$300 drawn by Keller upon a banker at Niles, and not honored. The cause was tried without a jury, and the Circuit Judge found as facts, that the check was given for an old silver watch, worth about \$15, which Keller took and kept till the day of trial, when he offered to return it to the plaintiff, who refused to receive it. The whole transaction was a frolic and banter—the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn. The defendant when he drew the check had no money in the banker's hands, and had intended to insert a condition in the check that would prevent his being liable upon it; but as he had failed to do so, and had retained the watch, the Judge held him liable, and judgment was rendered against him for the amount of the check.

MARTIN, C. J. When the court below found as a fact that “the whole transaction between the parties was a frolic and a banter, the plaintiff not expecting to sell, nor the defendant intending to buy the watch at the sum for which the check was drawn,” the conclusion should have been that no contract was ever made by the parties, and the finding should have been that no cause of action existed upon the check to the plaintiff.

The judgment is reversed, with costs of this court and of the court below.

The other Justices concurred.

QUESTIONS:

1. How could the judge determine that the “transaction was a frolic and banter”?
2. What does it mean that “the judge held him liable”?
3. Did the defendant make a promise?

NOTE

A “check” is an order to a bank to pay a specified sum of money to the named payee, or to his order, or to bearer. It is not in form a promise; but in an ordinary business transaction it is reasonable to infer that the drawer of the check promises that it will be honored by the drawee bank. A promise that is found only by such an inference is called an “implied” promise.

In *Plate v. Durst*, 42 W. Va. 63, 24 S.E. 580, 32 L.R.A. 404 (1896), the defendant promised plaintiff \$1,000 and a diamond ring if she would stay in his service. He now claims this was said in jest. The court said:

"Jokes are sometimes taken seriously by the young and inexperienced in the deceptive ways of the business world, and if such is the case, and thereby the person deceived is led to give valuable services in the full belief and expectation that the joker is in earnest, the law will also take the joker at his word, and give him good reason to smile." See, to the same effect: *Nyulasy v. Rowan*, 17 Vict. L.R. 663 (1891); *Theiss v. Weiss*, 166 Pa. 9, 31 A. 63 (1895).

HIGGINS v. LESSIG.

Appellate Court of Illinois, 1893. 49 Ill.App. 459.

CARTWRIGHT, J. Appellant was the owner of a set of old double harness, worth perhaps \$15, which was taken from his premises without his knowledge, and he offered a reward of \$100 for the recovery of the harness and the conviction of the thief. A few days afterward a boy named Wilt found part of the harness in appellee's berry patch, and appellant went with appellee to the place and brought that part of the harness into appellee's blacksmith shop. Appellant gave the boy who had found the harness a quarter of a dollar, and said he would give him a dollar to find the rest of it. Appellee claims that appellant at that time offered a reward of \$100 to the one who would find out who the thief was, and that he earned the reward. This suit was brought to recover the amount so claimed as a reward, and a trial resulted in a verdict and judgment for appellee for \$100.

The evidence showed that the defendant was much excited on the occasion, when it is claimed that the offer was made in the shop. Plaintiff's version of the language used was that defendant said, "I will give \$100 to any man who will find out who the thief is, and I will give a lawyer \$100 for prosecuting him," using rough language and epithets concerning the thief. There was evidence of substantial repetitions of the statement, together with the assertion that he would not have a second-class lawyer, either, and that he would not hire a cheap lawyer, but a good lawyer. The harness had been taken by a man called Red John Smith, who had been adjudged insane, and a Mrs. Phillips told the plaintiff that she saw Smith walking by with the harness on his back, on Sunday morning, which was the time when it was taken. Plaintiff watched Smith that night and saw him hiding the collars, and the next day he waited for the return of the defendant from Galesburg, and told him that Red John Smith had the harness. A search warrant was procured, and the remainder of the harness was found.

We do not think that the language used was such as, under the circumstances would show an intention to contract to pay a reward, and think plaintiff had no right to regard it as such. Defendant had previously offered a very liberal reward for the return of the old harness and the conviction of the thief. On this occasion he paid the boy only

a trifling sum, and offered only \$1 for finding the rest of the property. His further language was in the nature of an explosion of wrath against some supposed thief who had stolen the harness, and was coupled with boasting and bluster about the prosecution of the thief. It was indicative of a state of excitement, so out of proportion to the supposed cause of it, that it should be regarded rather as the extravagant exclamation of an excited man than as manifesting an intention to contract. . . .

QUESTIONS:

1. How many apparent "offers" by the defendant are stated in the opinion?
2. What performance was specified in each as the "consideration" for the promise of a reward?
3. Did the plaintiff render any one of these performances?
4. Why did the plaintiff have "no right to regard" the words as an offer to contract?

NOTE

The absence of an intention to create legal relations may be evidenced in various ways. In *Balfour v. Balfour*, [1919] 2 K.B. 571, Atkin, L. J., said: "There are agreements which do not result in contracts. * * * The ordinary example is where two parties agree to take a walk together, or where there is an offer and acceptance of hospitality. * * * One of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. * * * They are not contracts because the parties did not intend that they should be attended by legal consequences."

Sometimes parties merely give their "word of honor, as business men," *Osgood v. Skinner*, 211 Ill. 229, 71 N.E. 869 (1904); or they may expressly provide that their agreement shall not be enforceable at law, *Smith v. Macdonald*, 37 Cal.App. 503, 174 P. 80 (1918); *Monroe v. Martin*, 137 Ga. 262, 73 S.E. 841 (1911).

ROSE & FRANK CO. v. CROMPTON & BROS. [1923] 2 K.B. 261. The plaintiff was an American company acting as the distributing agent for carbon papers manufactured by the defendant, an English company. After seven years on a year to year basis, the parties signed a long written agreement for a period that was later extended for more than six years. In this document, having otherwise the appearance of a "contract," the following provision was included:

"This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite expression and record of the purpose

and intention of the parties concerned to which they each honorably pledge themselves with the fullest confidence, based on past business with each other, that it will be carried through with mutual loyalty and friendly cooperation."

Before the end of the agreed period, the defendant became dissatisfied and gave notice terminating the arrangement. The plaintiff sued for damages amounting to more than \$600,000. The court held that there was no contract.

BANKES, L.J., said: "There is, I think, no doubt that it is essential to the creation of a contract, using that word in its legal sense, that the parties to an agreement shall not only be *ad idem* as to the terms of their agreement, but that they shall have intended that it shall have legal consequences and be legally enforceable. In the case of agreements regulating business relations it follows almost as a matter of course that the parties intend legal consequences to follow. In the case of agreements regulating social engagements it equally follows almost as a matter of course that the parties do not intend legal consequences to follow." Bankes, Scrutton, and Atkin, L.JJ., all agreed that the quoted provision prevented any part of the writing from having legal operation. The same effect is produced when two parties express their agreement on all the terms of a contract that is to be reduced to writing with the express understanding that they shall not be bound by contract until the writing has been drawn up and signed.

SECTION 2.—INOPERATIVE NEGOTIATION PRELIMINARY TO A BARGAIN

(Advertising Circulars, Invitations to Deal, Agreement on Terms to be Reduced to Writing, Estimates, Agreements with One or More Terms Left Open)

MONTGOMERY WARD & CO. v. JOHNSON.

Supreme Judicial Court of Massachusetts, 1911. 209 Mass. 89, 95 N.E. 290.

Bill by Montgomery Ward & Co. against Mary E. Johnson. Decree for defendant, and plaintiff appeals. Affirmed

BRALEY, J. The essential allegations of the bill are admitted by the demurrer, but if they fail to show a binding contract between the parties, it cannot be maintained for specific performance, or injunctive relief. The defendant manufactured and sold firearms of certain types, which had acquired in the market a recognized reputation for their quality and style of workmanship. In the management of the busi-

ness, sales were made only to jobbers, who were to resell to their customers at a uniform price. But having received complaints that the scale of prices in some instances had not been followed, she issued a printed letter, which after reciting the cause of its publication, and that "we have prepared, and are sending under this cover by registered post, a printed document setting forth the terms and conditions upon which Iver Johnson revolvers will be supplied to the jobbing trade," contained the statement that "hereafter no order will be filled except upon the terms set forth in the enclosed document, therefore please read it carefully, for we are going to ask your support and cooperation." The plaintiff apparently was a customer of the defendant, and having received the letter, alleges that it was "a certain offer in writing to make a contract," the terms and conditions of which were expressed in the accompanying document. It is then alleged that, "intending to accept said contract, and to cause that the defendant should be bound by said acceptance, and that the parties should be mutually bound thereby," the plaintiff transmitted to the defendant an order for revolvers; but there is no allegation that this purpose was communicated to her, or that the order was accepted with this understanding.

The plaintiff relies on these transactions as constituting a bilateral contract. But if the letter and document are examined in connection with the recitals, they were not in the nature of a general offer, where upon compliance with the conditions by those to whom it is addressed, a legally binding contract at once springs into existence. The defendant promulgated the terms under which she proposed to do business in the future, not with the plaintiff only, but with the members of the jobbing trade, who were to be treated as licensees, if they would agree to abide by them. It is expressly announced, in the seventh paragraph of the document, that the defendant does not undertake to furnish, or to be responsible for a failure to deliver goods which may be ordered, and the words, "that it can be revoked without liability for damages by thirty days' written notice, to date from the actual mailing of the notice," refer to the license to deal in the defendant's product, with a discontinuance of all business relations. "A contract is an agreement which creates an obligation," said Mr. Justice Field in *Ashcroft v. Butterworth*, 136 Mass. 511, 514. And an invitation to prospective buyers to negotiate for a license, and to trade with the defendant, even when confined to a definite class, imposes no obligation on the sender of accepting any offer which thereafter might be received. The order of the prospective buyer does not ripen into a contract of sale until the defendant's acceptance, and then only as to goods specifically ordered. *Smith v. Gowdy*, 8 Allen, 566; *Lincoln v. Erie Preserving Co.*, 132 Mass. 129; *Edge Moor Bridge Works v. Bristol*, 170 Mass. 528, 49 N.E. 918; *Moulton v. Kershaw*, 59 Wis. 316, 18 N.W. 172, 48 Am.

Rep. 516; *Spencer v. Harding*, L.R. 5 C.P. 561; *Canning v. Farquhar*, 16 Q.B.D. 727, 732.

We are of opinion that a fair interpretation of the letter, and document, very plainly shows that it was not a general offer to sell to those addressed, but an announcement, or invitation, that the defendant would receive proposals for sales on the terms and conditions stated, which she might accept or reject at her option. No contract between the parties having been created, the defendant's refusal to accept and fill the plaintiff's orders, as alleged in the bill, was not an actionable wrong, and the further questions of a breach, and the measure and form of relief and whether the contract was legally terminated by the notice, become immaterial, and need not be discussed.

The decree of the single justice, sustaining the demurrer and dismissing the bill, must be affirmed with costs.

Decree accordingly.

QUESTIONS:

1. What is a "bill" for "specific performance"?
2. Would Ward have the legal privilege to deal in Iver Johnson revolvers without getting a "license" from Johnson?
3. Did the printed letter have any effect upon the legal relations of anybody?
4. Did the provision for revocation by 30 days' notice have any effect?
5. How can an order for goods "ripen into a contract"?

NEBRASKA SEED CO. v. HARSH.

Supreme Court of Nebraska, 1915.

98 Neb. 89, 152 N.W. 310, L.R.A.1915F, 824.

Action by the Nebraska Seed Company, a corporation, against H. F. Harsh. From judgment for plaintiff, defendant appeals. Reversed.

MORRISSEY, C. J. Plaintiff, a corporation, engaged in buying and selling seed in the city of Omaha, Neb., brought this action against the defendant, a farmer residing at Lowell, Kearney county, Neb. The petition alleges:

"That on the 26th day of April, 1912, the plaintiff purchased of and from the defendant 1,800 bushels of millet seed at the agreed price of \$2.25 per hundredweight, F. O. B. Lowell, Neb., which said purchase and contract was evidenced by writing and correspondence passing between the respective parties of which the following is a copy:

" 'Lowell, Nebraska, 4—24—1912.

" 'Neb. Seed Co., Omaha, Neb.—Gentlemen: I have about 1,800 bu. or thereabouts of millet seed of which I am mailing you a sample. This millet is recleaned and was grown on sod and is good seed. I want \$2.25 per cwt. for this seed f. o. b. Lowell.

" 'Yours truly,

H. F. Harsh.'

"Said letter was received by the plaintiff at its place of business in Omaha, Neb., on the 26th day of April, 1912, and immediately thereafter the plaintiff telegraphed to the defendant at Lowell, Neb., a copy of which is as follows:

" '4—26—12.

" 'H. F. Harsh, Lowell, Nebr. Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred. Wire how soon can load. The Nebraska Seed Co.'

"On the same day, to wit, April 26, 1912, the plaintiff, in answer to the letter of the said defendant, wrote to him a letter and deposited the same in the United States mail, directed to the said defendant at Lowell, Neb., which said letter was duly stamped, and which the plaintiff charges that the defendant in due course of mail received. That a copy of said letter is as follows:

" '4—26—12.

" 'Mr. H. F. Harsh, Lowell, Neb.—Dear Sir: We received your letter and sample of millet seed this morning and at once wired you as follows: "Sample and letter received. Accept your offer. Millet like sample two twenty-five per hundred, wire how soon can load." We confirm this message have booked purchase of you 1,800 bushels of millet seed to be fully equal to sample you sent us at \$2.25 per cwt. your track. Please be so kind as to load this seed at once and ship to us at Omaha. We thank you in advance for prompt attention. When anything further in the line of millet to offer, let us have samples.

" 'Yours truly,

The Nebraska Seed Co.' "

It alleges that defendant refused to deliver the seed, after due demand and tender of the purchase price, and prays judgment in the sum of \$900. Defendant filed a demurrer, which was overruled. He saved an exception to the ruling and answered, denying that the petition stated a cause of action; that the correspondence set out constituted a contract, etc. There was a trial to a jury with verdict and judgment for plaintiff, and defendant appeals.

In our opinion the letter of defendant cannot be fairly construed into an offer to sell to the plaintiff. After describing the seed, the writer says, "I want \$2.25 per cwt. for this seed f. o. b. Lowell." He does not say, "I offer to sell to you." The language used is general, and such as may be used in an advertisement, or circular addressed generally to those engaged in the seed business, and is not an offer by which he may be bound, if accepted, by any or all of the persons addressed.

"If a proposal is nothing more than an invitation to the person to whom it is made to make an offer to the proposer, it is not such an offer as can be turned into an agreement by acceptance. Proposals of this kind, although made to definite persons and not to the public generally, are merely invitations to trade; they go no further than what occurs when one asks another what he will give or take for certain goods. Such inquiries may lead to bargains, but do not make them. They ask for offers which the proposer has a right to accept or reject as he pleases." 9 Cyc. 278e.

The letter as a whole shows that it was not intended as a final proposition, but as a request for bids. It did not fix a time for delivery, and this seems to have been regarded as one of the essentials by plaintiff, for in his telegram he requests defendant to "wire how soon can load."

"The mere statement of the price at which property is held cannot be understood as an offer to sell." *Knight v. Cooley*, 34 Iowa, 218.

The letter of acceptance is not in the terms of the offer. Defendant stated that he had 1,800 bushels or thereabouts. He did not fix a definite and certain amount. It might be 1,800 bushels; it might be more; it might be less; but plaintiff undertook to make an acceptance for 1,800 bushels—no more, no less. Defendant might not have this amount, and therefore be unable to deliver, or he might have a greater amount, and, after filling plaintiff's order, have a quantity of seed left for which he might find no market. We may assume that when he wrote the letter he did not contemplate the sale of more seed than he had, and that he fixed the price on the whole lot whether it was more or less than 1,800 bushels.

We do not think the correspondence made a complete contract. To so hold where a party sends out letters to a number of dealers would subject him to a suit by each one receiving a letter, or invitation to bid, even though his supply of seed were exhausted. In *Lyman v. Robinson*, 14 Allen (Mass.) 242, 254, the Supreme Court of Massachusetts has sounded the warning:

"Care should always be taken not to construe as an agreement letters which the parties intended only as a preliminary negotiation."

Holding, as we do, that there was no binding contract between the parties, it is unnecessary to discuss the other questions presented.

The judgment of the district court is reversed.

QUESTIONS:

1. Was the seed company reasonable in thinking that Harsh made an offer to sell?
2. Is it possible to make a general offer that empowers many people to accept? See Restatement, Contracts, § 28.
3. Did the defendant win this case because he made no offer or because the plaintiff did not accept his offer?

NOTE

In *Moulton v. Kershaw*, 59 Wis. 316, 18 N.W. 172, 48 Am.Rep. 516 (1884) the defendant sent the following letter:

"Milwaukee, September 19, 1882.

"J. H. Moulton, Esq., La Crosse, Wis.—Dear Sir: In consequence of a rupture in the salt trade, we are authorized to offer Michigan fine salt, in full car-load lots of 80 to 95 bbls., delivered at your city, at 85c. per bbl., to be shipped per C. & N. W. R. R. Co. only. At this price it is a bargain, as the price in general remains unchanged. Shall be pleased to receive your order.

"Yours truly,

C. J. Kershaw & Son."

The plaintiff replied, saying: "You may ship me two thousand barrels as offered in your letter." It was held that the defendant's letter created no power of acceptance, but was a mere invitation to deal.

In *Ahearn v. Ayres*, 38 Mich. 692 (1878) the opinion of the court was as follows: "Ahearn sued defendants for not accepting certain stave bolts. It appears that he asked one of the firm what they were paying for bolts, and was answered they would take all he could make and deliver at \$2 per cord. He afterwards made a lot of bolts, which he proposed to furnish, but they denied any bargain. There was no contract made out. Ahearn did not inform defendants that he would accept or act on their order, or deliver any bolts, or, if any, how many. The transaction went no further than what occurs when any one asks another what he will either give or take for commodities. Such inquiries may lead to bargains, but do not make them."

In *Harvey v. Facey*, [1893] A.C. 552, the plaintiff telegraphed: "Will you sell us Bumper Hall Pen? Telegraph lowest cash price—answer paid." The defendant replied: "Lowest price for Bumper Hall Pen £900." The plaintiff then telegraphed: "We agree to buy Bumper Hall Pen for the sum of £900 asked by you." It was held there was no contract.

In *Sellers v. Warren*, 116 Me. 350, 102 A. 40 (1917), A. offered to buy B.'s interest in certain land for four-elevenths of the total selling price. B. replied: "Cannot accept offer; would not consider less than half." A. telegraphed: "Accept your offer of equal division." There was no contract made.

The following cases held that there was no offer creating any power of acceptance: *Patton v. Arney*, 95 Iowa, 664, 64 N.W. 635 (1895), defendant wrote that his steers "ought to be worth \$4.25"; *Johnston Bros. v. Rogers Bros.*, 30 Ont. 150 (1899), "We quote you f. o. b. your station Hungarian \$5.40 car lots only. * * * We would suggest your using the wire to order as prices are so rapidly advancing".

In the following case the words used were held to constitute an offer: *Fairmount Glass Works v. Crunden-Martin Woodenware Co.*, 106 Ky. 659, 51 S.W. 196 (1899), "We quote you Mason jars * * * pints \$4.50 per gross, for immediate acceptance".

MORRIS et al. v. BALLARD

Court of Appeals of District of Columbia, 1926. 16 F.2d 175.

Appeal from Supreme Court of District of Columbia.

Suit for specific performance by William T. Ballard against F. Wm. Ernst, since deceased. Decree for plaintiff, and Barbara V. Morris and others, representing the estate of F. Wm. Ernst, appeal. Affirmed.

MARTIN, Chief Justice. This is an appeal from a decree ordering specific performance of a contract for the sale and conveyance of certain real estate situate within the District of Columbia. The appellee, William T. Ballard, was plaintiff in the lower court, and F. Wm. Ernst, since deceased, whose estate is represented by the appellants, was defendant.

The record discloses that on December 28, 1921, the defendant, being the owner of the property in question, entered into a written contract with the plaintiff, whereby he leased the same to plaintiff for a period of three years, commencing on January 1, 1922, at a rental of \$100 per month, stipulating that plaintiff should keep the premises in good repair, and should have the privilege of making alterations or additions to the property at his own expense at any time during the demised term. The contract also contained the following clause giving the plaintiff the right to purchase the property at any time on or before July 1, 1923, to wit:

"It is further provided that the said party of the second part is hereby given the privilege of purchasing said premises on or before July 1, 1923, for the sum of \$18,000 on terms to be agreed upon."

The contract was duly signed, acknowledged, and recorded, and the plaintiff took possession of the premises under it, and has continuously occupied the same ever since as his residence and office. He has fully discharged all obligations imposed upon him by the contract, and has made alterations of the property as thereby permitted.

In the month of December, 1922, plaintiff advised defendant that he desired to avail himself of his right to purchase the premises as permitted by the contract. Accordingly he tendered himself as ready, willing, and able to pay the agreed price therefor, either in cash or upon such terms as defendant might impose. And afterwards, to wit, on May 15, 1923, defendant having refused to accept payment in cash or to name any terms of payment as acceptable to him, plaintiff made due tender of the agreed price in cash, less certain undisputed liens then existing upon the property, and demanded a deed of conveyance for the same. Defendant, however, unconditionally refused to accept the tender or make the conveyance, whereupon plaintiff filed his present bill for specific performance of the contract.

In the bill plaintiff repeated his tender to pay for the property in cash, or upon any lawful terms which defendant should prefer. Defendant answered, alleging that the stipulated price for the property was grossly inadequate, and that his signature to the instrument had been obtained by fraud upon the part of the plaintiff. He also denied that any lawful tender had been made to him by plaintiff. He maintained, furthermore, that the provisions requiring that payment of the purchase price should be made "on terms to be agreed upon" was indefinite and incomplete, and rendered the contract of sale unenforceable, in the absence of further negotiations and agreement as to the terms of payment, and claimed that, inasmuch as no such terms had ever been agreed upon by the parties, the court should not award a decree of specific performance.

At the trial below the defendant introduced no evidence whatever in support of the charge that the agreed price of the property was inadequate, or that his signature to the contract had been obtained by fraud. Proof was introduced by the plaintiff in support of his claim of tender. The court decreed specific performance in favor of plaintiff upon condition that he should pay the purchase price in cash, less the valid incumbrances then existing upon the property.

We think this decree was right. The plaintiff had taken possession of the property under the contract, and had expended money in making alterations and repairs upon it in reliance upon the option, which was one of the terms of the agreement. Under these circumstances, it became the duty of defendant, upon proper demand, either to accept the agreed purchase price in cash or to specify such terms as were acceptable to him. He had no right to refuse arbitrarily and unconditionally to accept payment solely for the purpose of defeating the option. Such a refusal would operate as a fraud upon the plaintiff.

The agreement of the defendant, under the circumstances, to accept the agreed purchase price "on terms to be agreed upon," was in good conscience a stipulation that he would in fact agree with plaintiff upon reasonable terms of payment, and would not arbitrarily refuse to proceed with the sale. His refusal either to accept cash or to name any terms whatever was a wrongful violation of that agreement, for which the plaintiff had no adequate remedy except a decree of specific performance.

We have been cited to many authorities which hold that equity will not enforce specific performance of a contract, if any of its material terms has been left to be settled by future negotiation. But the peculiar facts of this case differentiate it from such authorities, for the defendant in this case was simply called upon to decide for himself whether the agreed price for the property should be paid to him in cash or upon terms, and, if the latter, to state what terms he desired. The contract must be considered as a whole, and accordingly, since it

had been partly performed by the plaintiff, the defendant was not entitled to refuse to perform his obligations under it.

"It should also be remarked, before proceeding with the discussion, that when a *contract has been partly performed* by the plaintiff, and the defendant has received and enjoys the benefits thereof, and the plaintiff would be virtually remediless unless the contract were enforced, the court, from the plainest considerations of equity and common justice, does not regard with favor any objections raised by the defendant merely on the ground of the incompleteness or uncertainty of the agreement. Even if the agreement be incomplete, the court will then, in furtherance of justice and to prevent a most inequitable result, decree a performance of its terms as far as possible, although, perhaps with compensation or allowance. In fact, as has been shown in chapter 1, one ground of the equitable jurisdiction to decree a specific performance is the incompleteness of the contract, which would prevent an action at law, but which exists to such a limited extent and under such circumstances that a refusal to grant any relief would be plainly inequitable." Pomeroy, Specific Performance, § 145.

The decree of the lower court is affirmed, with costs.

QUESTIONS:

1. Would the case have been decided the same way if the lessee had been given an "option to buy at such a price as the parties may hereafter agree upon"?
2. If a bargain is too indefinite or incomplete to justify a judgment for damages, why should it be enforced by a decree for specific performance?
3. Should an agreement containing mutual promises to sell and to buy 900 tons of strawboard in monthly instalments of 75 tons each be held invalid for indefiniteness of price, when the provision as to price is as follows: "Price: shall be fixed by the seller on or before Dec. 15, 1920, for the first three months' shipments, beginning Jan. 1, 1921. Seller shall give the buyer notice on or before March 15, 1921, of the price for the tons to be shipped the ensuing three months' period, which price shall be the seller's market price then existing under the seller's standard form of quarterly price fixing contract." *Weston Paper Mfg. Co. v. Downing Box Co.*, 293 F. 725 (1923, C.C.A.).

Would the decision be affected if after the seller named a price for a three months' period, the buyer received a shipment of the goods?

NOTE

Language is at best an imperfect vehicle of expression, and there is nearly always some degree of uncertainty in the terms of an agreement that has been put into written or spoken words. Gaps will often be filled and doubts resolved by interpretation in the light of custom and usage and

by what reasonable men would do in like circumstances. Judges vary in their readiness to spell out a contract by these means; and they will always go farther after part performance by a party to the contract, in order to avoid hardship and injustice. See *Sun Printing & Pub. Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 139 N.E. 470 (1923), where even a liberal court refused to fill a gap left by the parties in the mode of determining the price of 16,000 tons of print paper, deliverable over a period of 16 months. A definite price was fixed for the first four months; but "for the balance of the period of this agreement the price of the paper and length of terms for which such price shall apply shall be agreed upon by and between the parties hereto fifteen days prior to the expiration of each period for which the price and length of term thereof have been previously agreed upon, said price in no event to be higher than the contract price for news print charged by the Canadian Export Paper Co. to large consumers." The plaintiff offered to pay the Canadian Export price for the whole remaining period, which would appear to be the maximum fixed by the first agreement. See *Restatement, Contracts*, §§ 32, 33; also chapter 9.

In *Talamina v. Rosa*, 257 Ky. 228, 77 S.W.2d 627 (1934), a buyer promised in exchange for shares of stock "to pay, or properly secure the payment of, \$18,000." The buyer was given a decree for specific performance on condition of payment of the full amount in cash.

LESKIE v. HASELTINE.

Supreme Court of Pennsylvania, 1893. 155 Pa. 98, 25 A. 886.

Assumpsit by Henry B. Leskie against Charles F. Haseltine for breach of an agreement by defendant to give plaintiff the contract, as the successful bidder, for the erection of a building in Philadelphia. From a judgment entered on a verdict in defendant's favor, plaintiff appeals. Affirmed.

The defendant, Charles F. Haseltine, desired to erect a large and costly building in Philadelphia, and requested his architect to ask for estimates. The architect did so by postal cards sent to a number of builders, in the following form: "204 South Fifth Street, March 28th, 1887. Dear Sir: You are requested to estimate on the Haseltine building. My office will be open from 9 A.M. to 5 P.M. All bids must be addressed to me, and must be received at this office by noon, Wednesday, April 6th. Yours truly, W. N. Lockington, per W. W. L."

Ten builders, including H. B. Leskie, the plaintiff in this case, sent written estimates. Most of these were brought to the architect's office at noon on Wednesday, April 6th, the time mentioned in the postal card. The estimates were then opened, Mr. Haseltine and most of the builders or their representatives being present. The plaintiff's bid was the lowest. It was in the alternative for either \$152,740 or \$153,000, ac-

according to whether brick or iron arches were to be used. The plaintiff testified that when the bids were read out the defendant smiled, and said to plaintiff, "You are the lucky man." A witness called by the plaintiff added to this that the defendant said, "You have won, and fairly so." The defendant and his architect testified that all that was said by defendant was, "That is all for the present," and that the matter was adjourned for the purpose of considering the estimates, and this was corroborated by two or three other persons who were present. It was understood by all parties that a formal written contract would have to be entered into for the erection of the building before anything would be done.

The plaintiff testified that during several days after the opening of the estimates, and while the matter was under consideration, some of the details which would enter into such a contract were discussed between him and the defendant, but many of these details remained unsettled. While these matters were under discussion, and before any contract had been prepared or signed, the defendant, who had been investigating the character and ability of the plaintiff, came to the conclusion that he was not a desirable man to whom to intrust so large an undertaking, and notified him that he had concluded to give the contract to another bidder.

Defendant subsequently entered into a formal written contract with one of the higher bidders. The plaintiff then sued him for \$15,000, alleging that what took place at the architect's office on the reading of the estimates amounted to a binding contract in law between the plaintiff and defendant for the erection of the building.

PER CURIAM. The plaintiff was admittedly the lowest bidder for the erection of defendant's building. It does not follow, however, that because he was the lowest bidder the defendant was bound to award him the contract. The fact that upon the opening of the bids either the architect or the defendant may have said to the plaintiff: "You are the lucky man," amounts to nothing more than a recognition of the fact that he was the lowest bidder. After the bids had been opened, it was the right of the defendant to inquire into the fitness and ability of the respective bidders to fulfill the contract. He was not bound to award it to a bidder who lacked either the skill, experience, or ability to properly perform the contract.

In this case the contract never was awarded to the plaintiff. There were a number of questions to be settled when the defendant and the bidder were brought together before their minds could be said to have agreed upon anything. The learned judge below submitted the case to the jury under proper instructions, and their verdict is the end of the matter.

Judgment affirmed.

QUESTIONS:

1. If on opening the bids the defendant had said to the plaintiff "your bid is the lowest and is accepted," would a contract have been consummated thereby?
 2. If one always has the legal privilege "to inquire into the fitness and ability" of another who has (or has not) made an offer, is his failure to make the inquiry relevant in determining whether or not his words constitute an acceptance?
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STANTON v. DENNIS.

Supreme Court of Washington, 1911. 64 Wash. 85, 116 P. 650.

Action by E. M. Stanton against W. H. Dennis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

FULLERTON, J. Some time in 1909, the Thompson-Starrett Company entered into a contract to construct an addition to the Fidelity Trust Company's building in the city of Tacoma. Thereafter they sublet the contract for doing the painting and carpentry work on the building to the appellant, W. H. Dennis. The appellant, being desirous of again subletting the carpentry work, requested one Phil E. Dunnivant to bid thereon, at the same time furnishing him with a copy of the plans and specifications of the work. Later on Dunnivant submitted the following writing:

"Portland, Ore., Jan. 7, 1910. W. H. Dennis, Seattle, Wash.—Dear Sir: Confirming our conversation with you over long distance phone this afternoon we propose to furnish all labor for setting millwork and carpentry on the addition to the Fidelity Trust Co.'s building at Tacoma, Wash., for the sum of five thousand seven hundred and no/100 dollars (\$5,700.00). The work above mentioned is to be included and above the seventh floor and is to be in accordance with plans and specifications prepared by D. H. Burnham, Chicago. It is understood that we are not to furnish labor for laying floors, putting up door jacks or setting any centers or grounds. It is also understood that we are to furnish no material of any description used in setting the millwork or in any of the carpentry work. Formal contract to follow. Phil E. Dunnivant & Co., per Phil E. Dunnivant. Accepted: _____."

This writing with duplicate copies was forwarded to the appellant by Dunnivant, who, upon receipt thereof, wrote his name after the word "Accepted," and returned the same to Dunnivant.

Early in February, 1910, Dunnivant became financially embarrassed and sought the appellant, and suggested to him the idea of putting the contract in the name of a third party. The appellant took

the matter under consideration, and Dunnivant returned to his home at Portland, Or., from which place he wrote the appellant as follows: "Portland, Oregon. Feb. 25, 1910. W. H. Dennis, White Building, Seattle, Wash.—Dear Sir: Would like to have you write me and let me know what response you got to the telegram you sent while I was there. I have had to turn all of my work over to the bonding companies as I was unable to pull through. It will help me a great deal if you will give me same information about the Spokane job and also the Tacoma job. I have been expecting a letter from you daily since my return but so far have received none. Thanking you in advance, I am, yours very truly, Phil E. Dunnivant."

To this the appellant answered by the following letter: "Feb. 28, 1910. Mr. Phil E. Dunnivant, Portland, Oregon—Dear Sir: In answer to yours of last week, will say that under the circumstances it will be impossible to do the work as we talked of in our talk when you were up here and will have to arrange with some other contractor to do the work at Spokane and Tacoma. Am sorry but cannot do anything else as it has turned out. Yours truly, W. H. Dennis & Son."

To this letter Dunnivant replied: "Portland, Oregon. March 2, 1910. Mr. W. H. Dennis, Seattle, Wash.—Dear Sir: Your letter of the 28th ult. received and carefully noted, under existing circumstances I do not feel like letting the contracts for the Tacoma and Spokane jobs go as there is good prospects in them for me, if I can make no other arrangements with you I will have to carry them on as was first intended. I will probably be in Seattle some time in the near future and will talk the matter over with you but in the meantime would like to know just how the work stands on the two jobs as I have my men ready to go on short notice. Trusting that I will hear from you as soon as possible I beg to remain, Yours very truly, Phil E. Dunnivant."

No formal contract was ever forwarded for execution by Dunnivant and none in fact was entered into, and thereafter the appellant prosecuted the work described in the writing through other parties. After the completion of the work, Dunnivant assigned his claim to the present respondent, who brought this action on the accepted writing to recover damages as for breach of contract. The cause was tried in the court below by the judge, sitting without a jury, and resulted in a judgment in favor of the respondent for the full amount claimed, namely, \$1,700. To reverse the judgment, this appeal is prosecuted.

The principal question suggested by the record is whether the writing containing the bid of Dunnivant and the acceptance thereof by the appellant constituted the completed contract between the parties, or was it an agreement settling some of the terms of a contract to be entered into later. The face of the writing, it is at once apparent, indicates that it was intended as the latter, rather than the former.

After specifying certain particulars, it expressly provides that a formal contract is to follow. If the writing itself was intended as the completed contract, there would have been no need for this proviso. A contract complete in itself does not need the sanction of another contract.

Again, the contract, when tested by the surrounding circumstances, seems incomplete. It refers to work of a particular character in a described building, yet it specifies no time when the work shall be begun, when it shall be completed, the character of the work that shall be performed, or when payment for the work shall be made. While the law in such cases implies certain conditions, namely, that the work shall be commenced and completed within a reasonable time after demand, shall be performed in an ordinarily skillful manner, and shall be paid for within a reasonable time after its completion, it is apparent that these conditions might not satisfy the appellant. He was a sub-contractor of Thompson-Starrett Company, and bound to perform according to the stipulations of his written contract with them, which might vary materially from the stipulations implied by law. This being true, the appellant very naturally would want the contract under which the work was to be actually performed conditioned so as to accord with his contract with the original builder. The writing, in whatever aspect it is viewed, therefore, seems to us to point to the conclusion that it was not intended to be the final agreement between the parties.

The evidence also, we think, sustains this conclusion. The appellant testifies to the fact positively, and Dunnivant admits that such a thing was talked over between them, but that the purpose was to put the contract in more formal shape, rather than supply any further details. Both parties were men of ability and experience, and it would hardly seem that if they intended this writing to be a complete contract between them they would solemnly provide, both in writing and orally, for a further agreement.

By the conditions of the writing, it was Dunnivant's duty, after the acceptance by the appellant of the terms proposed, to prepare a formal contract embodying such terms and such further details as the character of the work required, and forward the same to the appellant for execution. Failing in this, he had no cause of action against the appellant, as the appellant could not otherwise be put in default, and of course no cause of action passed to his assignee by the assignment.

The judgment appealed from is reversed and the case remanded, with instructions to enter a judgment in favor of the appellant to the effect that the respondent take nothing by his action.

NOTE

Whether words having the appearance of offer and acceptance should be held inoperative as being no more than preliminary steps toward the execution of a documentary contract is a question of fact to be determined by interpretation in the light of all the circumstances, including the acts of the parties, their previous relations and usages in contracting, the usages of the community in like cases, and the degree of fullness in the expression of promises and conditions. The question is much litigated; and the reports contain many cases in which it has been decided each way. The evidential factors are never identical; and frequently they are not reported very fully in the court's opinion.

In *Mississippi & D. S. S. Co. v. Swift*, 86 Me. 248, 29 A. 1066, 41 Am. St. Rep. 545 (1894), Emery, J., said: "From these expressions of courts and jurists, it is quite clear that, after all, the question is mainly one of intention. If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signature, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: if the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as consummation of the negotiation, there is no contract until the written draft is finally signed." It was held that there was no contract.

In *Ridgway v. Wharton*, 6 H.L.Cas. 238, 268 (1857) it was said that "the circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement." In *Rossdale v. Denny*, [1921] 1 Ch. 57, a letter contained several proposed terms and then said: "Subject to a formal contract to embody such reasonable provisions as my solicitors may approve." The court reviewed the cases where the words "subject to" had been used, and it held there was no contract.

See Restatement. Contracts, §§ 25, 26.

BILLINGS v. WILBY.

Supreme Court of North Carolina, 1918. 175 N.C. 571, 96 S.E. 50.

Action by A. U. Billings against William Wilby. Judgment for plaintiff, and defendant excepts and appeals. No error.

HOKE, J. There was evidence on the part of the plaintiff tending to show that plaintiff, a contractor of extended experience and engaged at the time in "grading off the foundation" for the new federal

building at Wilkesboro, N. C., on January 10, 1916, received a letter from William Wilby, defendant, then at Selma, Ala., and who had the subcontract for the plumbing and laying the sewer line, inviting a proposition from plaintiff for cutting the ditch and laying the line, etc., according to survey and specifications which had been already made by the government; that on January 13, 1916, plaintiff replied by telegram from North Wilkesboro, as follows:

"Will put in sewer line according to specifications for five hundred dollars you furnish pipe and material North Wilkesboro wire at once if you accept this. [Signed] A. U. Billings."

On same date defendant sent by wire a night letter as follows:

"Forty cents per running foot is best I can do I furnish pipe and you cement. I can do it myself for less than this but want it put in before my man comes. If I cannot get it for the above amount will wait and put it in myself. [Signed] William Wilby."

To this plaintiff replied by telegram at 10:40 a. m. January 14:

"Night letter received. Will accept. Send contract signed at once."

That plaintiff was ready, able, and willing to do the work, and had the hands and tools there for the purpose, and on the night before he was to begin, which was several days after plaintiff's last message, plaintiff received a telegram from defendant to the effect that he would advise plaintiff in a day or two about the work; that defendant never did advise plaintiff further about it, but soon thereafter undertook the work himself, etc.; that plaintiff's damage in the loss of the contract was about \$250. On matters relevant to the issue, defendant introduced his own deposition to the effect "that he was a plumber resident in Selma, Ala., and had a subcontract for installing the plumbing and sewer for the building and in addition to the telegrams already in evidence, there was attached to his deposition two other telegrams in terms as follows; one purporting to be from plaintiff to defendant, dated January 18, 3 p. m.:

"I accept your sewer proposition wire at once if you accept mine start work at once in the morning. [Signed] A. U. Billings."

—and another from defendant to plaintiff:

"Will advise you within next few days regarding sewer proposition. [Signed] William Wilby."

In reference to the additional telegrams attached to the deposition and purporting to be from plaintiff, "I accept your sewer proposition wire at once if you accept mine start work in the morning," plaintiff recalled testified that he did not send nor authorize any one else to send such a telegram. On perusal of this evidence, we are clearly of opinion that a definite contract to let the work in question was constituted between these parties by the telegram of plaintiff, dated January 14th, in reply to defendant's night letter and in terms, "Night

letter received will accept send contract signed at once," and this result is not affected by the closing words of the message, "Send contract signed," etc.—this by correct interpretation meaning merely that it was the desire and preference of the plaintiff that the agreement they had made should be written out and formally signed by the parties, and it is the recognized position here and elsewhere that, when the parties have entered into a valid and binding agreement, the contract will not be avoided because of their intent and purpose to have the same more formally drawn up and executed, and which purpose was not carried out. *Gooding v. Moore*, 150 N.C. 195, 63 S.E. 895; *Teal v. Templeton*, 149 N.C. 32, 62 S.E. 737; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N.Y. 209, 39 N.E. 75, 29 L.R.A. 431, 43 Am.St.Rep. 757; *Clark on Contracts* (2d Ed.) p. 29, and authorities cited. In *Moore's Case*, *supra*, it was held:

"That when parties to an oral contract contemplate a subsequent reducing of it to writing, as a matter of convenience and prudence and not as a condition precedent, it is binding on them, though their intent to formally express the agreement in writing was never carried out."

And in 144 N. Y., *supra*:

"If the correspondence and telegrams between the parties contain all the details of a contract, it is enforceable, though they intended that their agreement should be formally expressed in a single paper which, when signed, should be the evidence of what already had been agreed upon."

This being the correct position, we must approve his honor's charge on the first issue:

"That, if the jury believe the evidence and find the facts to be as testified by the witness and disclosed by the documents produced in evidence, you will answer the first issue Yes."

The parties having entered into a definite contract by the message from the plaintiff, of date January 14th, the additional message introduced by the defendant, even if genuine, evinces no purpose to abandon any rights he had acquired or to reopen the question of what had been done between them, and, if it were otherwise, the charge of his honor, when considered in reference to the testimony and the conditions presented, could only mean, and was clearly intended to mean, that, if the parol evidence given by plaintiff to the effect that he had never sent this telegram or authorized any one else to do so should be accepted by the jury, and, the fact so found, such message should not be allowed to affect the determination of the issue.

On the record, we find no error in the charge or in the refusal of the motion to nonsuit, and the judgment below must be affirmed.

No error.

SECTION 3.—UNILATERAL BARGAINS

(Acceptance of an Offered Promise by Rendition of a Requested Performance.)

INTRODUCTORY NOTE

In proposing a bargain, the party making the offer has full control over its terms. He states both ends of the bargain—what he offers (usually a promise of a specified future performance) and what he requests in exchange. It is compliance with this request that constitutes the “acceptance”; it also constitutes the “consideration” for the offered promise. The offeree has no power of acceptance other than that created by the terms of the offer.

The offeror may request a return promise, even going so far as to specify the words or acts by which it is to be made and the mode, time, and place in which it must be communicated. In such a case the power of acceptance is definitely limited. On the other hand, the offeror may leave some of these matters to the offeree’s own discretion (his power then being less limited) or to the usages of men in like cases. The making of the return promise as requested completes the bargain and a bilateral contract is made.

The offeror may request a return performance, either action or forbearance, without any promise express or implied. It is this performance that then constitutes the “acceptance” and the “consideration” for the offeror’s promise. There is only one promissory duty and the contract thus made is unilateral.

The offer may be so made as to empower the offeree to accept either by rendering the specified performance or by promising to render it.

The terms of the proposed bargain, the extent of the offeree’s power of acceptance, and the character of the completed transaction must be determined by interpretation of the offer that was made, in the light of the relevant usages of men and the particular circumstances.

When it is action or forbearance that is requested as the consideration for an offered promise, the legal effect of beginning its rendition must be considered, as well as the legal effect of its completion. What is the effect of beginning the requested action or forbearance, with or without the knowledge of the offeror? When, if ever, is the offeree legally bound to complete the action that he has begun? It must be remembered in answering these questions that promises can be made, and given very clear expression, by conduct other than words, either written or spoken.

In the cases in this Section, the question is whether the offeree has accepted in the manner required by the offer; or, in other words, whether the offeree gave the consideration that was requested in exchange for the offered promise. We are not yet raising the question whether the performance so rendered is a legally sufficient consideration. In the chapter on "Consideration" there are other cases in which a promise was offered in exchange for action or forbearance. In those cases the question will not be whether the consideration that was given was the one for which the offeror bargained; instead the question before the court will be whether the performance that was actually bargained for and given is a legally sufficient consideration.

ROGERS v. SNOW.

In the King's Bench, 1578. Dallison, 94.

In an action on the case between Daniel Rogers and Daniel Snow, the plaintiff alleged that whereas the brother of the defendant was indebted to the plaintiff in the sum of £303, in consideration that the plaintiff would take the personal bond of the brother without surety and would not sue him until Michaelmas and would forbear to claim the money during that time, the defendant promised to pay it to the plaintiff. Issue was joined and verdict for plaintiff.

Gawdy, Jun., moved that the declaration was bad because the plaintiff did not allege that the consideration was performed on his part. Just as in case I promise a man 20s. if he will go to York for me, in an action on the case on this promise he must allege the performance on his own part.

THE COURT conceded this to be true and judgment was therefore arrested.

NOTE

The terms of a bargain may be such that a specified performance may be a condition precedent to the defendant's duty to pay, even though it is not the required mode of acceptance. At the date of the above case, bilateral contracts were just beginning to be recognized. Promises had previously been held enforceable only when made in writing and under seal or when the promisee had acted in reasonable reliance on them.

One of the early forms of action at common law for the enforcement of informal promises was called an "action on the case." This was derived from the fact that the writ of trespass had been authorized to be used in cases that were not clearly within its stereotyped form. When so used, the special facts had to be stated in the writ, and the action was then described as Trespass on the Special Case. When used for enforcement of a promise, this writ alleged in Latin that the defendant had promised (*super se assumpsit*).

PORT HURON MACHINERY CO., Limited, v. WOHLERS.

Supreme Court of Iowa, 1928. 207 Iowa 826, 221 N.W. 843.

Action at law to recover liquidated damages as stipulated in an alleged written contract or order for the purchase of certain farm machinery by the defendant (appellant) from the plaintiff. The defendant in answer admits that he signed the written order of purchase of the goods and that he refused the shipment of the goods, but pleads an oral condition precedent, to wit: That the goods were to be delivered on or before a certain date, and that by reason of his cancellation of the order before delivery and before notification of acceptance of the order by plaintiff an enforceable contract did not result. No evidence was introduced by the defendant. Upon the conclusion of the introduction of plaintiff's testimony, the defendant moved the court to instruct the jury to return a verdict for the defendant. This motion was overruled, and thereupon the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff. This motion was sustained, and the jury was directed to return a verdict for the plaintiff in the sum of \$349.55. Judgment was entered in conformity to the verdict, and the defendant appeals. Affirmed.

DE GRAFF, J. This case involves an alleged contract containing a stipulation for liquidated damages. If a contract did result, there can be no question that the plaintiff is entitled to recover, since the terms of the alleged contract clearly fix the amount recoverable by plaintiff in case of a breach. See *Pace v. Zellmer*, 194 Iowa 516, 186 N.W. 420.

This appeal presents but one question. It is a question of law and calls for the statement of the applicable legal principle. But, like every other case, the governing principle arises out of a fact situation. It is said in *Steffes v. Hale et al.*, 204 Iowa 226, 215 N.W. 248:

"It is almost a legal maxim that 'out of the facts the law arises,' since, if there be no state of facts, there can be no question of law."

We necessarily first turn to the factual side.

On July 18, 1927, a written order signed by the defendant was delivered to plaintiff's agent, and in that order the plaintiff was directed to deliver immediately, or as soon thereafter as possible, to the defendant on board cars consigned to the order of plaintiff at Neola, Iowa, defendant's place of residence, certain described goods (farm machinery). The order further states that the defendant will receive the machinery, pay the freight charges, and also pay to the plaintiff on or before the arrival of the machinery the sum of \$1,562.50 in the manner and form recited in the order. Further:

"If, for any reason, the purchaser fails to accept and settle for the machinery order, he will, if the company so elects and demands, pay

to the company, in lieu of the enforcement of this contract, as liquidated damages, a sum equal to ten per cent. of the list price, and, if shipment has been made, freight from the factory and return, demurrage, cartage, loading and unloading expense and all other similar expenses actually incurred by reason of the shipment and attempted delivery of said machinery; if suit is commenced to enforce the performance of any part of this contract the purchaser agrees to pay a reasonable attorney's fee."

The plaintiff's agent immediately, upon the signing of this order by defendant, telephoned the plaintiff at Des Moines the receipt of the order and requested that the goods be loaded and sent forthwith to the defendant. On July 20, 1927, the plaintiff filled the order in accordance with its terms and shipped the goods. On July 22, 1927, the plaintiff received a telegram from the defendant bearing date July 21, which said:

"Delivery date specified on thresher deal now past and order is hereby cancelled."

The plaintiff, as a result of defendant's attempt to revoke and cancel the order and his refusal to accept the goods, was obliged to recall the goods and reship them to the point of delivery, thereby incurring certain expense which was established by competent proof upon the trial of this case. True, the defendant in his answer alleged a condition precedent, but the allegation continued to rest in the answer. It finds no support in the evidence. When the plaintiff rested its case, motions for a directed verdict were made respectively by the parties. The plaintiff's motion was sustained. The question, therefore, at this point, is whether the plaintiff established a *prima facie* case. The contention of the defendant on appeal is that the plaintiff failed to prove a contract for the reason that there is no showing that the plaintiff accepted the offer of the defendant and communicated the acceptance of the offer prior to its revocation by the defendant.

The point is now reached that we may discuss the law involved under the undisputed facts. Did a contract result? It is not practicable, or is it necessary, in a definition of contract, to state all of the operative facts, or all of the legal relations that are created by such facts. A "contract" may be defined as a promise, the performance of which the law recognizes as a duty and for a breach of which a remedy is given. A contract, therefore, does not contemplate simply the act of promising, but obligations arising therefrom. The law recognizes, as a matter of classification, two kinds of contracts—unilateral and bilateral. In the case at bar a typical example of unilateral contract is found, since it is universally agreed that a "unilateral contract" is one in which no promisor receives a promise as consideration, whereas, in a "bilateral contract" there are mutual promises between the two parties to the contract. This matter of definition has recently re-

ceived careful consideration by the American Law Institute and may be found in the restatement of the law of contracts, § 12. * * *

In the instant case the offer of the defendant must be viewed as a promise. It is promissory in terms. The rule is well stated by Prof. Williston: A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. [Restatement, Contracts, § 90.] See Williston on Contracts, vol. 1, § 139. Clearly the instant offer signed by the defendant was of this character. Appellant, however, contends that there was no acceptance of the offer. Words are not the only medium of expression of mutual assent. An offer may invite an acceptance to be made by merely an affirmative answer or by performing a specific act. True, if an act other than a promise is requested, no contract exists until what is requested is performed or tendered in whole or in part. We are here dealing with a unilateral contract, and the act requested and performed as consideration for the contract indicates acceptance as well as furnishes the consideration. The sending of an order for goods to a merchant is an offer of a promise for an act. 13 C.J. p. 266, § 57. In the same text it is said that an acceptance of an offer may be by acts, as where an offer is made that the offerer will pay or do something else if the offeree shall do a particular thing. In such a case performance is the only thing needful to complete the agreement and to create a binding promise. *Id.*, p. 275, § 73. It must be kept in mind that there is a distinction in regard to communication of acceptance between offers which ask that the offeree shall do something, as in the instant case, and offers which ask that the offeree shall promise something. In offers of the latter kind communication of the acceptance is always essential. *Id.*, p. 284, 285, §§ 88, 89. * * * Judgment affirmed.

MOTT v. JACKSON et al.

Supreme Court of Alabama, 1911. 172 Ala. 448, 55 So. 528.

Action by John D. Mott against M. R. Jackson and others. Judgment for defendants, and plaintiff appeals. Reversed, rendered, and remanded.

The complaint is as follows:

Count 1: "Plaintiff claims of the defendants the sum of \$1,500 damages, for that, whereas, on, to wit, the 22d day of January, 1908, the said defendants were engaged in running a steamboat, viz., the **Liberty**, as a common carrier on the navigable waters of Alabama, and

on or about such time promised and agreed as such carriers to and with plaintiff to receive for him for hire on the next down trip of the boat, and on said trip to carry for him, a lot of staves, to wit, 10,000 in number, from Davis' Bluff, a landing on the Tombigbee river, and deliver the same safely at the wharves or docks in the city of Mobile, in the state of Alabama, for a reward then and there to be paid by the said plaintiff; that plaintiff, in consideration of said promise on the part of the defendants to carry said staves, had the same placed on the margin of the river at the usual and customary place for loading that kind of freight on said steamboat, the *Liberty*, and when the said boat arrived on the said down trip announced himself willing to load said staves on said boat, when defendants willfully, knowingly, and wrongly neglected and refused to take said staves. And plaintiff alleges that their refusal was without just cause or good excuse, and that before plaintiff had shipped said staves by any other carrier a freshet came in the river and washed said staves away, and they became entirely lost to plaintiff." * * *

The demurrers take the point that no consideration for the defendants' promise is alleged, and because the count does not allege that the plaintiff agreed and bound himself to ship some staves and pay the freight thereon, and others not necessary to be here set out.

SIMPSON, J. This action is by the appellant against the appellees, as common carriers, by water, for damages for refusal to receive freight. Demurrers were sustained to the complaint as amended, the plaintiff refused to amend, and the errors claimed are the action of the court in sustaining the demurrers to the several counts of the complaint.

The counts of the complaint (which will be set out by the reporter) are on the contract, and not *ex delicto*. *Wilkinson v. Moseley*, 18 Ala. 288, 290, et seq.; *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170, 176; *McDaniel v. Johnston*, 110 Ala. 526, 532, 19 So. 35; *Southern Railway Co. v. Rosenberg*, 129 Ala. 287, 30 So. 32; *W. U. Tel. Co. v. Littleton*, 169 Ala. 99, 53 So. 97.

The insistence of the appellees is that the contract set out in the several counts of the complaint is unilateral, and does not allege any consideration for the promise or any acceptance of the offer. It is familiar contract law that where one party makes an offer, dependent upon some act of the other party, and the other party performs the act, that is an acceptance of the offer, and constitutes a sufficient consideration to support the contract. 6 Cyc. 429, and notes. It is true that a mere general offer by a carrier to receive and transport goods generally would be too indefinite, and would include nothing but its common-law liability, and under such an offer a failure to receive goods for shipment would be subject to the defenses applicable to an action on the common-law duty, such as that the vessel was already

loaded to its full capacity; but when the carrier says to the shipper, "I will receive and carry your freight at a particular time [as on the next down trip of the boat] and at a particular place [as at Davis' Bluff]," it cannot mean anything except that "I will have the space and facilities, when the boat reaches said landing, to receive your goods, and if you will have them there at that time I will receive and transport them." It is true that, up to that time, the carrier's promise was but an offer, or a proposition; but, if it had desired to protect itself against the contingency of the shipper's not accepting the proposition, by having his goods ready for shipment, or of his receiving a boat load of freight before reaching said point, he should have required a specific acceptance of the proposal, or inserted a proviso as to space, etc.

The appellees insist that the offer should specify whether it is to be accepted by promise or by act. While a party making an offer has a right to specify how it shall be accepted, in order to complete the contract, yet, if he does not so specify, it is clear that anything which in law would be an acceptance, so long as the offer is left open, would be sufficient, and an acceptance by act is as effective as acceptance by words. In an early English case it was said: "If I say to another, 'If you will go to York, I will give you £100,' that is, in a certain sense, a unilateral contract. He has not promised to go to York. But, if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise." *Gt. N. Ry. Co. v. Witham*, 9 Law Rep. (C.C.P.) 12, 19. If the shipper had been standing on the river bank, and the captain of the boat had said, "I will take your staves and carry them to Mobile for a reasonable compensation," and the shipper, without saying a word, had immediately delivered the goods to the boat, or offered them to its employes, it cannot be doubted that that would have been a sufficient acceptance to close the contract. The offer, then, being still open and unrevoked, was necessarily a continuing one, and its acceptance at one time as effectual as at another. * * *

Reversed and demurrers overruled.

QUESTIONS:

1. What was the specific "act" by which the plaintiff consummated the contract?
2. Did the plaintiff make a "promise" to the defendant and thus create a "bilateral" contract? See Restatement, Contracts § 31.
3. After piling the staves on the wharf, was the plaintiff privileged to haul them away again?
4. Did the plaintiff promise to ship 10,000 staves?
5. If the plaintiff had put only 5,000 staves on the wharf, would the defendant have been bound to carry them?

NOTE

In *Lamb v. Prettyman*, 33 Pa.Super. 190 (1907) an agent sued for a commission: "The counsel for defendant contends that when Prettyman asked Lamb 'to get a deal,' Lamb did not agree to do so and therefore there was no contract. The answer to this is that it was not necessary for Lamb to say in words that he would act; he could make it a contract by performance, and there is evidence that he did procure a party to deal with the defendant. Where acceptance of a proposition is by a promise, it must presently follow the offer and notice of it be given to the other party. But where acceptance is by act, the mere performance of the act, without notice, concludes the contract."

TROUNSTINE et al. v. SELLERS.

Supreme Court of Kansas, 1886. 35 Kan. 447, 11 P. 441.

This was an action of replevin, brought by A. & J. Trounstin & Co. to recover from A. H. Sellers the possession of a stock of ready-made clothing of the alleged value of \$2,085.20. To a judgment for the defendant, the plaintiffs excepted.

JOHNSTON, J. The right of possession to the clothing in controversy depends upon whether the proposition made to the plaintiffs by Moore & Weaver, on November 16, 1884, was accepted and became a contract before the execution of the mortgages by Moore & Weaver to their creditors on the fifteenth day of December, 1884. It appears that the plaintiffs, who were engaged in the wholesale clothing business at Cincinnati, Ohio, sold on credit a stock of clothing, through one of their agents, to Moore & Weaver, at Ottawa, Kansas. The goods were sold and shipped in the early part of September, 1884, upon the terms that Moore & Weaver were to have a discount of 6 per cent off the prices named not later than 10 days after January 1, 1885, and credit was given them until the expiration of that time for a discount. On November 10, 1884, Moore & Weaver wrote to the plaintiffs, claiming that if they did not choose to discount the bill within 10 days after January 1, 1885, they were entitled to a credit of four months from that time. The plaintiffs answered this letter on the fourteenth of November, 1884, insisting that the credit did not extend beyond 10 days after January 1, 1885. Moore & Weaver again wrote to the plaintiffs on November 16, 1884, insisting on the additional credit of four months from January 1st, and, in closing their letter stated: "If you think we are misrepresenting the facts in the case, we will return the goods which we have on hand, and pay for what we have sold out of them. Hoping to hear from you soon, we remain," etc. This letter was received by the usual course of mail, but was never answered. It seems

that, soon after the plaintiffs received the letter of November 16th, Mr. Harper, one of their firm, started out from Cincinnati on a business trip, with the intention of attending to some important business matters of the firm in Indiana and Illinois which demanded immediate attention, and with a view of coming on to Ottawa as soon as those matters were disposed of. He reached Ottawa on the evening of December 16, 1884, one month after the proposition was made, when he demanded the possession of the goods from the defendant, Sellers, who was in charge of them under the mortgages executed the preceding day.

It is insisted by the plaintiffs that the court erred in not holding the conduct of the plaintiff in starting from Cincinnati as an acceptance of the proposal made by Moore & Weaver, and as a completion of the contract which vested the title and right of possession of the goods in the plaintiffs. In our opinion, the conduct of the plaintiffs did not indicate a purpose to accept the proposal made by Moore & Weaver, and cannot be regarded as an acceptance. Although the proposition did not, within itself, limit the time or manner of acceptance, it cannot be regarded as a perpetual one, forever open to be accepted or rejected, at the will of the plaintiffs. In *Mactier v. Frith*, 6 Wend. 103, 21 Am. Dec. 262, the rule laid down with respect to a proposal made by letter is that the offer continues until the letter containing it is received, "and the party has had a fair opportunity to answer it." It has also been held that "a letter written would not be an acceptance so long as it remained in the possession or under the control of the writer. An offer, then, made through a letter, is not continued beyond the time that the party has a fair opportunity to answer it." *Averill v. Hedge*, 12 Conn. 424. Upon receipt of Moore & Weaver's letter the plaintiffs were bound "to accept in a reasonable time, and give notice thereof, or the defendant was no longer bound by the offer." *Chicago & G. E. R. Co. v. Dane*, 43 N.Y. 240.

The offer which was made was the result of correspondence through the mails, and, as the dates of the letters indicate, they had been promptly answered and responded to by both the parties. Besides, the letter containing the proposal, by its terms, enjoined an early reply. It closes with the words, "Hoping to hear from you soon," etc. While the mode of acceptance was not indicated in the letter making the offer, the nature of the negotiations, as well as the manner in which they were carried on, suggested, not only the desire and necessity for an early reply, but also that the parties making the offer would expect an answer through and by the usual course of the mails. It has been said that "where an individual makes an offer by post, stipulating for, or by the nature of the business having the right to expect, an answer by return post, the offer can only endure for a limited time, and the making of it is accompanied by the implied stipulation that the answer

will be sent by return post. If that stipulation is not satisfied, the person making the offer is released from it." *Maclay v. Harvey*, 90 Ill. 525, 32 Am.Rep. 35; *Dunlop v. Higgins*, 1 H.L.Cas. 387.

If the plaintiffs intended to accept the proposal, it was their duty to have signified their acceptance, either through the mails, or by some equally expeditious means. The plaintiffs say that they determined to accept the proposition as soon as the offer was received, and that Mr. Harper's act in starting to Ottawa was an overt act, amounting to an acceptance. Every overt act caused by a determination to accept a proposition does not constitute an acceptance. If it was the intention of the plaintiffs to accept the offer, they could, and most likely would, have written Moore & Weaver a letter, which was the usual mode of communication between the parties, and which is the usual mode of accepting an offer made by letter. Instead of sending a letter or telegram announcing a determination to accept, one of them started on a business trip through the country, intending finally to come to Kansas, and take the goods, which trip consumed almost 30 days' time, during which time they were at liberty to change their purpose, and reject the proposition. The mere determination to accept an offer does not constitute an acceptance which is binding on the parties. "The assent must either be communicated to the other party, or some act must have been done which the other party has expressly or impliedly offered to treat as a communication." *Benj. Sales*, 54. Where parties are distant, and the contract is to be made by correspondence the writing of a letter or telegram containing a notice of acceptance is not, of itself, sufficient to complete a contract. In such a case the act must involve an irrevocable element, and the letter must be placed in the mail, or the telegram deposited in the office, for transmission, and thus placed beyond the power or control of the sender, before the assent becomes effectual to consummate a contract, and not then, unless the offer is still standing. See authorities above cited. The action of the plaintiffs in sending a member of the firm, by a circuitous route, to Kansas, was no more than a mere mental assent, which, as we have seen, is insufficient. There was no act of acceptance until Harper arrived at Ottawa, and demanded the goods. This was not within a reasonable time, and, when the proposition was not met within a reasonable time, Moore & Weaver were at liberty to regard their proposition as rejected, and to make other disposition of their property, which they manifestly did do. * * *

Judgment affirmed.

QUESTIONS:

1. What mode of acceptance of the offer of Moore & Weaver would have been effective?

2. Would the contract so made have been bilateral or unilateral?
 3. If the contract had been so made, would the plaintiff have won his action of replevin (a tort action) against Sellers?
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WHITE v. CORLIES.

Court of Appeals of New York, 1871. 46 N.Y. 467.

Appeal from First Judicial District.

The action was for an alleged breach of contract.

The plaintiff was a builder with his place of business in Fortieth street, New York City.

The defendants were merchants at 32 Dey street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September 28th the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff, for his assent under his estimate which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' bookkeeper wrote the plaintiff the following note:

"New York, September 29th. Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date you can begin at once. The writer will call again, probably between five and six this p. m. W. H. R., for J. W. Corlies & Co., 32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September 29th, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent) before commencing the work. In my opinion it was not. He had a right to act upon this note

and commence the job, and that was a binding contract between the parties."

To this defendants excepted.

FOLGER, J. We do not think that the jury found, or that the testimony shows that there was any agreement between the parties before the written communication of the defendants of September 29 was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound in contract to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work as we understand the testimony, upon that stuff.

We understand the rule to be that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal may be answered by letter by mail containing the acceptance. And in general as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act which in itself is no indication of an acceptance, become such because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff **need not** indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed and a new trial ordered, with costs to abide the event of the action. All concur, but ALLEN, J., not voting.

Judgment reversed, and new trial ordered.

QUESTIONS:

1. Did Corlies specify the mode of acceptance, either as a requisite or as sufficient?
2. Was the power of acceptance so limited that only a bilateral contract could be made? See Restatement, Contracts § 31.
3. How could White have effectively accepted?

NOTE

The sending of a notice is so generally looked upon as the final and operative act that votes and other acts prior to notice may not be operative. In *Powell v. Lee*, 99 L.T. 284 (1908), the plaintiff had applied for a position; the defendant school board voted to appoint him, but reconsidered the vote before any formal notice to him. It was held that there was no contract. In *re London & Northern Bank*, [1900] 1 Ch. 220, held that an applicant for shares could revoke his offer after the company had voted to allot the shares to him and had started a letter of notification by a messenger.

CARLILL v. CARBOLIC SMOKE BALL CO.

Court of Appeal, 1892. [1893] 1 Q.B. 256.

Appeal from a decision of Hawkins, J. [1892] 2 Q.B. 484.

The defendants, who were the proprietors and vendors of a medical preparation called "The Carbolic Smoke Ball," inserted in the *Pall Mall Gazette* of November 13, 1891, and in other newspapers, the following advertisement:

"£100 reward will be paid by the Carbolic Smoke Ball Company to any person who contracts the increasing epidemic influenza, colds, or any disease caused by taking cold, after having used the ball three times daily for two weeks according to the printed directions supplied with each ball. £1000 is deposited with the Alliance Bank, Regent Street shewing our sincerity in the matter.

"During the last epidemic of influenza many thousand carbolic smoke balls were sold as preventives against this disease, and in no ascertained case was the disease contracted by those using the carbolic smoke ball.

"One carbolic smoke ball will last a family several months, making it the cheapest remedy in the world at the price, 10s., post free. The ball can be refilled at a cost of 5s. Address, Carbolic Smoke Ball Company, 27 Princes Street, Hanover Square, London."

The plaintiff, a lady, on the faith of this advertisement, bought one of the balls at a chemist's and used it as directed, three times a day, from November 20, 1891, to January 17, 1892, when she was attacked by influenza. Hawkins, J., held that she was entitled to recover the £100. The defendants appealed.

LINDLEY, L. J. * * * We must first consider whether this was intended to be a promise at all, or whether it was a mere puff which meant nothing. Was it a mere puff? My answer to that question is "No," and I base my answer upon this passage: "£1000 is deposited with the Alliance Bank, shewing our sincerity in the matter." Now, for what was that money deposited or that statement made except to negative the suggestion that this was a mere puff and meant nothing at all? The deposit is called in aid by the advertiser as a proof of his sincerity in the matter—that is, the sincerity of his promise to pay this £100 in the event which he has specified. I say this for the purpose of giving point to the observation that we are not inferring a promise; there is the promise, as plain as words can make it.

Then it is contended that it is not binding. In the first place, it is said that it is not made with anybody in particular. Now that point is common to the words of this advertisement and to the words of all other advertisements offering rewards. They are offers to anybody who performs the conditions named in the advertisement, and anybody who does perform the condition accepts the offer. In point of law this advertisement is an offer to pay £100 to anybody who will perform these conditions, and the performance of the conditions, is the acceptance of the offer. That rests upon a string of authorities, the earliest of which is *Williams v. Carwardine*, 4 Barn. & Adol. 621, which has been followed by many other decisions upon advertisements offering rewards.

But then it is said, "Supposing that the performance of the conditions is an acceptance of the offer, that acceptance ought to have been notified." Unquestionably, as a general proposition, when an offer is made, it is necessary in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified. But is that so in cases of this kind? I apprehend that they are an exception to that rule, or, if not an exception, they are open to the obser-

vation that the notification of the acceptance need not precede the performance. This offer is a continuing offer. It was never revoked, and if notice of acceptance is required,—which I doubt very much, for I rather think the true view is that which was expressed and explained by Lord Blackburn in the case of *Brogden v. Railway Co.*, 2 App.Cas. 666, 691,—if notice of acceptance is required, the person who makes the offer gets the notice of acceptance contemporaneously with his notice of the performance of the condition. If he gets notice of the acceptance before his offer is revoked, that in principle is all you want. I, however, think that the true view, in a case of this kind, is that the person who makes the offer shows by his language and from the nature of the transaction that he does not expect and does not require notice of the acceptance apart from notice of the performance. * * *

I come now to the last point which I think requires attention: that is, the consideration. It has been argued that this is *nudum pactum*—that there is no consideration. We must apply to that argument the usual legal tests. Let us see whether there is no advantage to the defendants. It is said that the use of the ball is no advantage to them, and that what benefits them is the sale; and the case is put that a lot of these balls might be stolen, and that it would be no advantage to the defendants if the thief or other people used them. The answer to that, I think, is as follows: It is quite obvious that in view of the advertisers a use by the public of their remedy, if they can only get the public to have confidence enough to use it, will react and produce a sale which is directly beneficial to them. Therefore, the advertisers get out of the use an advantage which is enough to constitute a consideration.

But there is another view. Does not the person who acts upon this advertisement and accepts the offer put himself to some inconvenience at the request of the defendants? Is it nothing to use this ball three times daily for two weeks according to the directions at the request of the advertiser? Is that to go for nothing? It appears to me that there is a distinct inconvenience, not to say a detriment, to any person who so uses the smoke ball. I am of opinion, therefore, that there is ample consideration for the promise. * * *

BOWEN, L. J. * * * Then it was said that there was no notification of the acceptance of the contract. One cannot doubt that, as an ordinary rule of law, an acceptance of an offer made ought to be notified to the person who makes the offer, in order that the two minds may come together. Unless this is done, the two minds may be apart, and there is not that consensus which is necessary according to the English law—I say nothing about the laws of other countries—to make a contract. But there is this clear gloss to be made upon that doctrine, that as notification of acceptance is required for the benefit of the person who makes the offer, the person who makes the offer may dispense with notice to himself if he thinks it desirable to do so, and I suppose

there can be no doubt that where a person in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated method of acceptance; and if the person making the offer, expressly or impliedly intimates in his offer that it will be sufficient to act on the proposal without communicating acceptance of it to himself, performance of the condition is a sufficient acceptance without notification.

That seems to me to be the principle which lies at the bottom of the acceptance cases, of which two instances are the well-known judgment of Mellish, L. J., in *Harris's Case*, L.R. 7 Ch. 587, and the very instructive judgment of Lord Blackburn in *Brogden v. Railway Co.*, 2 App.Cas. 666, 691, in which he appears to me to take exactly the line I have indicated.

Now, if that is the law, how are we to find out whether the person who makes the offer does intimate that notification of acceptance will not be necessary in order to constitute a binding bargain? In many cases you look to the offer itself. In many cases you extract from the character of the transaction that notification is not required, and in the advertisement cases it seems to me to follow as an inference to be drawn from the transaction itself that a person is not to notify his acceptance of the offer before he performs the condition, but that if he performs the condition notification is dispensed with. It seems to me that from the point of view of common sense no other idea could be entertained. If I advertise to the world that my dog is lost, and that anybody who brings the dog to a particular place will be paid some money, are all the police or other persons whose business it is to find lost dogs to be expected to sit down and write a note saying that they have accepted my proposal? Why, of course, they at once look after the dog, and as soon as they find the dog they have performed the condition. The essence of the transaction is that the dog should be found, and it is not necessary under such circumstances, as it seems to me, that in order to make the contract binding there should be any notification of acceptance. It follows from the nature of the thing that the performance of the condition is sufficient acceptance without the notification of it, and a person who makes an offer in an advertisement of that kind makes an offer which must be read by the light of that common sense reflection. He does, therefore, in his offer impliedly indicate that he does not require notification of the acceptance of the offer. • • •

Appeal dismissed.

QUESTIONS:

1. In order to accept the offer, was it necessary for the plaintiff to "buy" a smoke ball?
 2. Was catching the influenza a part of the required mode of acceptance?
 3. In how many persons was a power of acceptance created and how many contracts might be made? See Restatement, Contracts, §§ 28-30.
 4. Was Carlill at any time bound by a promissory duty?
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BISHOP v. FRANK EATON.

Supreme Judicial Court of Massachusetts, 1894.
161 Mass. 496, 37 N.E. 665, 42 Am.St.Rep. 437.

Contract, on a guaranty. Writ dated February 2d, 1892. Trial in the Superior Court without a jury, before Braley, J., who found the following facts:

The plaintiff in 1886 was a resident of Sycamore in the State of Illinois, and was to some extent connected in business with Harry H. Eaton, a brother of the defendant. In December, 1886, the defendant in a letter to the plaintiff said, "If Harry needs more money, let him have it, or assist him to get it, and I will see that it is paid."

On January 7th, 1887, Harry Eaton gave his promissory note for two hundred dollars to one Stark, payable in one year. The plaintiff signed the note as surety, relying on the letter of the defendant, and looked to the defendant solely for reimbursement, if called upon to pay the note. Shortly afterward the plaintiff wrote to the defendant a letter stating that the note had been given and its amount, and deposited the letter in the mail at Sycamore, postage prepaid, and properly addressed to the defendant at his home in Nova Scotia. The letter, according to the testimony of the defendant, was never received by him. At the maturity of the note the time for its payment was extended for a year, but whether with the knowledge or consent of the defendant was in dispute. In August, 1889, in an interview between them, the plaintiff asked the defendant to take up the note still outstanding, and pay it, to which the defendant replied: "Try to get Harry to pay it. If he don't, I will. It shall not cost you anything."

On October 1st, 1891, the plaintiff paid the note, and thereafter made no effort to collect it from Harry Eaton, the maker. The defendant testified that he had no notice of the payment of the note by the plaintiff until December 22d, 1891.

The defendant requested the judge to rule: 1. The letter of the defendant constituted in law no more than an offer of guaranty. 2. The

defendant did not become bound by a contract of guaranty unless it appeared from a preponderance of the evidence that, within a reasonable time after his offer was accepted and acted upon, he had notice of such acceptance, and the giving of credit thereon. 3. The mere deposit in the mail of a letter accepting an offer of guaranty which has been made by mail, such letter being properly stamped and addressed to the party making the offer, and mailed within a reasonable time after the acceptance, does not in law constitute such notice to the latter as thereupon to bind him. 4. The defendant did not become bound by a contract of guaranty, if at all, unless he actually received such letter of acceptance. 5. A delay for two years and a half after accepting and acting upon an offer of guaranty to give notice to the person making the offer is an unreasonable delay. * * * 7. If for a year and a half after the maturity of the note and the default of payment by the maker, the defendant had no notice of the default, he was discharged from his contract unless he subsequently waived his rights arising from the plaintiff's laches. * * *

The judge declined so to rule, and ruled, as matter of law upon the findings of fact, that the plaintiff was entitled to recover, and ordered judgment for him; and the defendant alleged exceptions.

KNOWLTON, J. * * * The defendant requested many rulings in regard to the law applicable to contracts of guaranty, most of which it becomes necessary to consider. The language relied on was an offer to guarantee, which the plaintiff might or might not accept. Without acceptance of it there was no contract, because the offer was conditional and there was no consideration for the promise. But this was not a proposition which was to become a contract only upon the giving of a promise for the promise, and it was not necessary that the plaintiff should accept it in words, or promise to do anything before acting upon it. It was an offer which was to become effective as a contract upon the doing of the act referred to. It was an offer to be bound in consideration of an act to be done, and in such a case the doing of the act constitutes the acceptance of the offer and furnishes the consideration. Ordinarily there is no occasion to notify the offerer of the acceptance of such an offer, for the doing of the act is a sufficient acceptance, and the promisor knows that he is bound when he sees that action has been taken on the faith of his offer. But if the act is of such a kind that knowledge of it will not quickly come to the promisor, the promisee is bound to give him notice of his acceptance within a reasonable time after doing that which constitutes the acceptance. In such a case it is implied in the offer that, to complete the contract, notice shall be given with due diligence, so that the promisor may know that a contract has been made. But where the promise is in consideration of an act to be done, it becomes binding upon the doing of the act so far that the promisee cannot be affected by a sub-

sequent withdrawal of it, if within a reasonable time afterward he notifies the promisor. In accordance with these principles, it has been held in cases like the present, where the guarantor would not know of himself, from the nature of the transaction, whether the offer has been accepted or not, that he is not bound without notice of the acceptance, seasonably given after the performance which constitutes the consideration. *Babcock v. Bryant*, 12 Pick. 133; *Whiting v. Stacy*, 15 Gray, 270; *Schlessinger v. Dickinson*, 5 Allen, 47.

In the present case the plaintiff seasonably mailed a letter to the defendant, informing him of what he had done in compliance with the defendant's request, but the defendant testified that he never received it, and there is no finding that it ever reached him. The judge ruled, as matter of law, that upon the facts found, the plaintiff was entitled to recover, and the question is thus presented whether the defendant was bound by the acceptance when the letter was properly mailed, although he never received it.

When an offer of guaranty of this kind is made, the implication is that notice of the act which constitutes an acceptance of it shall be given in a reasonable way. What kind of a notice is required depends upon the nature of the transaction, the situation of the parties, and the inferences fairly to be drawn from their previous dealings, if any, in regard to the matter. If they are so situated that communication by letter is naturally to be expected, then the deposit of a letter in the mail is all that is necessary. If that is done which is fairly to be contemplated from their relations to the subject-matter and from their course of dealing, the rights of the parties are fixed, and a failure actually to receive the notice will not affect the obligation of the guarantor.

The plaintiff in the case now before us resided in Illinois, and the defendant in Nova Scotia. The offer was made by letter, and the defendant must have contemplated that information in regard to the plaintiff's acceptance or rejection of it would be by letter. It would be a harsh rule which would subject the plaintiff to the risk of the defendant's failure to receive the letter giving notice of his action on the faith of the offer. We are of opinion that the plaintiff, after assisting Harry to get the money, did all that he was required to do when he seasonably sent the defendant the letter by mail informing him of what had been done.

How far such considerations are applicable to the case of an ordinary contract made by letter, about which some of the early decisions are conflicting, we need not now consider. * * *

[The defendant's exceptions were sustained for reasons not here under consideration.]

QUESTIONS:

1. Was Bishop's letter of notification a part of the necessary mode of acceptance?
2. At what instant was a contract, whether unilateral or bilateral, made?

NOTE

See Restatement, Contracts, § 56.

There are many apparently conflicting cases as to whether a guarantor is bound in the absence of any notice by the creditor. See Ames' Cases on Suretyship, p. 225 et seq.

Offer by Creditor.—If the offer is made by the creditor to the surety, the latter must usually give notice of his acceptance, because he is asked for a promise; but no further notice by the creditor is necessary. *Stauffer v. Koch*, 225 Mass. 525, 114 N.E. 750 (1917). It is often said that, when the guaranty is given at the creditor's request, the creditor need give no notice of acceptance.

Offer by Guarantor.—(1) *Promise for Act.* The offer by the guarantor must of necessity be an offer of a promise. He may request a non-promissory act in return.

(a) This act may be the giving of credit to the principal debtor. The doing of this act (giving credit to M.) is the acceptance of the offer, and no notice should be required. *Lennox v. Murphy*, 171 Mass. 370, 50 N.E. 644 (1898), "there is no universal doctrine of the common law that acceptance of an offer must be communicated in order to make a valid simple contract". The guarantor's duty to pay may still be subject to a constructive condition precedent that some notice be given. This may be notice that the requested credit has been given, or that the balance due is some specific amount, or that there has been default. See *Bishop v. Eaton*, supra. Even before this notice, however, it is too late for the guarantor to withdraw; he is bound by a conditional contract.

(b) The act requested may be the payment of money to the guarantor. The performance of this act involves notice perhaps; certainly no other notice is required. *Davis v. Wells*, 104 U.S. 159, 26 L.Ed. 686 (1881).

(2) *Promise under Seal.* The guaranty offered may be a sealed document. In such case it is binding as soon as delivered to the creditor or his representative. No notice is necessary, except possibly as a condition precedent to the secondary obligation, as explained above. See *Davis v. Wells*, supra.

(3) *Promise for a Promise.* If the offer contemplates the undertaking of a return duty by the creditor, thus empowering the latter to make only a bilateral contract, a notice of acceptance will nearly always be necessary to the formation of a contract.

HOLLIDGE v. GUSSOW, KAHN & CO., Inc.

Circuit Court of Appeals of the United States, First Circuit, 1933.
67 F.2d 459.

Proceeding by Gussow, Kahn & Co., Incorporated, against C. Crawford Hollidge, bankrupt. From an adverse decree, the bankrupt appeals.

Affirmed.

ANDERSON, Circuit Judge. The appellant was adjudicated a bankrupt on April 12, 1932. On July 29, 1932, he filed an offer of composition which was confirmed on August 9, 1932.

This appeal presents the question as to whether the creditor's claim should be allowed for \$940 only, as the referee held, or for \$4657.84, as the court below held.

The controlling facts are as follows: Late in 1931, or early in 1932, Kahn, for the creditor, began negotiations with the bankrupt for the publication by the appellee of an illustrated leaflet to advertise the merchandise of the bankrupt's store in New York City. The negotiations resulted in the execution by the bankrupt's duly authorized agent of a document, as follows:

"To Gussow, Kahn & Co. Incorporated Advertising
"13 West 36th Street, New York City

"January 28, 1932.

"For Kurzman C. Crawford Hollidge 661 Fifth Avenue
New York City

"Please enter our order for: 160,000 copies of the Kurzman Courier as per dummy submitted—divided into (8) issues of 20,000 per issue—Editorials to be set in News type with two columns (as per dummy) devoted to water colored illustrations.

"Date of Delivery: One issue for each of the following months of 1932: February, March, April, May, June, September, October and November inclusive.

"Price \$940 per issue (including envelopes) \$7,520 Complete for eight (8) issues.

"Remarks: Paper stock subject to okay. Envelopes subject to okay. All art work, copy, editorials and proofs subject to okay before each issue goes to press—after original typewritten copy sheets are okayed, any major changes will be subject to an author's correction charge.

"Subject to Approval of your Credit Department.

"Representative

"[Signed] Charlina Davenport.

"(This order is non-cancellable)"

Thereafter, several conferences were held between Kahn and representatives of the bankrupt for the purpose of getting the leaflet into proper shape for publication. About April 1, 1932, the creditor delivered to the bankrupt's store 20,000 copies of the "Kurzman Chatterer," which were entitled "Volume 1, No. 1, dated March, 1932." This was the first of the eight issues contemplated in the order supra. As bankruptcy came on April 12, no other issues were printed by the creditor. The referee finds that the creditor's profit on the other seven issues, if they had been printed and paid for, would have been \$3,717.84. He also finds: "There was no acceptance of the order by Gussow, Kahn & Co., Inc., either in writing or orally."

Learned counsel for the bankrupt has argued, with much ability and ingenuity, that this contract was not an entire contract, but was simply "an offer for several unilateral contracts to be formed upon the delivery of each 20,000 copies of the 'Courier.'" But we think the court below was right in holding the contract an entire one, and that it was effectively accepted. In the light of the finding of conferences between the creditor and the bankrupt as to the form and substance of the leaflet, and the actual furnishing of the first of the eight issues, this finding of no oral or written acceptance must be narrowly construed. It obviously means merely that there was no written or oral *technical* and *formal* acceptance of the order.

The order reads "for 160,000 copies." Part of the consideration having been furnished, there was an acceptance of the order. The undertaking was between business men; legalistic formalities are not to be expected. But when the order for 160,000 copies was made and acted upon by the offeree, we think it clear that both parties regarded themselves as bound to the whole scheme of advertising. The case falls under the doctrine laid down in the Restatement of Contracts, § 45, as follows:

"If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or if no time is stated therein, within a reasonable time." * * *

The fact that the bankrupt naturally reserved the right of approving the character and quality of advertising matter of each issue of the leaflet does not prevent the contract from attaching nor from being an entire one. This was merely a term of performance. The contractual relation was to be established before the proposed issues of the Kurzman Courier were submitted to Hollidge for approval; in other words, the submission for approval would be made, and as to the first issue was made, in performance of an existing contract. Com-

pare *Allegheny College v. National Chautauqua County Bank of Jamestown*, 246 N.Y. 369, 378, 159 N.E. 173, 57 A.L.R. 980, a learned and interesting opinion by Chief Judge Cardozo.

The decree of the District Court is affirmed, with costs to the appellee in this court.

WILSON, Circuit Judge (dissenting). I regret I am not able to concur in the opinion. The record before this court presents issues which have troubled courts and have been the subject of much refining by the text writers.

The evidence on which the referee made his findings and from which he drew his conclusions was not before the District Court, and, perforce, is not before this court. While the order could have been accepted as an entirety, since the order was for 160,000 copies at a fixed price, or as a severable order composed of distinct units, since the copy, art work, and editorials of each issue had to be approved by the appellant before it went to press, and the price for each issue was also definitely fixed, it was not formally accepted by the appellee as an entire contract by any written or oral communication.

Its acceptance, it is true, either as to the first monthly issue or in its entirety, could have been found from what was said and done at the conferences preliminary to the printing of the first issue and delivery of the first unit; but whether there was a meeting of the minds of the parties in the conferences held before the first publication to treat the contract as an entirety, was a question of fact for the referee. *Cecile Costumes, Inc., v. Michel et al.* (Sup.) 190 N.Y.S. 509, 511. The referee found that there was no evidence before him to indicate that the bankrupt had any intent of treating the order as an entire contract, and the only definite intention shown on his part was that of accepting the first issue.

It is not a fair inference from the referee's certificate that the conferences held indicated that the creditor accepted the order as an entire contract. Instead, the referee by his conclusion must have found to the contrary, since he allowed the appellee's claim only to the extent of \$940. There is nothing in his certificate to indicate that the conferences had anything to do with any publication except the first, and by the express terms of the order, the art work, editorials, and copy of each issue must receive the approval of the appellant before it went to press.

I do not think section 45 of the Restatement of the Law of Contract determines the issue here. It is, of course, true that an acceptance of a unilateral offer can be shown by the acts of the parties; but where the unilateral offer is divisible and the acceptance of the offer as an entirety is not otherwise shown, a supplying by the offeree and

an acceptance of one unit by the offeror may be an acceptance only on the unit supplied. • • •

QUESTION:

From the facts as reported in the majority opinion would you draw the inference that Gussow, Kahn & Co. promised Hollidge to supply the full 8 issues?

SECTION 4.—PUBLISHED OFFERS OF A REWARD FOR SPECIFIED SERVICE

(Effect of Performance by One Who Renders the Service Without Knowledge of the Published Offer)

WILLIAMS v. CARWARDINE.

In the King's Bench, 1833. 4 Barn. & Adol. 621.

Assumpsit to recover £20, which the defendant promised to pay to any person who should give such information as might lead to a discovery of the murderer of Walter Carwardine. Plea, general issue. At the trial before Parke, J., at the last spring assizes for the county of Hereford, the following appeared to be the facts of the case: One Walter Carwardine, the brother of the defendant, was seen on the evening of March 24th, 1831, at a public-house at Hereford, and was not heard of again till his body was found on April 12th in the river Wye, about two miles from the city. An inquest was held on the body on April 13th and the following days till the 19th; and it appearing that the plaintiff was at a house with the deceased on the night he was supposed to have been murdered, she was examined before the magistrates, but did not then give any information which led to the apprehension of the real offender. On April 25th the defendant caused a hand-bill to be published, stating that whoever would give such information as should lead to a discovery of the murderer of Walter Carwardine should, on conviction, receive a reward of £20; and any person concerned therein, or privy thereto (except the party who actually committed the offense), should be entitled to such reward, and every exertion used to procure a pardon; and it then added, that information was to be given, and application for the above reward was to be made to Mr. William Carwardine, Holmer, near Hereford. Two persons were tried for the murder at the summer assizes 1831, but acquitted.

Soon after this, the plaintiff was severely beaten and bruised by one Williams, and on August 23d, 1831, believing she had not long to live, and to ease her conscience, she made a voluntary statement, containing information which led to the subsequent conviction of Williams. Upon this evidence it was contended, that as the plaintiff was not induced by the reward promised by the defendant to give evidence, the law would not imply a contract by the defendant to pay her the £20. The learned Judge was of opinion, that the plaintiff, having given the information which led to the conviction of the murderer, had performed the condition on which the £20 was to become payable, and was therefore entitled to recover it; and he directed the jury to find a verdict for the plaintiff, but desired them to find specially whether she was induced to give the information by the offer of the promised reward. The jury found that she was not induced by the offer of the reward, but by other motives.

Curwood now moved for a new trial. There was no promise to pay the plaintiff the sum of £20. That promise could only be enforced in favor of persons who should have been induced to make disclosures by the promise of reward. Here the jury have found that the plaintiff was induced by other motives to give the information. They have, therefore, negatived any contract on the part of the defendant with the plaintiff.

DENMAN, C. J. The plaintiff, by having given information which led to the conviction of the murderer of Walter Carwardine, has brought herself within the terms of the advertisement, and therefore is entitled to recover.

LITTLEDALE, J. The advertisement amounts to a general promise, to give a sum of money to any person who shall give information which might lead to the discovery of the offender. The plaintiff gave that information.

PARKE, J. There was a contract with any person who performed the condition mentioned in the advertisement.

PATTESON, J. I am of the same opinion. We cannot go into the plaintiff's motives.

Rule refused.

QUESTIONS:

1. Did the jury find as a fact that the plaintiff did not know of the offer of reward?
2. Does the fact that plaintiff was not induced to give the information by the defendant's offer prevent the existence of a "bargain"?
3. Is there reason for holding the defendant bound by a unilateral contract even though the plaintiff did not "accept" the offer and did not give the information in exchange for the promise of reward?

DAWKINS v. SAPPINGTON.

Supreme Court of Indiana, 1866. 26 Ind. 199.

FRAZER, J. The appellant was the plaintiff below. The complaint was in two paragraphs: (1) That a horse of the defendant had been stolen, whereupon he published a hand-bill offering a reward of \$50 for the recovery of the stolen property, and that thereupon the plaintiff rescued the horse from the thief and restored him to the defendant, who refused to pay the reward. (2) That the horse of the defendant was stolen, whereupon the plaintiff recovered and returned him to the defendant, who, in consideration thereof, promised to pay \$50 to the plaintiff, which he has failed and refused to do.

To the second paragraph a demurrer was sustained. To the first an answer was filed, the second paragraph of which alleged that the plaintiff, when he rescued the horse and returned him to the defendant, had no knowledge of the offering of the reward. The third paragraph averred that the hand-bill offering the reward was not published until after the rescue of the horse and his delivery to the defendant. The plaintiff unsuccessfully demurred to each of these paragraphs, and refusing to reply the defendant had judgment. * * *

3. The second paragraph of the answer shows a performance of the service without the knowledge that the reward had been offered. The offer therefore did not induce the plaintiff to act. The liability to pay a reward offered seems to rest, in some cases, upon an anomalous doctrine, constituting an exception to the general rule. In *Williams v. Carwardine*, 4 Barn. & Adolph. 621, there was a special finding, with a general verdict for the plaintiff, that the information for which the reward was offered was not induced to be given by the offer, yet it was held by all the judges of the King's Bench then present, Denman, C. J., and Littledale, Parke and Patteson, JJ., that the plaintiff was entitled to judgment. It was put upon the ground that the offer was a general promise to any person who would give the information sought; that the plaintiff, having given the information, was within the terms of the offer, and that the court could not go into the plaintiff's motives. This decision has not, we believe, been seriously questioned, and its reasoning is conclusive against the sufficiency of the defense under examination. There are some considerations of morality and public policy which strongly tend to support the judgment in the case cited. If the offer was made in good faith, why should the defendant inquire whether the plaintiff knew that it had been made? Would the benefit to him be diminished by the discovery that the plaintiff, instead of acting from mercenary motives, had been impelled solely by a desire to prevent the larceny from being profitable to the person who had committed it? Is it not well that any one who has an opportunity to prevent the success

of a crime, may know that by doing so he not only performs a virtuous service, but also entitles himself to whatever reward has been offered therefor to the public?

The judgment is reversed, with costs, and the cause remanded, with directions to the court below to sustain the demurrer to the second paragraph of the answer.

QUESTION:

"Is it not well" that a promise should not be enforced except in favor of one who has been induced to act in reliance on it?

NOTE

The rule is laid down in Restatement, Contracts, § 23, that an operative offer does not exist until the fact that an offer is being made to him is known to the offeree. It is further stated, however, that an offeree may be bound by his acceptance of an offer the exact terms of which he does not understand or even does not know. One who receives an offer in writing has a power of acceptance without reading the offer. Restatement, § 70. If an offeree, with knowledge that an offer has been made to him, leads the offeror reasonably to believe that the offer is accepted and to change his position substantially in reliance thereon, he is bound by contract in accordance with the terms of the offer. The decisions that support *Dawkins v. Sappington*, supra, are restricted within the field of published offers to the world at large and do not include offers expressly directed to a particular offeree.

The following cases held the offeror bound to pay the reward to one who rendered part or all of the service without knowledge of the offer: *Gibbons v. Proctor*, 64 L.T. 594 (1892); *Neville v. Kelly*, 12 C.B.(N.S.) 740 (1862); *Auditor v. Ballard*, 9 Bush (Ky.) 572, 15 Am.Rep. 728 (1873); *Coffey v. Com.*, 18 Ky.Law Rep. 646, 37 S.W. 575 (1896); *Russell v. Stewart*, 44 Vt. 170 (1872); *Stone v. Dysert*, 20 Kan. 123 (1878), plaintiff knew that a reward had been offered, but not by whom or on what terms; *Cummings v. Gann*, 52 Pa. 484 (1866); *Smith v. State*, 38 Nev. 477, 151 P. 512, L.R.A.1916A, 1276 (1915); *Eagle v. Smith*, 4 Houst.(Del.) 293 (1871); *Sullivan v. Phillips*, 178 Ind. 164, 98 N.E. 868, Ann.Cas.1915B, 670 (1912); *Drummond v. U. S.*, 35 Ct.Cl. 356 (1900). See 26 Yale L.Jour. 169, 182; 29 Harv.L.Rev. 221; 1 Cornell L.Q. 92.

TAFT et al. v. HYATT et al.

Supreme Court of Kansas, 1919. 105 Kan. 35, 180 P. 213.

Suit by B. L. Taft and others against William S. Hyatt and others in nature of interpleader to determine the right to a reward. From a decree for defendant named, the remaining defendants appeal. Reversed and remanded, with directions.

PORTER, J. The controversy is between rival claimants for a reward offered for the apprehension of a criminal. The suit is an equitable one instituted by the persons who offered the reward, and who alleged that they were threatened with litigation by different parties claiming it, that some one or more of the defendants are entitled to the money, which the plaintiffs brought into court, and asked that defendants be required to set up their respective claims.

On May 16, 1917, it became known in the city of Parsons that Agnes Smith, the Wife of Dr. Asa Smith, had been assaulted, and that a negro physician by the name of Robert E. Smith was suspected of the crime. (The victim of the assault died, and Robert E. Smith was charged with and convicted of murder in the first degree. The judgment was affirmed. *State v. Smith*, 103 Kan. 148, 174 P. 551.)

The plaintiffs are Dr. Asa Smith, husband of the murdered woman, and certain individuals who are members of the A. H. T. A. They caused to be published and circulated an offer of \$750 reward "for the arrest or information that will lead to" the arrest of the accused.

As to the claims of the defendant Wm. S. Hyatt, the findings of fact are, in substance, these: Hyatt is an attorney at law with an office in the city of Parsons. Another attorney notified him that R. E. Smith desired to see him, and told him where Smith could be found. During the afternoon of May 17, 1917, Hyatt went to the hiding place of the accused in the city of Parsons in compliance with the directions that had been given him, and there found Smith. The two talked together for an hour or more, but were unable to reach an agreement as to the employment of Hyatt to defend Smith. There is a finding that the relation of attorney and client never existed between them at any time, and that Hyatt came away without being employed. Shortly before he went to see Smith, Hyatt learned that the reward had been offered, and after returning from his interview, he went to the office of the county attorney and told him where Smith could be found, and an arrangement was made to have the deputy sheriff go to the place for the purpose of arresting Smith. The deputy sheriff was called, and with Hyatt drove to the place where Smith had been left by Hyatt earlier in the afternoon, when they discovered that Smith was not there, but had been taken away by the other defendants. The court further found that Hyatt gave the first information to the proper officers which would lead to the arrest of Smith after the offer of the reward had been made, and that the information was given more than an hour previous to the time Smith was removed by the other defendants from the house where he had been hiding, and that Hyatt's purpose in giving the information to the county attorney and the deputy sheriff was to obtain the reward offered by the plaintiffs; that the fact that Smith was not arrested from the information given by Hyatt was due to no

fault or neglect of Hyatt. As a conclusion of law the court held that Hyatt was entitled to the reward.

The findings with reference to the other claimants are that Clarence Glass and Charles C. Edwards went to Thomas A. Murry, the chief of police of the city of Parsons, shortly after 6 o'clock on the afternoon of May 17, 1917, and requested Murry to go in a closed cab to a certain place in the city and take charge of Smith and deliver him to the jail at Oswego. Murry complied with the request, and went to the place directed, where he found the accused, together with the defendants Glass, Edwards, Tyson, Cook, and Ransom. All of them got into the cab with the chief of police, and the party went to Oswego where Smith was delivered to the sheriff of Labette county. Before leaving Parsons, and just as the party got into the cab with the chief of police, the latter told the accused to consider himself under arrest and informed him of the intention to deliver him at the county jail at Oswego. The evidence shows that the defendants who secured the services of the chief of police in taking the accused to Oswego were all members of the lodge of Colored Masons, to which the accused belonged. The court finds that Smith expressed to them his fears of mob violence, and it was agreed that he would give himself into their custody, and they agreed to protect him; that none of these defendants had heard of the offer of reward at the time they called Murry, the chief of police, to their assistance. Murry testified that he had heard of the reward before he arrested Smith, and that the reason he placed him under arrest and took him to Oswego was partly to earn the reward and partly to protect Smith from mob violence. The court finds that it was the duty of Murry, as chief of police, to make arrest of fugitives from justice, that at the time of receiving Smith into custody Murry was not armed with a warrant or other process for the arrest, and that Smith had not committed any offense within the view of the chief of police.

The court found in favor of Hyatt and against the other defendants. The costs were directed to be paid out of the fund, and the balance of the \$750 was ordered paid to Hyatt. The other defendants bring the case here for review. * * *

It is urged that it would be unconscionable to permit an attorney, under such circumstances, to avail himself of an offer of reward; that to do so would sanction conduct highly unprofessional in an attorney, and would permit him to obtain from one who occupies the position of a prospective client information which he uses to the other's prejudice and to gain a pecuniary benefit to himself. Without passing upon the question of the propriety of the conduct of an attorney in attempting to obtain a pecuniary advantage to the prejudice of an accused person under such circumstances, we think that Hyatt is not entitled to recover, because, from his own statement and the undisputed facts

in evidence, his efforts to secure the apprehension of the accused were unavailing. The information which he gave to the officers did not result, even remotely, in bringing about the apprehension of the accused. The court finds that the information Hyatt gave would lead to the arrest of the guilty person if it had been acted upon promptly, and the fact that it did not bring about this result was through no fault of Hyatt's. But this finding does not help Hyatt's case. It may have been that the officers to whom he confided his information were too slow. Whatever the reason, before any action was taken by them which resulted in apprehending the accused, the latter was on his way to the county jail in the custody of another officer, having, with the aid of his friends, surrendered himself. So far as the apprehension of the guilty person was concerned, Hyatt might as well have kept his information to himself.

The defendants who admit that they had not heard of the offer of the reward until after the accused had been surrendered to the sheriff at Oswego are not entitled to recover. A private offer of reward for the apprehension of a fugitive from justice or of a person suspected or charged with an offense stands, as a general rule, upon a different footing from a statutory offer, or one made by virtue of a statute. 34 Cyc. 1752, 1753, and cases cited in notes. The offer of a private individual is a mere proposal, which, when accepted, becomes a contract. Until it is accepted by some person who upon the strength of the offer takes some steps to earn the reward, there is no contract. *Van Vlis-singen v. Manning*, 105 Ill.App. 255. There must be a meeting of the minds of the parties—on the one side, of the person who makes the offer; on the other, of the person who performs the service. Where a claimant for the reward was not aware that it had been offered until after he had performed his services, there has been no meeting of minds which would constitute a contract. Besides, the undisputed facts with respect to those defendants who called the chief of police to assist them in taking the accused to Oswego are that these claimants were simply assisting the accused in surrendering himself. Their testimony is that what they did was for the purpose of protecting him from mob violence. They had never heard of the reward, and, of course, are not entitled to any part of it.

Thomas A. Murry cannot recover, because, as chief of police of the city of Parsons, it was his duty to make an arrest of fugitives from justice or persons charged with or suspected of crimes. The fact that he was not armed with a warrant or other process for the arrest of the accused is immaterial, because there was reasonable ground for believing that Smith had committed the particular offense charged against him, and his subsequent conviction established his actual guilt. * *

It has been repeatedly held that public policy does not permit an officer to claim a reward for merely doing his duty. [This problem is dealt with later in the chapter on Consideration.] * * *

Inasmuch as none of the defendants are entitled to recover any part of the reward, we think it would be a harsh rule to say that the plaintiffs are estopped from claiming it because of the admissions in their petition. In our view of the matter, justice requires that the trial court be directed to render judgment against all of the defendants, and that the plaintiffs, after paying the cost of the proceeding, be entitled to the return of the money. * * *

The judgment is reversed, and the cause remanded, with directions to carry this order into effect. All the Justices concurring.

NOTE

That one who has no knowledge of an offer has no power of acceptance is stated as the prevailing rule in Restatement, Contracts, § 23. Among the cases supporting it are *Fitch v. Snedaker*, 38 N.Y. 248 (1868); *Arkansas Bankers' Ass'n v. Ligon*, 174 Ark. 234, 295 S.W. 4, 53 A.L.R. 543 (1927), two judges dissenting.

The rule in Restatement, Contracts, § 53, "The whole consideration requested by an offer must be given after the offeree knows of the offer", seems to the present editor to do injustice and not to be sufficiently supported by court decisions.

In a number of cases, similar in many respects to the principal case, although not in all, the reward was apportioned by the court among several claimants, who had not acted jointly, but whose united efforts caused the result desired by the offerer. Some of these were interpleader suits brought by the offerer. *Bloomfield v. Maloney*, 176 Mich. 548, 142 N.W. 785, Ann.Cas.1915B, 662 (1913); *Gallagher v. Garrett*, 144 Md. 241, 124 A. 898 (1923). Others were suits brought by one or more claimants. *Whitcher v. State*, 68 N.H. 605, 34 A. 745 (1894); *Goldsborough v. Cradie*, 28 Md. 477 (1867); *Chambers v. Ogle*, 117 Ark. 242, 174 S.W. 532 (1915); *Lancaster v. Walsh*, 4 M. & W. 14 (1835).

Where a reward is offered for lost property, it has been held that one who returns a part is entitled pro tanto. *Deslondes v. Wilson*, 5 La. 397, 25 Am.Dec. 187 (1833); *Symmes v. Frazier*, 6 Mass. 344, 4 Am.Dec. 142 (1810); *Hawk v. Marion County*, 48 Iowa 472 (1878).

Apportionment was refused where a reward was offered for two persons and only one was captured. *Blain v. Pacific Express Co.*, 69 Tex. 74, 6 S.W. 679 (1887).

A reasonable construction must be given to the published offer. A reward for "arrest and conviction" can be earned without personally arresting the criminal. Doing acts that are the substantial cause of the arrest and conviction is enough.

CHOICE et al. v. CITY OF DALLAS.

Court of Civil Appeals of Texas, 1919. 210 S.W. 753.

Action by Mrs. M. P. Choice against the City of Dallas and A. E. Firmin and wife, with cross-bill by defendant Firmin and wife. General and special exceptions urged by defendant city to plaintiff's petition and to the cross-bill sustained, and plaintiff and Firmin and wife appeal. Reversed and remanded.

BOYCE, J. This suit was brought by appellant Mrs. M. B. Choice against the city of Dallas to recover a reward offered by the city "for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas." A. E. Firmin and wife, Mrs. Nellie Firmin, were made defendants on allegations that they were claiming the reward. These parties appeared, and by cross-bill sought to recover the reward. The court sustained general and special exceptions urged by the city to the plaintiff's petition and the cross-bill of Mrs. Firmin, and this appeal complains of this action.

Plaintiff alleged in her petition that on January 27, 1917, her residence in the city of Dallas was destroyed by fire set by one Mary Wright, who was by such act guilty of arson; that the plaintiff secured and furnished information and testimony that led to the arrest and conviction of the said Mary Wright of said crime; that at such time there was in force in the city of Dallas an ordinance duly and legally passed at a time long prior to the occurrence of the fire, as follows:

"Arson Reward."

"Whereas, under provisions of law, the state fire insurance commission has provided that, where any city or town maintains a standing reward of a sum equal to \$1.00 for each one hundred of population for the arrest and conviction of any one guilty of arson, in that event the insurance key rate of such city or town is entitled to credit of 2%; and

"Whereas, the crime of arson results in loss of property, causes an increase in insurance premiums, and frequently results in the loss of life, and is one of the most serious crimes against society; and

"Whereas, the city of Dallas has now a population of 130,000; and

"Whereas, the people of Dallas, through their city government, are preparing to apply to the state insurance commission for a substantial reduction in our insurance key rate:

"Now, therefore, be it resolved by the board of commissioners that the city of Dallas hereby offers a standing reward in the sum of \$1,300.00 for the arrest and conviction of any one guilty of arson within the corporate limits of the city of Dallas, said reward, however, not to apply to the fire marshal, nor any other officer, city,

county or state, who makes such arrest in the discharge of his official duties.

"Be it further resolved that the city fire marshal be, and that he is hereby directed to have prepared and to post placards in all public buildings in the city, showing that such reward has been offered as above described."

It is further alleged that notices of such reward were posted in accordance with the terms of such ordinance, and that by the passage thereof the city did secure the reduction in the key rate of insurance for said city, as referred to in the ordinance; that the plaintiff, with knowledge of, and acting under, said ordinance, secured and furnished such information as caused the arrest and conviction of said Mary Wright. Mrs. Firmin, joined by her husband, alleged in her cross-petition that she, and not the plaintiff, discovered the facts and furnished the information which caused the arrest and conviction of the said Mary Wright, and that she was entitled to the reward. This cross-petition contained no allegations that the cross-petitioner had any knowledge of the offer of reward or acted thereunder.

The demurrers to these pleadings of the plaintiff and cross-petitioner were sustained on three grounds: (1) That the ordinance offering said reward was void as not being within the powers conferred upon the city by its charter; (2) that it did not appear that either of said claimants actually arrested the said Mary Wright; (3) that it did not appear from the cross-petition of Mrs. Firmin that she had knowledge of the offer of reward and was induced to act by reason thereof. We will consider these in the order stated. * * *

The offer of a reward for "arrest and conviction" cannot be taken literally, as the conviction at least requires the action of the courts of the state. So it has been generally held that the terms of such an offer are complied with when one acting thereunder secures and furnishes information necessary to and which results in arrest and conviction by the properly constituted authorities, and we think this is the rule that should be applied in this case. * * *

It is settled in this state that the recovery of rewards offered by individuals is governed by the principles of the law of contract, and that before recovery can be had it must appear that the party claiming the reward knew of and acted upon the offer when the services for the rendition of which the reward is claimed were rendered. *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S.W. 1111, 9 L.R.A.,N.S., 1057. The court in that case, however, suggests this distinction, which appellant Mrs. Firmin seeks to apply in this case:

"While we have seen no such distinction suggested, it may well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it was offered in accordance with law by the govern-

ment. A legal right might in such a case be given by law without the aid of contract."

A suggestion of such a distinction was also made in the cases of *Clinton County v. Davis*, 162 Ind. 60, 69 N.E. 680, 64 L.R.A. 780, 1 Ann.Cas. 282, and *Drummond v. United States* (U.S.) 35 Ct.Cl. 372. The only case we have found in which the distinction was actually applied is that of *Smith v. State*, 38 Nev. 477, 151 P. 512, L.R.A.1916A, 1276. In that case the Governor of the state of Nevada, acting under the provisions of an act of the Legislature, offered a reward for the arrest and conviction of the murderers of certain ranchmen, and the plaintiffs, who claimed the reward, were not aware of the fact that it had been offered when they did the acts on account of which the reward was claimed. The case of *Broadnax v. Ledbetter*, *supra*, was referred to in the opinion, and the above paragraph from the decision was quoted with approval, and it was concluded by the court that in cases of this kind it was not contemplated by the Legislature that any contractual relation was necessary; "that the right to the reward follows by operation of law if a compliance with the provisions of the statute has been shown."

It seems that a general reward offered by the government is regarded by these authorities somewhat in the nature of a bounty. While an ordinance is not a law, in one sense of the word it is a local law, emanating from legislative authority and operative within its limited sphere as effectively as a general law of the sovereignty. Words and Phrases, vol. 6, p. 5024; Second Series, vol. 3, p. 77. Following these authorities, we hold that it was not necessary for the cross-petitioner to allege knowledge of the existence of the reward at the time she took action to secure the arrest and conviction of Mary Wright. * * *

We are of the opinion that the court erred in sustaining the exceptions to the petition and cross-petition, and the case will be reversed and remanded.

QUESTIONS:

1. Is there only one "correct" theory of contract, all decisions in conflict with it being "erroneous"?
2. Suppose that an offer is sent to one particular person, requesting action by him or a return promise by him: Is a contract, unilateral or bilateral, consummated if without knowledge of the offer he happens to perform the action or to make the promise? An illustration of this is the case of identical offers crossing in the mails. Writers sometimes assert that there is no contract; but court decisions are wanting. See *Tinn v. Hoffman*, at page 128.

NOTE

The first person giving the required information is entitled to the whole reward. *United States v. Simons* (D.C.) 7 F. 709 (1881); *Lancaster v. Walsh* (Exch.) 4 M. & W. 16 (1838).

In *Lockhart v. Barnard*, 14 M. & W. 674 (1845). Parke, B., said: "According to the true construction of the advertisement, the information must be given, with a view to its being acted on, either to the person offering the reward, or his agent, or some person having authority by law to apprehend the criminal." A mere statement to a disinterested third person in general conversation was no acceptance.

SLAUGHTER'S NEMESIS REFUSES REWARD

Little Rock, Ark., Dec. 12.—James Howard, convict who killed Tom Slaughter, notorious outlaw, in a communication to Gov. McRae today relieved the state from any and all obligations of paying him the \$500 reward offered for the apprehension and killing of Slaughter. Howard declared that when he shot and killed the bandit he did not know that any reward had been offered. (Newspaper clipping.)

SECTION 5.—BILATERAL BARGAINS—ACCEPTANCE
BY POST OR TELEGRAPH

ADAMS v. LINDSELL.

In the King's Bench, 1818. 1 Barn. & Ald. 681.

Action for non-delivery of wool according to agreement. At the trial at the last Lent assizes for the county of Worcester, before Burrough, J., it appeared that the defendants, who were dealers in wool, at St. Ives, in the county of Huntingdon, had, on Tuesday, September 2, 1817, written the following letter to the plaintiffs, who were woollen manufacturers residing in Bromsgrove, Worcestershire: "We now offer you eight hundred tods of wether fleeces, of a good fair quality of our country wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be paid for by two months' bill in two months, and to be weighed up by your agent within fourteen days, receiving your answer in course of post."

This letter was misdirected by the defendants, to Bromsgrove, Leicestershire, in consequence of which it was not received by the plaintiffs in Worcestershire till 7 p. m. on Friday, September 5th. On that evening the plaintiffs wrote an answer, agreeing to accept the wool on the terms proposed. The course of the post between St. Ives

and Bromsgrove is through London, and consequently this answer was not received by the defendants till Tuesday, September 9th. On Monday, September 8th, the defendants not having, as they expected, received an answer on Sunday, September 7th (which in case their letter had not been misdirected would have been in the usual course of the post), sold the wool in question to another person. Under these circumstances the learned judge held, that the delay having been occasioned by the neglect of the defendants, the jury must take it, that the answer did come back in due course of post; and that then the defendants were liable for the loss that had been sustained, and the plaintiffs accordingly recovered a verdict.

Jervis having in Easter Term obtained a rule nisi for a new trial, on the ground that there was no binding contract between the parties.

Dauncey, Puller & Richardson showed cause. They contended that at the moment of the acceptance of the offer of the defendants by the plaintiffs the former became bound. And that was on the Friday evening, when there had been no change of circumstances. They were then stopped by the Court, who called upon

Jervis & Campbell in support of the rule. They relied on *Payne v. Cave* [3 T.R. 148], and more particularly on *Cooke v. Oxley* [Id. 653]. In that case Oxley, who had proposed to sell goods to Cooke, and given him a certain time at his request, to determine whether he would buy them or not, was held not liable to the performance of the contract, even though Cooke, within the specified time, had determined to buy them, and given Oxley notice to that effect. So here the defendants who have proposed by letter to sell this wool, are not to be held liable, even though it be now admitted that the answer did come back in due course of post. Till the plaintiffs' answer was actually received there could be no binding contract between the parties; and before then the defendants had retracted their offer by selling the wool to other persons.

But the Court said that if that were so, no contract could ever be completed by the post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making, during every instant of the time their letter was traveling, the same identical offer to the plaintiffs, and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistake of the defendants, and it therefore must be taken as against them that the plaintiffs' answer was received in course of post.

Rule discharged.

QUESTIONS:

1. Is the offeror's state of mind while his offer is in the mails a material factor?
2. Is the offeree's power of acceptance affected by his having knowledge of the delay at the time when he receives the offer?
3. Consider the difference between (a) continuing act of offeror, (b) continuing state of mind, (c) continuing power in the offeree.
4. When did the plaintiff first get power to accept?

See Restatement, Contracts, § 51.

TAYLOE v. MERCHANTS' FIRE INS. CO. OF BALTIMORE.

Supreme Court of the United States, 1850. 9 How. 390, 13 L.Ed. 187.

Mr. Justice NELSON. This is an appeal from a decree of the Circuit Court for the District of Maryland, which was rendered for the defendants.

The case in the Court below was this: William H. Tayloe, of Richmond County, Va., applied to John Minor, the agent of the defendants, residing at Fredericksburg in that State, for an insurance upon his dwelling-house to the amount of \$8000 for one year, and, as he was about leaving home for the State of Alabama, desired the agent to make the application in his behalf.

The application was made accordingly, under the date of November 25th, 1844, and an answer received from the secretary of the company, stating that the risk would be taken at 70 cents on the \$100 the premium amounting to the sum of \$56. The agent stated in the application to the company the reason why it had not been signed by Tayloe; that he had gone to the State of Alabama on business, and would not return till February following, and that he was desired to communicate to him at that place the answer of the company.

On receiving the answer, the agent mailed a letter directed to Tayloe, under date of December 2d, advising him of the terms of the insurance, and adding, "Should you desire to effect the insurance, send me your check payable to my order for \$57, and the business is concluded." The additional dollar was added for the policy.

This letter, in consequence of a misdirection, did not reach Tayloe till the 20th of the month; who, on the next day, mailed a letter in answer to the agent, expressing his assent to the terms, and inclosing his check for the premium as requested. He also desired that the policy should be deposited in the bank for safe-keeping. This letter of acceptance was received on the 31st at Fredericksburg by the agent, who mailed a letter in answer the next day, communicating to Tayloe

his refusal to carry into effect the insurance, on the ground that his acceptance came too late, the center building of the dwelling-house in the meantime, on the 22d of the month, having been consumed by fire.

The company, on being advised of the facts, confirmed the view taken of the case by their agent, and refused to issue the policy or pay the loss.

A bill was filed in the Court below by the insured against the company, setting forth substantially, the above facts, and praying that the defendants might be decreed to pay the loss, or for such other relief as the complainant might be entitled to.

I. Several objections have been taken to the right of the complainant to recover, which it will be necessary to notice; but the principal one is that the contract of insurance was not complete at the time the loss happened, and therefore that the risk proposed to be assumed had never attached.

Two positions have been taken by the counsel for the company for the purpose of establishing this ground of defence.

1. The want of notice to the agent of the company of the acceptance of the terms of the insurance; and,

2. The nonpayment of the premium.

The first position assumes that, where the company have made an offer through the mail to insure upon certain terms, the agreement is not consummated by the mere acceptance of the offer by the party to whom it is addressed; that the contract is still open and incomplete until the notice of acceptance is received; and that the company are at liberty to withdraw the offer at any time before the arrival of the notice, and this even without communicating notice of the withdrawal to the applicant; in other words, that the assent of the company, express or implied, after the acceptance of the terms proposed by the insured, is essential to a consummation of the contract.

The effect of this construction is to leave the property of the insured uncovered until his acceptance of the offer has reached the company and has received their assent, for if the contract is incomplete until notice of the acceptance, till then the company may retract the offer, as neither party is bound until the negotiation has resulted in a complete bargain between the parties.

In our apprehension, this view of the transaction is not in accordance with the usages and practice of these companies in taking risks; nor with the understanding of merchants and other business men dealing with them; nor with the principles of law, settled in analogous cases, governing contracts entered into by correspondence between parties residing at a distance.

On the contrary, we are of opinion, that an offer under the circumstances stated, prescribing the terms of insurance, is intended, and is to be deemed, a valid undertaking on the part of the company, that they will be bound, according to the terms tendered, if an answer is transmitted in due course of mail, accepting them; and that it cannot be withdrawn, unless the withdrawal reaches the party to whom it is addressed before his letter of reply announcing the acceptance has been transmitted.

This view of the effect of the correspondence seems to us to be but carrying out the intent of the parties, as plainly manifested by their acts and declarations.

On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of both parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has a right to regard it as intended as a continuing offer until it shall have reached him, and shall be in due time accepted or rejected.

Such is the plain import of the offer. And besides, upon any other view the proposal amounts to nothing, as the acceptance would be but the adoption of the terms tendered, to be, in turn, proposed by the applicant to the company for their approval or rejection. For, if the contract is still open until the company is advised of an acceptance, it follows, of course, that the acceptance may be repudiated at any time before the notice is received. Nothing is effectually accomplished by an act of acceptance.

It is apparent, therefore, that such an interpretation of the acts of the parties would defeat the object which both had in view in entering upon the correspondence.

The fallacy of the argument, in our judgment, consists in the assumption, that the contract cannot be consummated without a knowledge on the part of the company that the offer has been accepted. This is the point of the objection. But a little reflection will show that, in all cases of contracts entered into between parties at a distance by correspondence, it is impossible that both should have a knowledge of it the moment it becomes complete. This can only exist where both parties are present.

The position may be illustrated by the case before us. If the contract became complete, as we think it did, on the acceptance of the offer by the applicant, on December 21st, 1844, the company, of course, could have no knowledge of it until the letter of acceptance reached the agent, on the 31st of the month; and, on the other hand, upon the hypothesis it was not complete until notice of the acceptance, and then became so, the applicant could have no knowledge of it at

the time it took effect. In either aspect, and, indeed, in any aspect in which the case can be presented, one of the parties must be unadvised of the time when the contract takes effect, as its consummation must depend upon the act of one of them in the absence of the other.

The negotiation being carried on through the mail, the offer and acceptance cannot occur at the same moment of time; nor, for the same reason, can the meeting of the minds of the parties on the subject be known by each at the moment of concurrence; the acceptance must succeed the offer after the lapse of some interval of time; and, if the process is to be carried farther in order to complete the bargain, and notice of the acceptance must be received, the only effect is to reverse the position of the parties, changing the knowledge of the completion from the one party to the other.

It is obviously impossible, therefore, under the circumstances stated, ever to perfect a contract by correspondence, if a knowledge of both parties at the moment they become bound is an essential element in making out the obligation. And as it must take effect, if effect is given at all to an endeavor to enter into a contract by correspondence, in the absence of the knowledge of one of the parties at the time of its consummation, it seems to us more consistent with the acts and declarations of the parties, to consider it complete on the transmission of the acceptance of the offer in the way they themselves contemplated; instead of postponing its completion till notice of such acceptance has been received and assented to by the company. * * *

Reversed and remanded.

NOTE

Dunlop v. Higgins, 1 H.L.Cas. 381 (1848) held that contract was not prevented by the fact that a letter of acceptance, mailed in due season, was delayed in the mails. Dunlop wrote from Glasgow offering to sell 2,000 tons of pig iron. Higgins mailed an acceptance at Liverpool on January 30, saying: "We have accepted your offer unconditionally; but we hope you will accede to our request as to delivery and mode of payment by two months' bill." This letter was misdated "January 31," and because of delay in the mails it was not received in Glasgow until February 1. An acceptance on January 31 would in fact have been too late. It was held that a contract was made.

HOUSEHOLD FIRE & CARRIAGE ACC. INS. CO.,
Limited, v. GRANT.

In the Court of Appeal, 1879. 4 Exch.Div. 216.

Action to recover £94. 15s., being the balance due upon 100 shares allotted to the defendant on the 25th of October, 1874, in pursuance of an application from the defendant for such shares, dated the 30th of September 1874.

At the trial before Lopes J., during the Middlesex sittings, 1878, the following facts were proved: In 1874 one Kendrick was acting in Glamorganshire as the agent of the company for the placing of their shares, and on the 30th of September the defendant handed to Kendrick an application in writing for shares in the plaintiff's company, which stated that the defendant had paid to the bankers of the company £5, being a deposit of 1s. per share, and requesting an allotment of 100 shares, and agreeing to pay the further sum of 19s. per share within twelve months of the date of the allotment. Kendrick duly forwarded this application to the plaintiffs in London, and the secretary of the company, on the 20th of October, 1874, made out the letter of allotment in favour of the defendant, which was posted addressed to the defendant at his residence, 16 Herbert street, Swansea, Glamorgan-shire. His name was then entered on the register of shareholders. This letter of allotment never reached the defendant. The defendant never paid the £5 mentioned in his application but, the plaintiffs' company being indebted to the defendant in the sum of £5 for commission, that sum was duly credited to his account in their books. In July, 1875, a dividend at the rate of $2\frac{1}{2}$ per cent was declared on the shares, and in February, 1876, a further dividend at the same rate. These dividends, amounting altogether to the sum of 5s. were also credited to the defendant's account in the books of the plaintiffs' company. Afterwards the company went into liquidation, and on the 7th of December, 1877, the official liquidator applied for the sum sued for from the defendant; the defendant declined to pay, on the ground that he was not a shareholder.

On these facts the learned judge left two questions to the jury: (1) Was the letter of allotment of the 20th of October in fact posted? (2) Was the letter of allotment received by the defendant? The jury found the first question in the affirmative and the last in the negative. The learned judge reserved the case for further consideration, and after argument directed judgment to be entered for the plaintiffs on the authority of *Dunlop v. Higgins*, 1 H.L.Cas. 381.

The defendant appealed.

THESIGER, L. J. In this case the defendant made an application for shares in the plaintiffs' company, under circumstances from which

we must imply that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post. The company did allot him the shares, and duly addressed to him and posted a letter containing the notice of allotment, but upon the finding of the jury it must be taken that the letter never reached its destination. In this state of circumstances, Lopes, J., has decided that the defendant is liable as a shareholder. He based his decision mainly upon the ground that the point for consideration was covered by authority binding upon him, and I am of opinion that he did so rightly, and that it is covered by authority equally binding upon this court.

The leading case upon the subject is *Dunlop v. Higgins*, 1 H.L.Cas. 381. It is true that Lord Cottenham might have decided that case without deciding the point raised in this. But it appears to me equally true that he did not do so, and that he preferred to rest and did rest his judgment as to one of the matters of exception before him upon a principle which embraces and governs the present case. If so, the court is as much bound to apply that principle constituting as it did a *ratio decidendi*, as it is to follow the exact decision itself. The exception was that the Lord Justice General directed the jury in point of law that, if the pursuers posted their acceptance of the offer in due time, according to the usage of trade they were not responsible for any casualties in the post-office establishment. This direction was wide enough in its terms to include the case of the acceptance never being delivered at all; and Lord Cottenham, in expressing his opinion that it was not open to objection did so after putting the case of a letter containing a notice of dishonour posted by the holder of a bill of exchange in proper time, in which case he said (1 H.L.Cas., at page 399): "Whether that letter be delivered or not is a matter quite immaterial, because for accidents happening at the post-office he is not responsible." In short, Lord Cottenham appears to me to have held that, as a rule, a contract formed by correspondence through the post is complete as soon as the letter accepting an offer is put into the post, and is not put an end to in the event of the letter never being delivered.

• • •

Now, whatever in abstract discussion may be said as to the legal notion of its being necessary, in order to the effecting of a valid and binding contract, that the minds of the parties should be brought together at one and the same moment, that notion is practically the foundation of English law upon the subject of the formation of contracts. Unless therefore a contract constituted by correspondence is absolutely concluded at the moment that the continuing offer is accepted by the person to whom the offer is addressed, it is difficult to see how the two minds are ever to be brought together at one and the same moment. This was pointed out by Lord Ellenborough in the case of *Adams v.*

Lindsell, 1 B. & Ald. 681, which is recognized authority upon this branch of the law. But, on the other hand, it is a principle of law, as well established as the legal notion to which I have referred, that the minds of the two parties must be brought together by mutual communication. An acceptance, which only remains in the breast of the acceptor without being actually and by legal implication communicated to the offerer, is no binding acceptance. How, then are these elements of law to be harmonized in the case of contracts formed by correspondence through the post? I see no better mode than that of treating the post-office as the agent of both parties, and it was so considered by Lord Romilly in *Hebb's Case*, L.R. 4 Eq. at page 12, when in the course of his judgment he said: "*Dunlop v. Higgins*, 1 H.L.C. 381, decides that the posting of a letter accepting an offer constitutes a binding contract, but the reason of that is, that the post-office is the common agent of both parties." Alderson, B., also in *Stocken v. Collin*, 7 M. & W. at page 516, a case of notice of dishonor, and the case referred to by Lord Cottenham, says: "If the doctrine that the post-office is only the agent for the delivery of the notice were correct, no one could safely avail himself of that mode of transmission." But if the post-office be such common agent, then it seems to me to follow that, as soon as the letter of acceptance is delivered to the post-office, the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the offerer himself as his agent to deliver the offer and receive the acceptance. What other principle can be adopted short of holding that the contract is not complete by acceptance until and except from the time that the letter containing the acceptance is delivered to the offerer, a principle which has been distinctly negatived? * * *

The mere suggestion thrown out at the close of his judgment [by Mellish, L. J., in *Harris' Case*, L.R. 7 Ch. 592], at page 597, when stopping short of actually overruling the decision in *Telegraph Co. v. Colson* [L.R. 6 Ex. 108], that although a contract is complete when the letter accepting an offer is posted, yet it may be subject to a condition subsequent that, if the letter does not arrive in due course of post, then the parties may act on the assumption that the offer has not been accepted, can hardly, when contrasted with the rest of the judgment, be said to represent his own opinion on the law upon the subject. The contract, as he says (L.R. 7 Ch. at page 596), is actually made when the letter is posted. The acceptor, in posting the letter, has, to use the language of Lord Blackburn, in *Brogden v. Directors of Metropolitan Ry. Co.*, 2 App.Cas. 666, 691, "put it out of his control and done an extraneous act which clinches the matter, and shows beyond all doubt that each side is bound." How, then, can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake

the contract? To me it appears that in practice a contract complete upon the acceptance of an offer being posted, but liable to put an end to by an accident in the post, would be more mischievous than a contract only binding upon the parties to it upon the acceptance actually reaching the offerer, and I can see no principle of law from which such an anomalous contract can be deduced.

There is no doubt that the implication of a complete, final, and absolutely binding contract being formed, as soon as the acceptance of an offer is posted, may in some cases lead to inconvenience and hardship. But such there must be at times in every view of the law. It is impossible in transactions which pass between parties at a distance, and have to be carried on through the medium of correspondence, to adjust conflicting rights between innocent parties, so as to make the consequences of mistake on the part of a mutual agent fall equally upon the shoulders of both. At the same time I am not prepared to admit that the implication in question will lead to any great or general inconvenience or hardship. An offerer, if he chooses, may always make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. If he trusts to the post he trusts to a means of communication which, as a rule, does not fail, and if no answer to his offer is received by him, and the matter is of importance to him, he can make inquiries of the person to whom his offer was addressed. On the other hand, if the contract is not finally concluded, except in the event of the acceptance actually reaching the offerer, the door would be opened to the perpetration of much fraud, and, putting aside this consideration, considerable delay in commercial transactions, in which despatch is, as a rule, of the greatest consequence, would be occasioned; for the acceptor would never be entirely safe in acting upon his acceptance until he had received notice that his letter of acceptance had reached its destination.

Upon balance of conveniences and inconveniences it seems to me, applying with slight alterations the language of the Supreme Court of the United States in *Tayloe v. Merchants Fire Insurance Co.*, 9 How. 390, more consistent with the acts and declarations of the parties in this case to consider the contract complete and absolutely binding on the transmission of the notice of allotment through the post, as the medium of communication that the parties themselves contemplated, instead of postponing its completion until the notice had been received by the defendant. Upon principle, therefore, as well as authority, I think that the judgment of Lopes, J., was right and should be affirmed, and that this appeal should therefore be dismissed.¹

¹ Opinion of Baggallay, L. J., concurring with Thesiger, is omitted.

BRAMWELL, L. J. (dissenting). The question in this case is not whether the post-office was a proper medium of communication from the plaintiffs to the defendant. There is no doubt that it is so in all cases where personal service is not required. It is an ordinary mode of communication, and every person who gives any one the right to communicate with him gives the right to communicate in an ordinary manner, and so in this way and to this extent, that if an offer were made by letter in the morning to a person at a place within half an hour's railway journey of the offerer, I should say that an acceptance by post, though it did not reach the offerer till the next morning, would be in time. Nor is the question whether, when the letter reaches an offerer, the latter is bound and the bargain made from the time the letter is posted or despatched, whether by post or otherwise. The question in this case is different. I will presently state what in my judgment it is. Meanwhile I wish to mention some elementary propositions which, if carefully borne in mind, will assist in the determination of this case:

First. Where a proposition to enter into a contract is made and accepted, it is necessary, as a rule, to constitute the contract that there should be a communication of that acceptance to the proposer, per Brian, C. J. (Y. B. 17 Edw. IV, 2),² and Lord Blackburn: *Brogden v. Metropolitan Ry. Co.*, 2 App.Cas. at page 692.

Secondly. That the present case is one of proposal and acceptance.

Thirdly. That as a consequence of or involved in the first proposition, if the acceptance is written or verbal—i. e., is by letter or message, as a rule, it must reach the proposer or there is no communication, and so no acceptance of the offer.

Fourthly. That if there is a difference where the acceptance is by a letter sent through the post which does not reach the offerer, it must be by virtue of some general rule or some particular agreement of the parties. As, for instance, there might be an agreement that the acceptance of the proposal may be by sending the article offered by the proposer to be bought, or hanging out a flag or sign to be seen by the offerer as he goes by, or leaving a letter at a certain place, or any

² In this ancient case the plaintiff sued the defendant as a trespasser for carrying away grain belonging to the plaintiff. The defendant pleaded in defense that the plaintiff invited him to look at the grain "And if he was pleased that he should then take the said grain, paying to the plaintiff 3s. 4d. for each acre." The defendant complied, was pleased with the grain, and carried it off without giving notice or making payment. Judgment was given for the

plaintiff, Brian, C. J., holding that the privilege of taking the grain was conditional on payment of the price. He also held that notice of assent was necessary, saying that "it is common knowledge that the mental assent of a man cannot be proved, for the devil himself knoweth not the thoughts of men." Brian said nothing as to the manner of giving notice or as to when it would be effective.

other agreed mode, and in the same way there might be an agreement that dropping a letter in a post pillar-box or other place of reception should suffice.

Fifthly. That as there is no such special agreement in this case, the defendant, if bound, must be bound by some general rule which makes a difference when the post-office is employed as the means of communication.

Sixthly. That if there is any such general rule applicable to the communication of the acceptance of offers, it is equally applicable to all communications that may be made by post. Because, as I have said, the question is not whether this communication may be made by post. If, therefore, posting a letter which does not reach is a sufficient communication of acceptance of an offer, it is equally a communication of everything else which may be communicated by post—e. g., notice to quit. It is impossible to hold, if I offer my landlord to sell him some hay, and he writes accepting my offer, and in the same letter gives me notice to quit, and posts his letter, which, however, does not reach me, that he had communicated to me his acceptance of my offer but not his notice to quit. Suppose a man has paid his tailor by check or bank-note, and posts a letter containing a check or bank-note to his tailor, which never reaches, is the tailor paid? If he is, would he be if he had never been paid before in that way? Suppose a man is in the habit of sending checks and bank-notes to his banker by post, and posts a letter containing checks and bank-notes, which never reaches. Is the banker liable? Would he be if this was the first instance of a remittance of the sort? In the cases I have supposed, the tailor and banker may have recognized this mode of remittance by sending back receipts and putting the money to the credit of the remitter. Are they liable with that? Are they liable without it? The question then is, Is posting a letter which is never received a communication to the person addressed, or an equivalent, or something which dispenses with it? It is for those who say it is to make good their contention. I ask why is it? My answer beforehand to any argument that may be urged is, that it is not a communication, and that there is no agreement to take it as an equivalent for or to dispense with a communication. That those who affirm the contrary say the thing which is not. That if Brian, C. J., had had to adjudicate on the case, he would deliver the same judgment as that reported. That because a man, who may send a communication by post or otherwise, sends it by post, he should bind the person addressed, though the communication never reaches him, while he would not so bind him if he had sent it by hand, is impossible. There is no reason in it; it is simply arbitrary. I ask whether any one who thinks so is prepared to follow that opinion to its consequence; suppose the offer is to sell a particular chattel, and the letter accepting it never arrives, is the property in the chattel transfer-

red? Suppose it is to sell an estate or grant a lease, is the bargain completed? The lease might be such as not to require a deed, could a subsequent lessee be ejected by the would-be acceptor of the offer because he had posted a letter. Suppose an article is advertised at so much, and that it would be sent on receipt of a post-office order. Is it enough to post the letter? If the word "receipt" is relied on, is it really meant that that makes a difference? If it should be said let the offerer wait, the answer is, maybe he may lose his market meanwhile. Besides, his offer may be by advertisement to all mankind. Suppose a reward for information, information posted does not reach, some one else gives it and is paid, is the offerer liable to the first man?

It is said that a contrary rule would be hard on the would-be acceptor, who may have made his arrangements on the footing that the bargain was concluded. But to hold as contended would be equally hard on the offerer, who may have made his arrangements on the footing that his offer was not accepted; his non-receipt of any communication may be attributable to the person to whom it was made being absent. What is he to do but to act on the negative, that no communication has been made to him? Further, the use of the post-office is no more authorized by the offerer than the sending of an answer by hand, and all these hardships would befall the person posting the letter if he sent it by hand. Doubtless in that case he would be the person to suffer if the letter did not reach its destination. Why should his sending it by post relieve him of the loss and cast it on the other party. It was said, if he sends it by hand it is revocable, but not if he sends it by post, which makes the difference. But it is revocable when sent by post, not that the letter can be got back, but its arrival might be anticipated by a letter by hand or telegram, and there is no case to show that such anticipation would not prevent the letter from binding.³ It would be a most alarming thing to say that it would. That a letter honestly but mistakenly written and posted must bind the writer if hours before its arrival he informed the person addressed that it was coming, but was wrong and recalled; suppose a false but honest character given, and the mistake found out after the letter posted, and notice that it was wrong given to the person addressed. * * *

I am at a loss to see how the post-office is the agent for both parties. What is the agency as to the sender? merely to receive? But suppose it is not an answer, but an original communication. What then? Does the extent of the agency of the post-office depend on the contents of the letter? But if the post-office is the agent of both parties, then the agent of both parties has failed in his duty, and to both. Suppose the offerer says, "My offer is conditional on your answer reaching me."

³ In the United States the postal regulations permit the recall of a letter by the sender after it has been posted.

Whose agent is the post-office then? But how does an offerer make the post-office his agent, because he gives the offeree an option of using that or any other means of communication?

I am of opinion that this judgment should be reversed. I am of opinion that there was no bargain between these parties to allot and take shares, that to make such bargain there should have been an acceptance of the defendant's offer and a communication to him of that acceptance. That there was no such communication. That posting a letter does not differ from other attempts at communication in any of its consequences, save that it is irrevocable as between the poster and post-office. The difficulty has arisen from a mistake as to what was decided in *Dunlop v. Higgins*, and from supposing that because there is a right to have recourse to the post as a means of communication, that right is attended with some peculiar consequences, and also from supposing that because if the letter reaches it binds from the time of posting, it also binds though it never reaches. Mischief may arise if my opinion prevails. It probably will not, as so much has been said on the matter that principle is lost sight of. I believe equal if not greater, will, if it does not prevail. I believe the latter will be obviated only by the rule being made nugatory by every prudent man saying, "Your answer by post is only to bind if it reaches me." But the question is not to be decided on these considerations. What is the law? What is the principle? If Brian, C. J., had had to decide this, a public post being instituted in his time, he would have said the law is the same, now there is a post, as it was before—viz., a communication to affect a man must be a communication—i. e., must reach him.

Judgment affirmed.

QUESTIONS:

1. Did the offeror and the offeree authorize the "post office" to act for them with power to affect their legal relations? Or a "post-master;" or a "letter carrier"?
2. Does the court decide that a contract was made because the post office was a "common agent" of the parties, or does it call the post office by that name as a rationalization of a decision already reached on other grounds?

NOTE

Some very able theorists agreed with Bramwell, L. J., apparently thinking with him that there is something absolute about "the law" and "principle" and that reasoning from business convenience is irrelevant. The student should give thought to this matter. Otherwise, it might not be worth while to read Bramwell's opinion; for the English and American courts are now uniformly agreed that, if the offeree is expressly or impliedly invited to use the post, acceptance is complete when the accepting

letter is posted, properly stamped and addressed. Apparently the "working rule" followed by the courts works well enough. An offeror who does not like the rule can specify in his offer that acceptance shall not be operative until it is received. See Restatement, Contracts, §§ 64-67. In section 65 there is a brief statement as to bargains by telephone.

The rule that is applied to notice of acceptance by mail or telegraph would be neither convenient nor reasonable with respect to many other kinds of notices.

LEWIS v. BROWNING.

Supreme Judicial Court of Massachusetts, 1881. 130 Mass. 173.

Action for breach of covenants in a lease. The question was whether the terms of a proposed new lease had been accepted by defendant. The negotiations with reference to the new lease were carried on by letter and telegraph. The facts sufficiently appear in the opinion of the court.

GRAY, C. J. In *M'Culloch v. Insurance Co.*, 1 Pick. 278, this court held that a contract made by mutual letters was not complete until the letter accepting the offer had been received by the person making the offer; and the correctness of that decision is maintained, upon an able and elaborate discussion of reasons and authorities, in Langd. Cont. (2d Ed.) 989-996. In England, New York and New Jersey, and in the supreme court of the United States, the opposite view has prevailed, and the contract has been deemed to be completed as soon as the letter of acceptance has been put into the post office duly addressed. *Adams v. Lindsell*, 1 Barn. & Ald. 681; *Dunlop v. Higgins*, 1 H.L.Cas. 381, 398-400; *Newcomb v. De Roos*, 2 El. & El. 271; *Harris' Case*, L.R. 7 Ch. 587; Lord Blackburn, in *Brogden v. Railway*, 2 App. Cas. 666, 691, 692; *Insurance Co. v. Grant*, 4 Exch.Div. 216; *Lindley, J.*, in *Byrne v. Van Tienhoven*, 5 C.P.Div. 344, 348; 2 Kent, Comm. 477, note c.; *Mactier v. Frith*, 6 Wend. (N.Y.) 103, 21 Am.Dec. 262; *Vassar v. Camp*, 11 N.Y. 441; *Trevor v. Wood*, 36 N.Y. 307, 93 Am.Dec. 511; *Hallock v. Insurance Co.*, 26 N.J.L. 268, 27 N.J.L. 645, 72 Am. Dec. 379; *Tayloe v. Insurance Co.*, 9 How. 390, 13 L.Ed. 187.

But this case does not require a consideration of the general question; for, in any view, the person making the offer may always, if he chooses, make the formation of the contract which he proposes dependent upon the actual communication to himself of the acceptance. *Thesiger, L. J.*, in *Insurance Co. v. Grant*, 4 Exch.Div. 223; *Pol.Cont.* (2d Ed.) 17; *Leake*, Cont. 39, note. And in the case at bar, the letter written in the plaintiff's behalf by her husband as her agent on July 8, 1878, in California, and addressed to the defendant at Boston, appears to us clearly to manifest such an intention. After proposing the terms of an agreement for a new lease, he says, "If you agree to this plan,

and will telegraph me on receipt of this, I will forward power of attorney to Mr. Ware," the plaintiff's attorney in Boston. "Telegraph me 'Yes' or 'No.' If 'No,' I will go on at once to Boston with my wife, and between us we will try to recover our lost ground. If I do not hear from you by the 18th or 20th, I shall conclude 'No.' " Taking the whole letter together, the offer is made dependent upon an actual communication to the plaintiff of the defendant's acceptance on or before the 20th of July, and does not discharge the old lease, nor bind the plaintiff to execute a new one, unless the acceptance reaches California within that time. Assuming, therefore, that the defendant's delivery of a despatch at the telegraph office had the same effect as the mailing of a letter, he has no ground of exception to the ruling at the trial.

Exceptions overruled.

TREVOR et al. v. WOOD et al.

Court of Appeals of New York, 1867. 36 N.Y. 307, 93 Am.Dec. 511.

Appeal from a judgment of the Supreme Court rendered at General Term, in the first district, reversing a judgment entered upon the report of Hon. William Mitchell, referee, and ordering a new trial before the same referee.

The appellants have stipulated that if the judgment be affirmed, judgment absolute may be entered against them.

The appellants are dealers in bullion in New York, and the respondents are dealers in bullion in New Orleans. In 1859 they agreed to deal with each other in the purchase and sale of dollars, and that all communications between them in reference to such transactions should be by telegraph.

On January 30th, 1860, the appellants telegraphed from New York to the respondents, at New Orleans, asking at what price they would sell 100,000 Mexican dollars. On the 31st of the same month the respondents answered that they would deliver 50,000 at $7\frac{1}{4}$; and on the same day the appellants telegraphed from New York to the defendants, at New Orleans, as follows:

"To John Wood & Co.:

"Your offer, 50,000 Mexicans at $7\frac{1}{4}$, accepted; send more if you can.

"Trevor & Colgate."

At the same time the appellants sent by mail to the respondents a letter acknowledging the receipt of the respondents' telegram, and copying the appellants' telegraphic answer. On the same day the respondents had also sent by mail a letter to the appellants, copying re-

spondents' telegram of that date. On the next day (February 1st, 1860) the appellants again telegraphed to the respondents as follows: "To John Wood & Co.:

"Accepted by telegraph yesterday, your offer for 50,000 Mexicans; send as many more, same price. Reply.

"Trevor & Colgate."

This telegram, as well as that of January 31st, from the appellants, did not reach the respondents until 10 a. m. on February 4th, 1860, in consequence of some derangement in a part of the line used by the appellants, but which was not known to the appellants until February 4th, when the telegraph company reported the line down. On February 3d the respondents telegraphed to the appellants as follows: "No answer to our despatch—dollars are sold." And on the same day they wrote by mail to the same effect. The appellants received this despatch on the same day, and answered it on the same day as follows:

"To John Wood & Co.:

"Your offer was accepted on receipt."

And again the next day:

"The dollars must come, or we will hold you responsible. Reply.

"Trevor & Colgate."

And again on February 4th insisting on the dollars being sent "by this or next steamer," and saying, "Don't fail to send the dollars at any price."

On the same February 4th the respondents telegraphed to appellants: "No dollars to be had. We may ship by steamer twelfth, as you propose, if we have them." No dollars were sent, and this action was brought to recover damages for an alleged breach of contract in not delivering them. The referee found for the plaintiff \$219.33.

SCRUGHAM, J. The offer of the respondents was made on January 31st, and they did not attempt to revoke it until February 3d. The offer was accepted by the appellants before, but the respondents did not obtain knowledge of the acceptance until after this attempted revocation. The principal question, therefore, which arises in the case, is whether a contract was created by this acceptance before knowledge of it reached the respondents.

The case of *Mactier v. Frith*, in the late Court of Errors (6 Wend. 103, 21 Am.Dec. 262) settles this precise question, and was so regarded by this court in *Vassar v. Camp*, 11 N.Y. 441, where it is said that the principle established in the case of *Mactier v. Frith* was that it was only necessary "that there should be concurrence of the minds of the parties upon a distinct proposition manifested by an overt act; and that the sending of a letter announcing a consent to the proposal was a sufficient manifestation and consummated the contract from the time it was sent."

There is nothing in either the case of *Mactier v. Frith* nor in that of *Vassar v. Camp*, indicating that this effect is given to the sending of a letter, because it is sent by mail through the public post-office, and in fact the letter referred to in the first case could not have been so sent, for it was to go from the city of New York to Jacmel, in the island of St. Domingo, between which places there was at that time no communication by mail.

The sending of a letter accepting the proposition is regarded as an acceptance, because it is an overt act clearly manifesting the intention of the party sending it to close with the offer of him to which it is sent, and thus marking that *aggregatio mentium* which is necessary to constitute a contract. • • •

It was agreed between these parties that their business should be transacted through the medium of the telegraph. The object of this agreement was to substitute the telegraph for other methods of communication, and to give to their transactions by it the same force and validity they would derive if they had been performed through other agencies. In accordance with this agreement the offer was made by telegraph to the appellants in New York, and the acceptance addressed to the respondents in New Orleans, and immediately despatched from New York by order of the appellants. It cannot, therefore, be said that the appellants did not put their acceptance in a proper way to be communicated to the respondents, for they adopted the method of communication which had been used in the transaction by the respondents, and which had been selected by prior agreement between them as that by means of which their business should be transacted.

Under these circumstances the sending of the despatch must be regarded as an acceptance of the respondents' offer, and thereupon the contract became complete.

I cannot conceive upon what principle an agreement to communicate by telegraph can be held to be in effect a warranty by each party that his communication to the other shall be received. On the contrary, by agreeing beforehand to adopt that means of communication the parties mutually assume its hazards, which are principally as to the prompt receipt of the despatches. • • •

Judgment reversed.

NOTE

If the offer is by telegraph, the acceptance is complete when the telegram of acceptance is filed. *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. 431, Fed.Cas.No.9,635 (1876); *Brauer v. Shaw*, 168 Mass. 198, 46 N.E. 617, 60 Am.St.Rep. 387 (1897), disregarding *McCulloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278 (1822). Whether the use of the telegraph is impliedly authorized is a question of fact. *Perry v. Mount Hope Iron Co.*, 15 R.I. 380, 5 A. 632, 2 Am.St.Rep. 902 (1886); *Restatement, Contracts*, §§ 29, 66.

In *Farmers' Produce Co. v. McAlester Storage & Commission Co.*, 48 Okl. 488, 150 P. 483, L.R.A.1916A, 1297 (1915), the offer was by telegram from Wisconsin and the acceptance was by mail from Oklahoma on the same day. A few hours after mailing the acceptance a telegram of revocation of the offer was received. It was held that there was a contract; the court believing that the post was a contemplated means of communication.

HENTHORN v. FRASER.

In the Court of Appeal, 1892. L.R.[1892] 2 Ch. 27.

The plaintiff called at the defendant's office in Liverpool and was there given a written offer to sell certain property to him for £750. Having received an offer of £760 from another buyer, the defendant mailed to the plaintiff a notice addressed to his home in Birkenhead revoking the written offer. This was mailed before 1 o'clock on July 8 and was received by the plaintiff that evening near 8 o'clock. That same afternoon, before 4 o'clock, the plaintiff had posted at Birkenhead his written acceptance of the £750 offer. This letter was delivered at 8:30 P. M. and was read by the defendant the next morning. Asserting that the offer had been revoked before acceptance the defendant refused to convey the property; and the plaintiff brought suit for specific performance. [This is a condensed statement of the facts.]

The court entered a decree for the plaintiff. The following excerpts are from the opinion of Lord Herschell:

The grounds upon which it has been held that the acceptance of an offer is complete when it is posted have, I think, no application to the revocation or modification of an offer. These can be no more effectual than the offer itself, unless brought to the mind of the person to whom the offer is made. But it is contended on behalf of the defendants that the acceptance was complete only when received by them and not on the letter being posted. It cannot, of course, be denied, after the decision in *Dunlop v. Higgins* in the House of Lords, that, where an offer has been made through the medium of the post, the contract is complete as soon as the acceptance of the offer is posted, but that decision is said to be inapplicable here, inasmuch as the letter containing the offer was not sent by post to Birkenhead, but handed to the plaintiff in the defendants' office at Liverpool. The question therefore arises in what circumstances the acceptance of an offer is to be regarded as complete as soon as it is posted. In the case of the *Household Fire and Carriage Accident Insurance Company v. Grant* [4 Ex.D. 216], Lord Justice Baggallay said: "I think that the principle established in *Dunlop v. Higgins* is limited in its application to cases in which by reason of general usage, or of the relations between

the parties to any particular transactions, or of the terms in which the offer is made, the acceptance of such offer by a letter through the post is expressly or impliedly authorized." And in the same case Lord Justice Thesiger based his judgment on the defendant having made an application for shares under circumstances "from which it must be implied that he authorized the company, in the event of their allotting to him the shares applied for, to send the notice of allotment by post." The facts of that case were that the defendant had, in Swansea, where he resided, handed a letter of application to an agent of the company, their place of business being situate in London. It was from these circumstances that the Lords Justices implied an authority to the company to accept the defendant's offer to take shares through the medium of the post. Applying the law thus laid down by the Court of Appeal, I think in the present case an authority to accept by post must be implied. Although the plaintiff received the offer at the defendants' office in Liverpool, he resided in another town, and it must have been in contemplation that he would take the offer, which by its terms was to remain open for some days, with him to his place of residence, and those who made the offer must have known that it would be according to the ordinary usages of mankind that if he accepted it he should communicate his acceptance by means of the post. I am not sure that I should myself have regarded the doctrine that an acceptance is complete as soon as the letter containing it is posted as resting upon an implied authority by the person making the offer to the person receiving it to accept by those means. It strikes me as somewhat artificial to speak of the person to whom the offer is made as having the implied authority of the other party to send his acceptance by post. He needs no authority to transmit the acceptance through any particular channel; he may select what means he pleases, the post-office no less than any other. The only effect of the supposed authority is to make the acceptance complete so soon as it is posted, and authority will obviously be implied only when the tribunal considers that it is a case in which this result ought to be reached. I should prefer to state the rule thus: Where the circumstances are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as posted.

DICKY v. HURD et al.

Circuit Court of Appeals of the United States, First Circuit, 1929.
33 F.2d 415.

The following is an excerpt from the opinion of BINGHAM, Circuit Judge:

It appears that on June 30, 1926, the plaintiff from Augusta, Ga., wrote a letter to Mr. Hurd, saying: "Under date of the 15th inst., I wrote you and asked you if you cared to put a price on your land on the Savannah River but am without a reply to this letter. If you care to put a price on it I would like to work on the proposition"; that on July 8, 1926, Mr. Hurd, from Winter Hill, Mass., by letter replied: "Dear Mr. Dickey: Replying to your favor of the 30th ult., I wish to say that I should like very much to look over the property before making a price on it. As I cannot come just at present, I think it only fair to name a price to you. My deeds call for 1,266 acres and I will sell the same to you for \$15 per acre cash and give you till July 18, 1926, including that day to accept this offer. This offer I wish you to consider strictly confidential."

July 17, 1926, the plaintiff, from Augusta, Ga., telegraphed Mr. Hurd at Winter Hill, Mass., as follows: "Answering your letter of July eighth in which you offer to sell me your twelve hundred sixty six acres in Richmond County on Savannah River at fifteen dollars per acre and give me thru the eighteenth to accept your offer, I desire to say I will buy the property at your price and terms and will send you Monday five hundred dollars to be held by you subject to examination of titles by my attorneys and survey of property to show acreage you claim. Unable to mail confirmation tonight as just returned from trip to your property but will send letter Monday."

This telegram was received by Mr. Hurd on the day of its date. On July 22, 1926, Mr. Hurd notified Mr. Dickey that the offer had expired, as he (Dickey) had "not complied with requirements." The letter of July 8th and the telegram of July 17th are the instruments which the plaintiff contends, and the court below found, constitute the contract, the specific performance of which it decreed. * * *

If the contract attempted to be consummated was unilateral, one where the offer simply called for the payment of money, it would be a Massachusetts contract, for the offeree, Mr. Dickey, in order to accept the offer, would be required to make payment of the price at Mr. Hurd's home in Massachusetts. And the same is true if the contract sought to be consummated was bilateral and involved mutual promises. The parties were at a distance from one another. The offer was sent by mail. The reply of acceptance was sent by telegraph. Where parties are at a distance from one another, and an offer is sent by mail,

it is universally held in this country that the reply accepting the offer may be sent through the same medium, and, if it is so sent, the contract will be complete when the acceptance is mailed, properly addressed to the party making the offer and beyond the acceptor's control; the theory being that, when one makes an offer through the mail, he authorizes the acceptance to be made through the same medium, and constitutes that medium his agent to receive his acceptance; that the acceptance, when mailed, is then constructively communicated to the offeror. *Busher v. New York Life Insurance Co.*, 72 N.H. 551, 552, 58 A. 41; *Commonwealth, etc., Ins. Co. v. Knabe & Co. Mfg. Co.*, 171 Mass. 265, 270, 50 N.E. 516; *Brauer v. Shaw*, 168 Mass. 198, 200, 201, 46 N.E. 617, 60 Am.St.Rep. 387, and cases there cited; *Patrick v. Bowman*, 149 U.S. 411, 416, 13 S.Ct. 866, 37 L.Ed. 790. But in this case, although the offer was by mail, the acceptance was by telegraph, and, not being sent through the same medium, it cannot be said that Mr. Hurd authorized an acceptance by telegraph and constituted that medium his agent to receive the acceptance. In this situation the acceptance, when delivered at the telegraph office was neither actually nor constructively communicated to Mr. Hurd, and the contract was not consummated, if it was ever consummated, until the telegram was delivered to Mr. Hurd in Massachusetts. Therefore, if a contract was consummated, whether unilateral or bilateral, it was made in Massachusetts; and its validity, construction, and effect are to be determined by the law of that state.

(The court reversed the lower court's decree, chiefly on the ground that the telegraphed acceptance varied in its terms from the offer. From other letters of the parties the court inferred that they contemplated a bilateral contract, one that could be consummated by a proper notice of acceptance, and not a unilateral contract to be consummated by actual payment of the price.)

ELIASON et al. v. HENSHAW.

Supreme Court of the United States, 1819. 4 Wheat. 225, 4 L.Ed. 556.

Error to Circuit Court for the District of Columbia.

WASHINGTON, J. This is an action, brought by the defendant in error, to recover damages for the non-performance of an agreement, alleged to have been entered into by the plaintiffs in error, for the purchase of a quantity of flour at a stipulated price. The evidence of this contract given in the court below, is stated in a bill of exceptions, and is to the following effect: A letter from the plaintiffs to the defendant, dated the 10th of February, 1813, in which they say: "Captain Conn informs us that you have a quantity of flour to dispose

of. We are in the practice of purchasing flour at all times, in Georgetown, and will be glad to serve you, either in receiving your flour in store, when the markets are dull, and disposing of it when the markets will answer to advantage, or we will purchase at market price when delivered; if you are disposed to engage two or three hundred barrels at present, we will give you \$9.50 per barrel, deliverable the first water in Georgetown, or any service we can. If you should want an advance, please write us by mail, and will send you part of the money in advance." In a postscript they add: "Please write by return of wagon whether you accept our offer." This letter was sent from the house at which the writer then was about two miles from Harper's Ferry, to the defendant at his mill, at Mill Creek, distant about 20 miles from Harper's Ferry, by a wagoner then employed by the defendant to haul flour from his mill to Harper's Ferry, and then about to return home with his wagon. He delivered the letter to the defendant on the 14th of the same month, to which an answer, dated the succeeding day was written by the defendant, addressed to the plaintiffs at Georgetown, and dispatched by a mail which left Mill Creek on the 19th, being the first regular mail from that place to Georgetown. In this letter the writer says: "Your favor of the 10th inst. was handed me by Mr. Chenoweth last evening. I take the earliest opportunity to answer it by post. Your proposal to engage 300 barrels of flour, delivered in Georgetown by the first water, at \$9.50 per barrel, I accept, and shall send on the flour by the first boats that pass down from where my flour is stored on the river; as to any advance, will be unnecessary—payment on delivery is all that is required."

On the 25th of the same month, the plaintiffs addressed to the defendant an answer to the above, dated at Georgetown, in which they acknowledged the receipt of it, and add: "Not having heard from you before, had quite given over the expectation of getting your flour, more particularly as we requested an answer by return of wagon the next day, and as we did not get it, had bought all we wanted."

The wagoner, by whom the plaintiffs' first letter was sent, informed them, when he received it, that he should not probably return to Harper's Ferry, and he did not in fact return in the defendant's employ. The flour was sent down to Georgetown, some time in March, and the delivery of it to the plaintiffs was regularly tendered and refused.

Upon this evidence, the defendants in the court below, the plaintiffs in error, moved that court to instruct the jury, that, if they believed the said evidence to be true, as stated, the plaintiff in this action was not entitled to recover the amount of the price of the 300 barrels of flour, at the rate of \$9.50 per barrel. The court being divided in opinion, the instruction prayed for was not given.

The question is, whether the court below ought to have given the instruction to the jury, as the same was prayed for? If they ought,

the judgment, which was in favor of the plaintiff in that court, must be reversed.

It is an undeniable principle of the law of contracts, that an offer of a bargain by one person to another, imposes no obligation upon the former, until it is accepted by the latter, according to the terms in which the offer was made. Any qualification of, or departure from, those terms invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both parties, the negotiation is open, and imposes no obligation upon either.

In this case, the plaintiffs in error offered to purchase from the defendant two or three hundred barrels of flour, to be delivered at Georgetown, by the first water, and to pay for the same \$9.50 per barrel. To the letter containing this offer, they required an answer by the return of the wagon, by which the letter was dispatched. This wagon was, at that time, in the service of the defendant, and employed by him in hauling flour from his mill to Harper's Ferry, near to which place the plaintiffs then were. The meaning of the writers was obvious. They could easily calculate by the usual length of time which was employed by this wagon, in traveling from Harper's Ferry to Mill Creek, and back again with a load of flour, about what time they should receive the desired answer, and, therefore, it was entirely unimportant, whether it was sent by that, or another wagon, or in any other manner, provided it was sent to Harper's Ferry, and was not delayed beyond the time which was ordinarily employed by wagons engaged in hauling flour from the defendant's mill to Harper's Ferry. Whatever uncertainty there might have been as to the time when the answer would be received, there was none as to the place to which it was to be sent; this was distinctly indicated by the mode pointed out for the conveyance of the answer. The place, therefore, to which the answer was to be sent, constituted an essential part of the plaintiff's offer.

It appears, however, from the bill of exceptions, that no answer to this letter was at any time sent to the plaintiffs, at Harper's Ferry. Their offer, it is true, was accepted by the terms of a letter addressed Georgetown, and received by the plaintiffs at that place; but an acceptance communicated at a place different from that pointed out by the plaintiffs, and forming a part of their proposal, imposed no obligation binding upon them, unless they had acquiesced in it, which they declined doing.

It is no argument, that an answer was received at Georgetown; the plaintiffs in error had a right to dictate the terms upon which they would purchase the flour, and, unless they were complied with, they were not bound by them. All their arrangements may have been

made with a view to the circumstance of place, and they were the only judges of its importance. There was, therefore, no contract concluded between these parties; and the court ought therefore, to have given the instruction to the jury, which was asked for.

Judgment reversed. Cause remanded with directions to award a venire facias de novo.

SECTION 6.—SILENCE AS ACCEPTANCE

ROYAL INS. CO. v. BEATTY.

Supreme Court of Pennsylvania, 1888. 119 Pa. 6, 12 A. 607, 4 Am.St.Rep. 622.

Error to Court of Common Pleas, Philadelphia County.

This was an action by William Beatty against the Royal Insurance Company, on a policy of fire insurance, averring a renewal, and that it was in force at the time of the fire. There was a verdict and judgment for plaintiff. Defendant brings error. Reversed.

GREEN, J. We find ourselves unable to discover any evidence of a contractual relation between the parties to this litigation. The contract alleged to exist was not founded upon any writing nor upon any words, nor upon any act done by the defendant. It was founded alone upon silence. While it must be conceded that circumstances may exist which will impose a contractual obligation by mere silence, yet it must be admitted that such circumstances are exceptional in their character, and of extremely rare occurrence. We have not been furnished with a perfect instance of the kind by the counsel on either side of the present case. Those cited for defendant in error had some other element in them than mere silence which contributed to the establishment of the relation. But, in any point of view, it is difficult to understand how a legal liability can arise out of mere silence of the party sought to be affected, unless he was subject to a duty of speech, which was neglected, to the harm of the other party. If there was no duty of speech, there could be no harmful omission arising from mere silence.

Take the present case as an illustration. The alleged contract was a contract of fire insurance. The plaintiff held two policies against the defendant, but they had expired before the loss occurred, and had not been formally renewed. At the time of the fire the plaintiff held no policy against the defendant. But he claims that the defendant agreed to continue the operation of the expired policies by what he calls "binding" them. How does he prove this? He calls a clerk who took the two policies in question, along with other policies of another per-

son, to the agent of the defendant to have them renewed, and this is the account he gives of what took place: "The Royal Company had some policies to be renewed, and I went in and bound them. Question. State what was said and done. Answer, I went into the office of the Royal Company, and asked them to bind the two policies of Mr. Beatty expiring to-morrow. The Court. Who were the policies for? A. For Mr. Beatty. The Court. That is your name, is it not? A. Yes, sir. These were the policies in question. I renewed the policies of Mr. Priestly up to the 1st of April. There was nothing more said about the Beatty policies at that time. The Court. What did they say? A. They did not say anything, but I suppose that they went to their books to do it. They commenced to talk about the night privilege, and that was the only subject discussed." In his further examination he was asked: "Question. Did you say anything about those policies [Robert Beatty's] at that time? Answer. No, sir; I only spoke of the two policies for William Beatty. Q. What did you say about them? A. I went in and said, 'Mr. Skinner, will you renew the Beatty policies, and the night privilege for Mr. Priestly?' and that ended it. Q. Were the other companies bound in the same way? A. Yes, sir; and I asked the Royal Company to bind Mr. Beatty."

The foregoing is the whole of the testimony for the plaintiff as to what was actually said at the time when it is alleged the policies were bound. It will be perceived that all that the witness says is that he asked the defendant's agent to bind the two policies, as he states at first, or to renew them, as he says last. He received no answer; nothing was said, nor was anything done. How is it possible to make a contract out of this? It is not as if one declares or states a fact in the presence of another, and the other is silent. If the declaration imposed a duty of speech on peril of an inference from silence, the fact of silence might justify the inference of an admission of the truth of the declared fact. It would then be only a question of hearing, which would be chiefly, if not entirely, for the jury. But here the utterance was a question, and not an assertion; and there was no answer to the question. Instead of silence being evidence of an agreement to do the thing requested, it is evidence, either that the question was not heard, or that it was not intended to comply with the request. Especially is this the case when, if a compliance was intended, the request would have been followed by an actual doing of the thing requested. But this was not done; how, then, can it be said it was agreed to be done? There is literally nothing upon which to base the inference of an agreement, upon such a state of facts. Hence the matter is for the court, and not for the jury; for, if there may not be an inference of the controverted fact, the jury must not be permitted to make it.

What has thus far been said relates only to the effect of the non-action of the defendant, either in responding, or doing the thing re-

quested. There remains for consideration the effect of the plaintiff's non-action. When he asked the question whether defendant would bind or renew the policies, and obtained no answer, what was his duty? Undoubtedly, to repeat his question until he obtained an answer; for his request was that the defendant should make a contract with him, and the defendant says nothing. Certainly, such silence is not an assent in any sense. There should be something done, or else something said before it is possible to assume that a contract was established. There being nothing done and nothing said, there is no footing upon which an inference of agreement can stand. But what was the position of the plaintiff? He had asked the defendant to make a contract with him, and the defendant had not agreed to do so; he had not even answered the question whether he would do so. The plaintiff knew he had obtained no answer, but he does not repeat the question; he, too, is silent thereafter, and he does not get the thing done which he asks to be done. Assuredly, it was his duty to speak again, and to take further action, if he really intended to obtain the defendant's assent; for what he wanted was something affirmative and positive, and without it he has no status. But he desists, and does and says nothing further

And so it is that the whole of the plaintiff's case is an unanswered request to the defendant to make a contract with the plaintiff, and no further attempt by the plaintiff to obtain an answer, and no actual contract made. Out of such facts it is not possible to make a legal inference of a contract. The other facts proved, and offered to be proved, but rejected, improperly as we think, and supposed by each to be consistent with his theory, tend much more strongly in favor of the defendant's theory than of the plaintiff's. It is not necessary to discuss them, since the other views we have expressed are fatal to the plaintiff's claim. Nor do I concede that if defendant heard plaintiff's request, and made no answer, an inference of assent should be made; for the hearing of a request, and not answering it, is as consistent, indeed more consistent with a dissent than an assent. If one is asked for alms on the street, and hears the request, but makes no answer, it certainly cannot be inferred that he intends to give them. In the present case there is no evidence that the defendant heard the plaintiff's request, and, without hearing, there was of course no duty of speech.

Judgment reversed.

NOTE

It has been held that silence does not operate as acceptance, even though the offeror prescribes it as the mode of acceptance and the offeree intends it as an acceptance. *Prescott v. Jones*, 69 N.H. 305, 41 A. 352 (1898); *Felthouse v. Bindley*, 11 C.B.N.S. 868 (1862). The contrary is stated in *Restatement, Contracts*, § 72.

Mere delay in passing on an application for insurance, even though the first premium is inclosed with the application, is not an acceptance by the insurer. *Dorman v. Connecticut Fire Ins. Co.*, 41 Okl. 509, 139 P. 262, 51 L.R.A.,N.S., 873 (1914).

AUSTIN v. BURGE.

Kansas City Court of Appeals, Missouri, 1911.
156 Mo.App. 286, 137 S.W. 618.

Action by O. D. Austin against Charles Burge. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

ELLISON, J. This action was brought on an account for the subscription price of a newspaper. The judgment in the trial court was for the defendant. It appears that plaintiff was publisher of a newspaper in Butler, Mo., and that defendant's father-in-law subscribed for the paper, to be sent to defendant for two years, and that the father-in-law paid for it for that time. It was then continued to be sent to defendant, through the mail, for several years more. On two occasions defendant paid a bill presented for the subscription price, but each time directed it to be stopped. Plaintiff denies the order to stop, but for the purpose of the case we shall assume that defendant is correct. He testified that, notwithstanding the order to stop it, it was continued to be sent to him, and he continued to receive and read it, until finally he removed to another state.

We have not been cited to a case in this state involving the liability of a person who, though not having subscribed for a newspaper, continues to accept it by receiving it through the mail. There are, however, certain well-understood principles in the law of contracts that ought to solve the question. It is certain that one cannot be forced into contractual relations with another and that therefore he cannot, against his will, be made the debtor of a newspaper publisher. But it is equally certain that he may cause contractual relations to arise by necessary implication from his conduct. The law in respect to contractual indebtedness for a newspaper is not different from that relating to other things which have not been made the subject of an express agreement. Thus one may not have ordered supplies for his table, or other household necessities, yet if he continue to receive and use them, under circumstances where he had no right to suppose they were a gratuity, he will be held to have agreed, by implication, to pay their value. In this case defendant admits that, notwithstanding he ordered the paper discontinued at the time when he paid a bill for it, yet plaintiff continued to send it, and he continued to take it from the post office to his home. This was an acceptance and use of the property, and, there being no pretense that a gratuity was intended, an obligation arose to pay for it.

A case quite applicable to the facts here involved arose in *Fogg v. Atheneum*, 44 N.H. 115, 82 Am.Dec. 191. There the Independent Democrat newspaper was forwarded weekly by mail to the defendant from May 1, 1847, to May 1, 1849, when a bill was presented, which defendant objected to paying on the ground of not having subscribed. Payment was, however, finally made, and directions given to discontinue. The paper changed ownership, and the order to stop it was not known to the new proprietors for a year; but, after being notified of the order, they nevertheless continued to send it to defendant until 1860, a period of 11 years, and defendant continued to receive it through the post office. Payment was several times demanded during this time, but refused on the ground that there was no subscription. The court said that: "During this period of time the defendants were occasionally requested, by the plaintiff's agent, to pay their bill. The answer was, by the defendants, 'We are not subscribers to your newspaper.' But the evidence is the defendants used or kept the plaintiff's * * * newspapers, and never offered to return a number, as they reasonably might have done, if they would have avoided the liability to pay for them. Nor did they ever decline to take the newspapers from the post office." The defendant was held to have accepted the papers, and to have become liable for the subscription price by implication of law.

In *Ward v. Powell*, 3 Har. (Del.) 379, it was decided that an implied agreement to pay for a newspaper or periodical arose by the continued taking and accepting the paper from the post office, and that "if a party, without subscribing to a paper, declines taking it out of the post office, he cannot become liable to pay for it; and a subscriber may cease to be such at the end of the year, by refusing to take the papers from the post office, and returning them to the editor as notice of such determination." In *Goodland v. Le Clair*, 78 Wis. 176, 47 N.W. 268, it was held that if a person receives a paper from the post office for a year, without refusing or returning it, he was liable for the year's subscription. And a like obligation was held to arise in the case of *Weatherby v. Bonham*, 5 C. & P. 228.

The preparation and publication of a newspaper involves much mental and physical labor, as well as an outlay of money. One who accepts the paper, by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another's labor, and by such act he must be held liable for the subscription price. On the defendant's own evidence, plaintiff should have recovered.

The judgment will therefore be reversed, and the cause remanded.
All concur.

NOTE

In accord, Restatement, Contracts, § 72(2). Mere failure to return a periodical that is not read or an article that is sent without request and is not used is not an acceptance. Post-office regulations have largely stopped the former habit of getting subscribers by mailing publications to non-subscribers.

HOBBS v. MASSASOTT WHIP CO.

Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 194, 33 N.E. 495.

Contract, upon an account annexed for one hundred and eight dollars and fifty cents, for 2,350 eelskins sold by the plaintiff to the defendant. At the trial in the Superior Court, before Hammond, J., it appeared in evidence that the plaintiff lived in Saugus, and the defendant had its usual place of business in Westfield, and was engaged in the manufacture of whips.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

HOLMES, J. This is an action for the price of eelskins sent by the plaintiff to the defendant, and kept by the defendant some months, until they were destroyed. It must be taken that the plaintiff received no notice that the defendants declined to accept the skins. The case comes before us on exceptions to an instruction to the jury, that, whether there was any prior contract or not, if skins are sent to the defendant, and it sees fit, whether it has agreed to take them or not, to lie back, and to say nothing, having reason to suppose that the man who has sent them believes that it is taking them, since it says nothing about it, then, if it fails to notify, the jury would be warranted in finding for the plaintiff.

Standing alone, and unexplained, this proposition might seem to imply that one stranger may impose a duty upon another, and make him a purchaser, in spite of himself, by sending goods to him, unless he will take the trouble, and be at the expense of notifying the sender that he will not buy. The case was argued for the defendant on that interpretation. But, in view of the evidence, we do not understand that to have been the meaning of the judge, and we do not think that the jury can have understood that to have been his meaning. The plaintiff was not a stranger to the defendant, even if there was no contract between them. He had sent eelskins in the same way four or five times before, and they had been accepted and paid for. On the defendant's testimony, it is fair to assume that, if it had admitted the eelskins to be over twenty-two inches in length, and fit for its business, as the plaintiff testified, and the jury found that they were, it would have

accepted them; that this was understood by the plaintiff; and indeed, that there was a standing offer to him for such skins. In such a condition of things, the plaintiff was warranted in sending the defendant skins conforming to the requirements, and even if the offer was not such that the contract was made as soon as skins corresponding to its terms were sent, sending them did impose on the defendant a duty to act about them; and silence on its part, coupled with a retention of the skins for an unreasonable time, might be found by the jury to warrant the plaintiff in assuming that they were accepted, and thus to amount to an acceptance. See *Bushel v. Wheeler*, 15 Q.B. 442; *Benjamin on Sales*, §§ 162-164; *Taylor v. Dexter Engine Co.*, 146 Mass. 613, 615, 16 N.E. 462. The proposition stands on the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases. *O'Donnell v. Clinton*, 145 Mass. 461, 463, 14 N.E. 747; *McCarthy v. Boston & Lowell Railroad*, 148 Mass. 550, 552, 20 N.E. 182, 2 L.R.A. 608.

Exceptions overruled.

QUESTIONS:

1. Was the sending of the eelskins by the plaintiff the acceptance of an offer made by the defendant?
2. Could the plaintiff, by shipping eelskins, "impose on the defendant a duty to act about them"? What duty?

NOTE

See *Restatement, Contracts*, § 72(1c).

In *Bohn Mfg. Co. v. Sawyer*, 169 Mass. 477, 482, 48 N.E. 620 (1897) *Allen, J.*, said: "From the defendant's silence in respect to the plaintiff's proposal to effect insurance at their joint expense, and from his subsequent letters and conduct in respect to the policies, the jury might well infer that he assented to that proposal; and if the jury found that such was the fair import of his correspondence and acts, or that the plaintiff believed and had reason to believe that he did assent to it, his secret intention not to do so was immaterial."

COLE-McINTYRE-NORFLEET CO. v. HOLLOWAY.

Supreme Court of Tennessee, 1919. 141 Tenn. 679, 214 S.W. 817, 7 A.L.R. 1083.

Action by A. S. Holloway against the Cole-McIntyre-Norfleet Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which affirmed, and defendant brings error. Writ denied.

LANSDEN, C. J. This case presents a question of law, which, so far as we are advised, has not been decided by this court in its exact phases. March 26, 1917, a traveling salesman of plaintiff in error [the defendant originally] solicited and received from defendant in error [the plaintiff originally], at his country store in Shelby county, Tenn., an order for certain goods, which he was authorized to sell. Among these goods were 50 barrels of meal. The meal was to be ordered out by defendant in error by the 31st day of July, and afterwards 5 cents per barrel per month was to be charged him for storage.

After the order was given, the defendant in error heard nothing from it until the 26th of May, 1917, when he was in the place of business of plaintiff in error, and told it to begin shipment of the meal on his contract. He was informed by plaintiff in error that it did not accept the order of March 26th, and for that reason the defendant had no contract for meal.

The defendant in error never received confirmation or rejection from plaintiff in error, or other refusal to fill the order. The same traveling salesman of plaintiff in error called on defendant as often as once each week, and this order was not mentioned to defendant, either by him or by his principals, in any way. Between the day of the order and the 26th of May, the day of its alleged rejection, prices on all of the articles in the contract greatly advanced. All of the goods advanced about 50 per cent in value.

Some jobbers at Memphis received orders from their drummers, and filled the orders or notified the purchaser that the orders were rejected; but this method was not followed by plaintiff in error.

The contract provided that it was not binding until accepted by the seller at its office in Memphis, and that the salesman had no authority to sign the contract for either the seller or buyer. It was further stipulated that the order should not be subject to countermand.

It will be observed that plaintiff in error was silent upon both the acceptance and rejection of the contract. It sent forth its salesman to solicit this and other orders. The defendant in error did not have the right to countermand orders and the contract was closed, if and when it was accepted by plaintiff in error. The proof that some jobbers in Memphis uniformly filled such orders unless the purchaser was notified to the contrary is of no value because it does not amount to a custom.

The case, therefore, must be decided upon its facts. The circuit court and the court of civil appeals were both of opinion that the contract was completed because of the lapse of time before plaintiff in error rejected it. The time intervening between the giving of the order by defendant and its alleged repudiation by plaintiff in error was about 60 days. Weekly opportunities were afforded the salesman of

plaintiff in error to notify the defendant in error of the rejection of the contract, and, of course, daily occasions were afforded plaintiff in error to notify him by mail or wire. The defendant believed the contract was in force on the 26th of May, because he directed plaintiff in error to begin shipment of the meal on that day. Such shipments were to have been completed by July 31st, or defendant to pay storage charges. From this evidence the Circuit Court found as an inference of fact that plaintiff in error had not acted within a reasonable time, and therefore its silence would be construed as an acceptance of the contract. The question of whether the delay of plaintiff in error was reasonable or unreasonable was one of fact, and the circuit court was justified from the evidence in finding that the delay was unreasonable. Hence the case, as it comes to us, is whether delay upon the part of plaintiff in error for an unreasonable time in notifying the defendant in error of its action upon the contract is an acceptance of its terms.

We think such delay was unreasonable, and effected an acceptance of the contract. It should not be forgotten that this is not the case of an agent exceeding his authority, or acting without authority. Even in such cases the principal must accept or reject the benefits of the contract promptly and within a reasonable time. *Williams v. Storm*, 6 Cold. 207.

Plaintiff's agent in this case was authorized to do precisely that which he did do, both as to time and substance. The only thing which was left open by the contract was the acceptance or rejection of its terms by plaintiff in error. It will not do to say that a seller of goods like these could wait indefinitely to decide whether or not he will accept the offer of the proposed buyer. This was all done in the usual course of business, and the articles embraced within the contract were consumable in the use, and some of them would become unfitted for the market within a short time.

It is undoubtedly true that an offer to buy or sell is not binding until its acceptance is communicated to the other party. The acceptance, however, of such an offer, may be communicated by the other party **either** by a formal acceptance, or acts amounting to an acceptance. Delay in communicating action as to the acceptance may amount to an acceptance itself. When the subject of a contract, either in its nature or by virtue of conditions of the market, will become unmarketable by delay, delay in notifying the other party of his decision will amount to an acceptance by the offerer. Otherwise, the offerer could place his goods upon the market, and solicit orders, and yet hold the other party to the contract, while he reserves time to himself to see if the contract will be profitable.

Writ denied.

Response to Petition to Rehear.

An earnest petition to rehear has been filed, and we have re-examined the question with great care. The petition quotes the text of 13 Corpus Juris, p. 276, as follows:

"An offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection, so as to turn silence on the part of the offeree into acceptance."

And further:

"In like manner mere delay in accepting or rejecting an offer cannot make an agreement."

It is also said that diligent search reveals only one case holding in accord with the court's decision of this case, and that case is *Blue Grass Cordage Co. v. Luthy*, 98 Ky. 583, 33 S.W. 835, and it is said this case was overruled by the later case of *L. A. Becker Co. v. Alvey*, 86 S.W. 974, 27 Ky.Law Rep. 832. We have examined both of those cases, and we do not think either is authority on the question at issue. In the first case the contract was admittedly executed, and the suit was for damages for its breach. The second case does not refer to the first, and is upon another branch of contracts. The quotation from Corpus Juris contemplates the case of an original offer, unaccompanied by other circumstances, and does not apply to this case, where the parties had been dealing with each other before the contract, and were dealing in due course at the time.

It is a general principle of the law of contracts that, while an assent to an offer is requisite to the formation of an agreement, yet such assent is a condition of the mind, and may be either express or evidenced by circumstances from which the assent may be inferred. *Hartford et al. v. Jackson*, 24 Conn. 514, 63 Am.Dec. 177; 6 Ruling Case Law, 605; 13 Corpus Juris 276; 9 Cyc. 258. And see the cases cited in the notes of these authorities. They all agree that acceptance of an offer may be inferred from silence. This is only where the circumstances surrounding the parties afford a basis from which an inference may be drawn from silence. There must be the right and the duty to speak, before the failure to do so can prevent a person from afterwards settling up the truth. We think it is the duty of a wholesale merchant, who sends out his drummers to solicit orders for perishable articles, and articles consumable in the use, to notify his customers within a reasonable time that the orders are not accepted; and if he fails to do so, and the proof shows that he had ample opportunity, silence for an

unreasonable length of time will amount to an acceptance, if the offeror is relying upon him for the goods.

The petition to rehear is denied.

QUESTIONS:

1. Did the defendant have both (or either) "the right and the duty to speak"?
2. What difference does it make that meal is "perishable" or "consumable in the use"? Would it have made any greater difference if the offer had been an offer by the plaintiff to sell meal instead of an offer to buy it?

NOTE

This case is discussed in 29 Yale L.Jour. 441, and is approved in *Hendrickson v. International Harvester Co.*, 100 Vt. 161, 135 A. 702 (1927). See Restatement, Contracts, § 72(1c). See, also, the following similar decisions: *Emery v. Cobbey*, 27 Neb. 621, 43 N.W. 410 (1889); *Hanson & Parker v. Wittenberg*, 205 Mass. 319, 91 N.E. 383 (1910); *Wheeler v. Klaholt*, 178 Mass. 141, 59 N.E. 756 (1901); *Ostman v. Lee*, 91 Conn. 731, 101 A. 23 (1917); *F. O. Evans Piano Co. v. Tully*, 116 Miss. 267, 76 So. 833, L.R.A.1918B, 870 (1917); *T. C. May Co. v. Menzies Shoe Co.*, 184 N.C. 150, 113 S.E. 593 (1922).

Failure to reply to a counter offer. Silence of the original offeror does not operate as an acceptance of a counter offer. *Cincinnati Equipment Co. v. Big Muddy River Consol. Coal Co.*, 158 Ky. 247, 164 S.W. 794 (1914), unless expressly so agreed; *Bowen v. McCarthy*, 85 Mich. 26, 48 N.W. 155 (1891), "he had a right to disregard it [counter offer]; nor was it his duty to notify complainant."

In the case of a late acceptance, the power of acceptance having lapsed, it has been suggested that silence by the original offeror should complete a contract. *Phillips v. Moor*, 71 Me. 78 (1880). See, also, German Civil Code, § 149; Swiss Code Oblig. § 5; Jap. Civil Code, art. 522; *Morrell v. Studd*, [1913] 2 Ch. 648. But in the case of *Maclay v. Harvey*, 90 Ill. 525, 530, 32 Am.Rep. 35 (1878), where the plaintiff mailed her acceptance two days later than by return mail as requested, the court said: "Appellant seeks to recover upon the strict letter of a special contract, and it is, therefore, incumbent on her to prove such contract. It is required of her, as we have seen, to prove an acceptance of appellee's offer within the time to which it was limited—that is to say, by the placing in the post-office of an answer unequivocally accepting the offer in time for the return mail, which she did not do. Appellee was, thereafter, under no obligation to regard the contract as closed. He might, it is true, have done so, but he was not legally bound in that respect, nor was he legally bound to notify appellant that her acceptance had not been signified within the time to which his offer was limited. She is legally chargeable with knowledge that her acceptance was not in time, and in order to fix a liability thereby upon appellee, it was incumbent upon her, before assuming that appellee waived this objection, to ascertain that he in fact did so." In

accord is *Ferrier v. Storer*, 63 Iowa 484, 19 N.W. 288, 50 Am.Rep. 752 (1884).

See Restatement, Contracts, § 73.

In *Lubell v. Rome*, 243 Mass. 13, 136 N.E. 607 (1922), a seller's counter offer was held to be accepted by the buyer's receiving the goods in silence.

SECTION 7.—CONDITIONAL ACCEPTANCE AND REJECTION

INTRODUCTORY NOTE

One who receives an offer of a bargain gets a power of acceptance, whether he wants it or not. There is no duty to exercise this power, however. He has exactly as much control over the bargain that is finally struck as has the offeror. While the offeree cannot enlarge or otherwise vary the power of acceptance, he can reject the offer, he can make a counter offer, he can inquire whether the offeror will not give better or different terms, or he can ignore the offer altogether. If he attempts to accept in an unauthorized manner, or on different terms, or "conditionally," he is making a counter offer of his own.

Any reply made by the offeree requires interpretation, just as the offer itself does. Having thus determined its character and meaning, the next problem is to determine its legal operation. The cases in the present Section deal with these two problems.

It should be observed that the fact that the offeree makes a conditional promise does not prove that he has made a conditional acceptance. The offeror may have requested the very conditional promise that the offeree has made, so that the latter could not accept in any other way. Bargains often consist of an exchange of conditional promises, a fact that does not prevent them from being valid contracts. This is considered in a later Chapter.

It is to be observed, also, that interpretation is often a difficult process. The expressions used by men do not always have a clear meaning to the men themselves; also they leave gaps to be filled by the courts in accordance with business usages. Practical common sense in this process is much to be preferred over meticulous technicality.

BEAUMONT v. PRIETO et al.

Supreme Court of the United States, 1919.
249 U.S. 554, 39 S.Ct. 383, 63 L.Ed. 770.

Suit by Hartford Beaumont, assignee of W. Borck, against Mauro Prieto and others. Decree for plaintiff was reversed by the Supreme Court of the Philippine Islands, and plaintiff appeals and brings error. Affirmed.

Mr. Justice HOLMES. This is a suit for the specific performance of an alleged contract to sell land. The court of first instance made a decree for the plaintiff, but the decree was reversed by the Supreme Court of the Philippine Islands and the defendants were absolved from the complaint. There is a motion to dismiss, on the ground that the writ of error and citation were not made returnable in time. But without going into particulars, as the appellant had color of authority from the court and a judge of that court, it appears to us that justice will be better served by dealing with the merits of the case. See *Southern Pine Co. v. Ward*, 208 U.S. 126, 137, 28 S.Ct. 239, 52 L. Ed. 420.

On the merits the only question is whether the alleged contract was made. The first material step was the following offer, dated December 4, 1911:

"Mr. W. Borck, Real Estate Agent, Manila, P. I.—Sir: In compliance with your request I herewith give you an option for three months to buy the property of Mr. Benito Legarda, known as the Nagtahan hacienda, situated in the district of Sampaloc, Manila, and consisting of about 1,993,000 square meters of land, for the price of its assessed government valuation. B. Valdes."

There is no dispute that the assessed government valuation was 307,000 pesos, that Legarda owned the land and that Valdes had power to make the offer. On January 17, 1912, Borck wrote to Valdes:

"In reference to our negotiations regarding" the property in question, "I offer to purchase said property for the sum of three hundred and seven thousand (307,000.00) pesos, Ph. C., cash, net to you, payable the first day of May, 1912, or before and with delivery of a torrens title free of all encumbrances as taxes and other debts."

There was dispute about the admissibility of this letter and its being signed, but we see no occasion to disturb the opinion of the Supreme Court that it was a part of the transaction and was admissible. No answer was received, and on January 19 Borck wrote again, saying that he was ready to purchase the property at the price and that full payment would be made on or before March 3, provided all documents in connection with the hacienda were immediately placed at his disposal and found in good order. On January 23, Borck wrote again

that he could improve the condition of payment and would pay ten days after the documents had been put at his disposal for inspection, etc., and finally, on February 28, wrote that the price was ready to be paid over and requesting notice when it was convenient to allow inspection of all papers. Before this last letter was written Valdes had indicated that he regarded compliance as an open question by saying in conversation that he wished to communicate with Mr. Legarda. Subsequently conveyance was refused.

The letter of January 17 plainly departed from the terms of the offer as to the time of payment and was, as it was expressed to be, a counter offer. In the language of a similar English case:

"The plaintiff made an offer of his own * * * and he thereby rejected the offer previously made by the defendant. * * * It was not afterwards competent for him to revive the proposal of the defendant, by tendering an acceptance of it." *Hyde v. Wrench*, 3 Beavan, 334; *Langdell*, Cont. § 18.

We do not find it necessary to go into the discussion of the later communications, which led the Supreme Court to the conclusion that they also would not have been sufficient. The right to hold the defendant to the proposed terms by a word of assent was gone, and after that all that the plaintiff could do was to make an offer in his turn. It would need a very much stronger case than this to induce us to reverse the decision of the court below. *Cardona v. Quinones*, 240 U.S. 83, 88, 36 S.Ct. 346, 60 L.Ed. 538.

Judgment affirmed.

QUESTIONS:

1. In what respect is the legal operation of a counter offer different from that of a rejection? Cf. *Restatement, Contracts*, § 38.
2. When is a counter offer operative
 - (a) To extinguish the power of accepting the prior offer?
 - (b) To create a power of accepting the counter offer?

See *Restatement, Contracts*, § 39.

NOTE

In accord: *Hyde v. Wrench*, 3 Beav. 334 (1840); *Egger v. Nesbitt*, 122 Mo. 667, 27 S.W. 385, 43 Am.St.Rep. 596 (1894).

In *Howard Smith & Co. v. Varawa* (High Court of Australia) 5 C.L.R. 68 (1907), an offer was made by cable, on the part of the plaintiff; and after various intervening cable messages, the defendant cabled a conditional acceptance and counter offer at 3:40 p. m. Twenty minutes later, at 4 p. m. the defendant cabled an unconditional acceptance. As to the effect of these messages the court said: "The telegram of 3:40 appears to have arrived at Manila at 5:30 p. m. There was no evidence to show when that of 4 p. m. arrived there. An interesting argument was ad-

dressed to us to the effect that the telegram of 3:40 operated from the time of its despatch, and had the effect of a refusal which could not be followed by an acceptance of the original offer, even if an acceptance of that offer were in fact received before it, and a fortiori if the acceptance were received after the refusal." The court found it unnecessary to pass upon the point.

POEL et al. v. BRUNSWICK-BALKE-COLLENDER CO.
OF NEW YORK.

Court of Appeals of New York, 1915. 216 N.Y. 310, 110 N.E. 619.

Action by Frans Poel and another, copartners doing business as Poel & Arnold, against the Brunswick-Balke-Collender Company of New York. From an order of the Appellate Division, First Department (144 N.Y.S. 725), and the judgment entered thereon, unanimously affirming a judgment rendered in favor of plaintiffs, defendant appeals. Reversed, and new trial granted.

SEABURY, J. In this action the plaintiffs sued to recover damages from this defendant for the breach of an executory contract. * * * The theory of the action is that the defendant agreed to accept and pay for certain rubber which the plaintiffs agreed to sell to it, and that the refusal of the defendant to accept and pay for said rubber caused a breach of that contract. * * *

There are in this case four writings, and upon three of them this controversy must be determined. * * * The writings referred to are as follows: * * *

New York, April 4, 1910.

Brunswick-Balke-Collender Co., Long Island City, L. I.—Gentlemen: Inclosed, we beg to hand you contract for 12 tons Upriver Fine Para Rubber, as sold you to-day, with our thanks for the order.

Very truly yours,

Poel & Arnold,

Per W. J. Kelly.

Inclosed with this letter was the following:

Apr. 4/10.

Brunswick-Balke-Collender Co., Long Island City, L. I.

Sold to You: For equal monthly shipments January to June, 1911, from Brazil and/or Liverpool, about twelve (12) tons Upriver Fine Para Rubber at two dollars and forty-two cents (\$2.42) per pound; payable in U. S. gold or its equivalent, cash twenty (20) days from date of delivery here.

On April 6th Rogers [representing the defendant] sent the following order to the plaintiffs. It is partly printed and partly written. The part in writing is italicized: * * *

Long Island City, 4/6, 1910.

M. Poel and Arnold, 277 Broadway, N. Y. C. Please deliver at once the following, and send invoice with goods:

About 12 tons Upriver Fine Para Rubber at 2.42 per lb. Equal monthly shipments January to June, 1911.

Conditions on Which Above Order is Given.

Goods on this order must be delivered when specified. In case you cannot comply, advise us by return mail stating earliest date of delivery you can make, and await our further orders.

The acceptance of this order which in any event you must promptly acknowledge will be considered by us as a guaranty on your part of prompt delivery within the specified time.

Terms: F. O. B.

Respectfully yours,

The Brunswick-Balke-Collender Co. of New York.

• • • • •

The fundamental question in this case is whether these writings constitute a contract between the parties. If they do not, no question as to whether these writings meet the requirements of the statute of frauds need be considered. An analysis of their provisions will show that they do not constitute a contract. It is not contended, and in face of the provisions of the plaintiffs' letter of April 4th it cannot be claimed, that that letter is in itself a contract. It is a mere offer or proposal by the plaintiffs that the defendant should accept the proposed contract inclosed which is said to embody an oral order that the defendant had that day given the plaintiffs. The object of this letter was to have the terms of the oral agreement reduced to writing so that there could be no uncertainty as to the terms of the contract. The letter of the defendant of April 6th did not accept this offer. If the intention of the defendant had been to accept the offer made in the plaintiffs' letter of April 4th, it would have been a simple matter for the defendant to have indorsed its acceptance upon the proposed contract which the plaintiffs' letter of April 4th had inclosed. Instead of adopting this simple and obvious method of indicating an intent to accept the contract proposed by the plaintiffs, the defendant submitted its own proposal and specified the terms and conditions upon which it should be accepted.

The defendant's letter of April 6th was not an acceptance of this offer made by the plaintiffs in their letter of April 4th. It was a counter offer or proposition for a contract. Its provisions make it perfectly clear that the defendant: (1) Asked the plaintiffs to deliver rubber of a certain quality and quantity at the price specified in designated shipments; (2) *it specified that the order therein given was conditional upon the receipt of its order being promptly acknowl-*

edged; and (3) upon the further condition that the plaintiffs would guarantee delivery within the time specified. It may be urged that the condition specified in defendant's order that the plaintiffs would guarantee the delivery of the goods within the time specified added nothing of substance to the agreement, because if the offer was accepted the acceptance itself would involve this obligation on the part of the plaintiffs. The other condition specified by the defendant cannot be disposed of in the same manner. That provision of the defendant's offer provided that the offer was conditional upon the receipt of the order being promptly acknowledged. It embodied a condition that the defendant had the right to annex to its offer. The import of this proposal was that the defendant should not be bound until the plaintiffs signified their assent to the terms set forth. When this assent was given and the acknowledgment made, this contract was then to come into existence and would be completely expressed in writing.

The plaintiffs did not acknowledge the receipt of this order and the proposal remained unaccepted. As the party making this offer deemed this provision material, and as the offer was made subject to compliance with it by the plaintiffs, it is not for the court to say that it is immaterial. When the plaintiffs submitted this offer in their letter of April 4th to the defendant, only one of two courses of action was open to the defendant. It could accept the offer made and thus manifest that assent which was essential to the creation of a contract, or it could reject the offer. There was no middle course. If it did not accept the offer proposed it necessarily rejected it. A proposal to accept the offer it modified or an acceptance subject to other terms and conditions was equivalent to an absolute rejection of the offer made by the plaintiffs. *Mactier's Adm'rs v. Frith*, 6 Wend. 103, 21 Am.Dec. 262; *Vassar v. Camp*, 11 N.Y. 441; *Chicago & G. E. R. Co. v. Dane*, 43 N.Y. 240; *Sidney Glass Works v. Barnes & Co.*, 86 Hun, 374, 33 N.Y.S. 508; *Mahar v. Compton*, 18 App.Div. 536, 540, 45 N.Y.S. 1126; *Nundy v. Matthews*, 34 Hun, 74; *Barrow Steamship Co. v. Mexican C. R. Co.*, 134 N.Y. 15, 31 N.E. 261, 17 L.R.A. 359. * * *

Judgment reversed.

QUESTION:

Will the introduction of a new form of words in the acceptance prevent a contract if their legal interpretation and effect are the same as those of the words used by the offeror?

NOTE

See Restatement, Contracts, §§ 58, 59, 60.

The following cases deal with the problem: *Minneapolis & St. L. R. Co. v. Columbus Rolling Mill*, 119 U.S. 149, 7 S.Ct. 168, 30 L.Ed. 376 (1886); *Sterling & Son Co. v. Watson & Bennett Co.*, 193 Mich. 11, 159

N.W. 381 (1916), offer of 4,000 poles is not accepted, if offeree adds "more or less"; *State v. Robertson* (Mo.) 191 S.W. 989 (1917), insurance policy issued different from the one applied for; *Seymour v. Armstrong*, 62 Kan. 720, 64 P. 612 (1901); *Hall v. Olson*, 58 Or. 464, 114 P. 638 (1911), offer to sell 18,000 acres of land with warranty of 40 million feet of timber—acceptance, subject to a "cruise" showing warranty correct; *Duke v. Andrews*, 2 Ex. 290 (1848), application for shares not accepted by allotting "nontransferable" shares.

"An acceptance may be complete, though it expresses dissatisfaction at some of the terms, if the dissatisfaction stops short of dissent, so that the whole thing be described as a 'grumbling assent.'" *Pollock, Contracts*; *Johnson v. Federal Union Surety Co.*, 187 Mich. 454, 153 N.W. 788, 792 (1915).

PHOENIX IRON & STEEL CO. v. WILKOFF CO.

Circuit Court of Appeals of the United States, Sixth Circuit, 1918.
253 F. 165, 1 A.L.R. 1497.

[Only excerpts of the opinion are here printed.]

COCHRAN, District Judge. The action was to recover \$202,500 as damages for breach of contract. * * *

The alleged contract related to one of two kinds of discard billets, made in the manufacture of high explosive shells. Such billets are cut-offs from billets rolled from ingots. Two are made from the top of each billet. The first is imperfect, in that it contains pipes and seams caused by the passage from the top of the ingot of gases formed by the hot steel. The second is apparently perfect, i. e., free from pipes and seams, and is made to insure that all imperfect steel has been eliminated. The remaining part of the billet is alone used in the manufacture of the shells. It was the latter kind of discard billets which was the subject-matter of the alleged contract.

The plaintiff and defendant are each engaged in buying and selling iron and steel products, the one in New York City and the other at Youngstown, Ohio. Plaintiff's claim was that the contract sued on arose from a telegram * * * sent Monday evening, August 14, 1916, by defendant to it, granting an option, and a counter telegram sent Wednesday morning, August 16th, by it to defendant, accepting the option. * * * Defendant's telegram was as follows:

"For consideration of one dollar, receipt of which is hereby acknowledged, we hereby give you option, providing we receive your acceptance not later than Wednesday evening next, to purchase from us 15,000 tons discard billets free of pipes and seams, price \$26.50 gross ton f. o. b. cars Youngstown, size of billets as confirmed by letter this evening."

Plaintiff's counter telegram was as follows:

"We accept option, and hereby purchase from you fifteen thousand tons billets on basis of terms and specifications of option given us, it being understood that we have the right to have our inspector at loading point as material is shipped. Acknowledge receipt of this message."

The defendant replied to this telegram as follows:

"Billets on hand ready to ship. Your message satisfactory provided you make inspections Thursday or Friday this week. If billets satisfactory will then sign contract. Wire when your inspector will be here."

Inspection was made on Friday of the billets thus referred to and they were rejected.

[The plaintiff's claim to damages is based on the defendant's failure to furnish billets in conformity with its offer.]

The question as to the correctness of plaintiff's claim depends on whether its counter telegram was an absolute acceptance of the offer made by defendant's telegram and confirming letter. If it was not—if it was only a qualified acceptance thereof—no contract arose therefrom.

Without doubt plaintiff's telegram on its face was a qualified and not an absolute, acceptance of defendant's offer. It contained two sentences. The second called for an acknowledgment of its receipt. The first begins, it is true, by stating unqualifiedly that plaintiff accepted the option, and thereby purchased 15,000 tons billets "on the basis of terms and specifications of option"; but this statement was immediately followed by the words "it being understood that we have the right to have our inspectors at loading point as material is shipped," a matter of which defendant's communications made no mention. The word "understood" is synonymous with "agreed." * * * And the words "it being understood" mean provided or on condition it is so agreed. The plaintiff in error practically concedes this. Its contention is that, even though this is so, yet the acceptance was in reality, an absolute and unqualified acceptance. It attempts to make this out in this way. It maintains that had its telegram said nothing as to the right of inspection therein specified as defendant's communications did, and hence its telegram been really as well as on its face an absolute acceptance, it would, under the contract thus formed by law, have had such right of inspection. This being so, notwithstanding its acceptance was expressly made conditional on its being so agreed, it was in reality an absolute and unqualified acceptance.

Suppose, it suggests, that it had said in its counter telegram, "it being understood that said discard billets shall be free from pipes or seams," or that the option had been for 15,000 bushels of wheat, and to

the acceptance thereof had been added, "it being understood that there shall be sixty pounds in each bushel of wheat." Clearly, in each case there would have been a contract entered into. This because, though the acceptance had been on its face qualified, there was in reality no qualification in that the condition was within the option. What the defendant offered in the one case was "discard billets free from pipes and seams," and what in the other it would have offered was 15,000 times 60 pounds of wheat, for a bushel of wheat consists of 60 pounds thereof. In fact, therefore, each party expressed one and the same intention, i. e., an assent to one and the same thing.

To repeat, then, the question before us is this: If an optionee expressly qualifies his acceptance by making it a condition thereof that it is to be agreed that he is to have a right to which he would have by law been entitled had his acceptance been absolute, there being no reference to such right in the option, is the acceptance in reality absolute in that the option and the acceptance each express one and the same intention, i. e., an assent to one and the same thing, and that therefore a contract has been formed?

It is [argued] that plaintiff in its counter telegram conditioned its acceptance on its having the right to make the inspection therein specified. Such was not the condition set forth in the telegram. It was that it should be agreed that it should have such right. It called for an assent on defendant's part that it should have such right. Plaintiff did not interpret defendant's communications as contemplating that it should have such right. Hence it called for an assent on defendant's part thereto and made its acceptance conditional thereon. The second sentence of plaintiff's telegram is to be accounted for on this basis. An acknowledgment of receipt thereof, without more, would have been an assent on defendant's part to the condition. Had the second sentence been omitted it would not have been otherwise. The telegram would still have called for an assent on defendant's part which possibly would have been given by mere silence.

Defendant so interpreted plaintiff's counter telegram in its response thereto, whereby it postponed the matter of entering into a contract with plaintiff until the inspection should be had.

That an acceptance of an option making no mention of the optionee's having a certain right which he would have as a matter of law, if the option should be accepted absolutely, conditional on the optionor's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the formation of a contract, unless the optionor thereafter in some way agrees thereto, would seem to be clear. By reason thereof it cannot be said that the option and the acceptance express one and the same intention, i. e., an assent to one and the same thing. They differ as to what shall be the form of the contract. It is the intention of the option that the form thereof shall

be as therein set forth, whereas it is that of the acceptance that it shall embrace a term expressly giving the optionee such right. Such an acceptance in such a case is in effect a rejection of the option because of its form, i. e., it does not expressly embrace such a term in it. A difference as to the form of a contract is just as effective to prevent the entering into of a contract as one as to substance.

[The court proceeded to hold that under the applicable law of sales the buyer of goods is given a right of inspection at the point of delivery, not at the point of shipment.]

Judgment for the defendant was affirmed.

QUESTIONS:

1. If the plaintiff's acceptance was conditional, did not the defendant express its assent thereto in the third telegram?
2. If this expression of assent was itself also conditional, was not this in turn assented to by the plaintiff's making inspection on Friday?
3. Did the third telegram make the existence of a contract dependent on the execution of a writing or on the plaintiff's expression of satisfaction with the billets?

GENERAL LITHOGRAPHING & PRINTING CO. v. WASHINGTON RUBBER CO., Inc.

Supreme Court of Washington, 1909. 55 Wash. 461, 104 P. 650.

Action by the General Lithographing & Printing Company against the Washington Rubber Company, Incorporated, for breach of contract. From a judgment for plaintiff, defendant appeals. Affirmed.

PARKER, J. The facts in this cause as found by the court, the trial being by the court without a jury, are in substance as follows:

About June 24, 1907, the plaintiff and Mix Fire Apparatus Company entered into a contract, whereby the former agreed to perform the work and furnish materials for the printing of 3,500 copies of a catalogue for the latter at the agreed price of \$800. In pursuance of the terms of the contract, the plaintiff proceeded with the work, when the Mix Fire Apparatus Company requested plaintiff not to complete same until further orders, and thereupon plaintiff held the printed forms for the work for a period of two months, for which it was entitled to \$50 as a reasonable charge for the holding of the forms. On the 15th day of November, 1907, in consideration of the release and discharge by the plaintiff of said claim of \$50 for holding the forms, and a continuation and completion of the contract as originally made,

the defendant entered into a contract in writing whereby plaintiff was to complete the catalogue, and the defendant was to accept and pay for the same. In pursuance of this last contract, the plaintiff proceeded to perform the same and submitted proofs for correction to defendant preparatory to final printing, but defendant wholly failed and refused to correct and return said proof, and refused to allow the work to proceed or to fulfill the terms of the contract on its part. The reasonable value of the work and labor in and about the composition performed by plaintiff is \$200. The reasonable value of labor incident to the furnishing of proof to defendant is \$25. The depreciation in the value of paper purchased by plaintiff for the work, and left on hand is \$100, and the profit plaintiff would have made upon the contract had it been allowed to complete the same is \$200.

From these facts the court concluded as a matter of law that plaintiff was entitled to recover from defendant \$525, and rendered judgment accordingly, from which defendant has appealed.

Appellant, having filed its exceptions to the court's findings, contends that there was no contract shown by the evidence to have been entered into between the parties, the breach of which would warrant a recovery. The contract referred to in the court's findings as being entered into between the appellant and respondent is evidenced by two letters as follows:

"Seattle, Wash., 11—6—07. General Lithographing & Printing Co., City—Gentlemen: Referring to the writer's conversation with your Mr. Graff about six weeks ago, at which time he proposed to him that the Washington Rubber Co. would be willing to assume the payment of \$800.00 for the catalogue ordered from his Company by the Mix Fire Apparatus Co. on delivery of said catalogue in accordance with the contract, as placed, we herewith confirm said offer on condition that there will be no additional charges beyond the original contract price of Eight Hundred Dollars (\$800.00). Kindly advise us what decision you have come to on this offer and oblige, Yours respectfully, The Washington Rubber Co., by Franz F. Richter, Pr."

"Nov. 15, 1907. Washington Rubber Co., 216 Jackson St., City—Gentlemen: In answer to your letter dated November 6th, 1907, we beg to accept your proposition with the understanding that we are to have \$800.00 for the catalogue printed as originally agreed, and no changes to be made in your copy or corrections except at your expense. The job has been set and waiting for you at some time, ready to run. We believe there will be no changes necessary but in case there are, we will expect \$1.25 per hour for composition changes. Yours truly, General Lithographing & Printing Co."

Counsel for appellant argue that the language of the second letter does not constitute an unconditional acceptance of the proposition contained in the first letter because of the words therein: "And no chang-

es to be made in your copy or corrections except at your expense." There may be room for argument as to whether or not these words so qualify the acceptance as to make it conditional, and thereby prevent the meeting of the minds of the parties. We are not inclined to so regard it; but rather as a statement indicating that there would be extra charge for any extra work beyond the strict terms of the contract. The latter part of the letter lends support to this view. However, this involves only a question of construction, which we are relieved from solving if as a matter of fact the parties subsequently treated the contract as existing. Mr. Graff, the president of respondent company, referring to a time immediately following the exchange of the letters, testified: "We immediately took new proofs as requested. Mr. Richter told me to go ahead with the work and to furnish new proofs for Mr. Mix to correct, which we did." If this be true, and we think the trial court was warranted in so believing from the evidence, it at once becomes apparent that both parties regarded the contract as complete.

* * *

The judgment is affirmed.

COLLIN v. WETZEL.

Court of Appeals of Maryland, 1932. 163 Md. 194, 161 A. 18.

Bill by Emma L. Wetzel against Alice H. Collin. Decree for plaintiff, and defendant appeals.

Affirmed.

DIGGES, J. The bill in this case was filed by the appellee for specific performance of an alleged contract by which the appellant agreed to sell her one-half joint interest in property No. 600 Biddle street, Baltimore city. The chancellor decreed specific performance, **and the appeal is from that decree.**

The appellant and appellee are sisters, and became the owners of the property in question by deed dated in 1910 as joint tenants. They lived upon the property for some years, when the appellee married, at which time, apparently, differences arose between them, and there were negotiations looking to one or the other acquiring the whole interest. The record shows that these negotiations culminated in the following manner, at which time both parties were represented by counsel: On October 7, 1931, counsel for the appellee wrote a letter to the appellant, who was then in Philadelphia, as follows: "Dear Miss Collin: It has been nearly three months now since I was promised that you would submit a proposition in order to settle the Biddle street property between you and Mrs. Wetzel. I have not urged this matter due to the fact that I had hoped sincerely the matter might be adjust-

ed without any outside assistance. I regret this, apparently, cannot be done. I have advised Mrs. Wetzel, however, and she has accepted my suggestion for you to make an offer for this property; an offer that you will either give or accept, and if you will give me to understand the price you fix I will immediately take it up with Mrs. Wetzel so that this matter may be finally closed. Let me suggest that I cannot permit this matter to remain open longer than Monday of next week. It is very simple for you to name a price, and we will immediately give you an answer." On October 12, 1931, the letter was replied to, the same being signed by the attorney, and the appellant herself: "Dear Mr. Freeny: On behalf of Miss Alice Collin, 3136 Page Street, Philadelphia, Pa., I am replying to your letter of October 7th, addressed to her, relative to the property on East Biddle Street owned jointly by her and Mrs. Wetzel; I beg leave to state that Miss Collin is willing to sell her interest in the property to her sister for \$900 or buy her sister's interest in the property for \$900. Sixty days for settlement. Kindly let me have an answer on this proposition at your earliest convenience, and oblige." In reply to that letter, on October 20, 1931, the attorney on behalf of the appellee wrote to the appellant's attorney: "Mrs. Wetzel will purchase the property on Biddle Street at the price mentioned in your letter to me, settlement to take place on November 4th, 1931; deed will be forwarded to you for Miss Collin's signature; adjustments as of October 20th, 1931." On November 3, 1931, the attorney for the appellee wrote to appellant's then attorney, saying: "I am enclosing herewith the deed for the property 600 East Biddle Street, which I will thank you to have Miss Collin sign. If convenient to you, will you kindly be in my office Wednesday, November 4th, 1931, at 2:00 p. m., in order to settle this matter." To which letter the attorney for the appellant, on November 4, 1931, replied: "Herewith I am returning you deed in the Collin-Wetzel matter contained in your favor of November 3rd. I no longer am counsel in this matter." On the same day the present attorney for the appellant notified the appellee's attorney that he had been retained by the appellant and would be glad to take the matter up with him; and on the same day the appellee's attorney wrote to the then attorney for the appellant: "Dear Mr. Padgett: This acknowledges your letter of the 4th inst. Since talking with you over the phone in regard to the transfer of the property from Miss Collin to Mrs. Wetzel, I have had a talk with Mrs. Wetzel and am authorized to say to you that there can be no other arrangement than the one agreed upon. If you care to execute the deed agreed to by Miss Collin in the letter of the 12th ult. and will let me know to that effect by Friday of this week, we will be very glad to wait until that time. If it is your intention to oppose this agreement, there is nothing to do but ask the Court to ratify the same."

We have no difficulty in affirming the decree of the chancellor in this case. The first contention of the appellant is that the letters

above set forth do not constitute such a contract as is capable of being specifically enforced, for the reason that the acceptance of the offer was not in the terms of the offer. This position cannot be maintained. In response to the letter on behalf of the appellee proposing that the appellant should name a figure for which she would be willing either to sell or buy, the appellant, with the advice of counsel, by a letter prepared by counsel and signed by both herself and counsel, stated that in reply to the suggestion contained in the former letter she was willing to sell to Mrs. Wetzel her interest in the property for \$900, or would buy Mrs. Wetzel's interest for \$900; sixty days for settlement. This offer was accepted in writing on behalf of Mrs. Wetzel by stating that Mrs. Wetzel would purchase the property at the price mentioned, settlement to take place on November 4, 1931, adjustments as of October 20, 1931, which was the date of the letter of acceptance. Clearly there is no variance between the terms of the offer and the acceptance. The price was the same, and the date of settlement named in the acceptance was within the sixty days provided for settlement in the offer. Under the terms of the offer, Mrs. Wetzel, in accepting, could have availed herself of the full sixty days, which would have carried the final date to December 19th; but, by making settlement before that date, it was in full compliance with and did not change any of the terms of the offer, because, if made on the 4th of November, it was within sixty days. It is true that, if Mrs. Wetzel had elected to sell instead of purchase, and had fixed the date of settlement less than sixty days, it would have been a change; because under the offer the party purchasing had sixty days within which to settle, and, if the accepting purchaser had named a shorter time, it would not have been in substantial accordance with the terms of the offer. This, however, as stated, does not apply where the purchaser names a day for settlement which is within, but shorter than, the time named in the offer. It is clear that the sixty-day limitation was for the benefit of the purchaser, and, if she chose to make settlement before the expiration of that time, the vendor cannot be heard to complain. • • •

Decree affirmed, with costs.

QUESTION:

Why did not "sixty days for settlement" apply to preparation and delivery of deed by Miss Collin as well as to payment by Mrs. Wetzel?

STEVENSON, JAQUES & CO. v. McLEAN.

In the High Court of Justice, Queen's Bench Division, 1880.
L.R. 5 Q.B.D. 346.

The following is a condensed statement of the facts: The plaintiff was the owner of warrants for the delivery of 3800 tons of iron that he had previously purchased from the defendants who were iron merchants. He wrote asking them if they could get him an offer for these warrants. They replied asking him to name his own price. After several intervening communications, the defendant finally wrote that he "would now sell for 40s., net cash, open till Monday." This was a letter sent by mail.

On the Monday morning, at 9:42, the plaintiffs telegraphed to the defendant: "Please wire whether you would accept forty for delivery over two months, or if not, longest limit you would give."

This telegram was received at the office at Moorgate at 10:01 a.m., and was delivered at the defendant's office in the Old Jewry shortly afterward.

No answer to this telegram was sent by the defendant, but after its receipt he sold the warrants for 40s., net cash, and at 1:25 sent off a telegram to the plaintiffs: "Have sold all my warrants here for forty net to-day." This telegram reached Middlesborough at 1:46, and was delivered in due course.

Before its arrival at Middlesborough, however, and at 1:34, the plaintiffs telegraphed to defendant: "Have secured your price for payment next Monday—write you fully by post."

By the usage of the iron market at Middlesborough, contracts made on a Monday for cash are payable on the following Monday.

At 2:06 on the same day, after receipt of the defendant's telegram announcing the sale, the plaintiffs telegraphed insisting that a contract with them had been consummated and that in reliance on it they had already resold the warrants to a third party. Later they brought this suit for damages for the defendant's refusal to deliver.

LUSH, J., said in his opinion: "Two objections were relied on by the defendant: First, it was contended that the telegram sent by the plaintiffs on the Monday morning was a rejection of the defendant's offer and a new proposal on the plaintiff's part, and that the defendant had therefore a right to regard it as putting an end to the original negotiation.

Looking at the form of the telegram, the time when it was sent, and the state of the iron market, I cannot think this is its fair meaning. The plaintiff Stevenson said he meant it only as an inquiry, expecting an answer for his guidance, and this, I think, is the sense in which the defendant ought to have regarded it.

It is apparent throughout the correspondence, that the plaintiffs did not contemplate buying the iron on speculation, but that their acceptance of the defendant's offer depended on their finding some one to take the warrants off their hands. All parties knew that the market was in an unsettled state, and that no one could predict at the early hour when the telegram was sent how the prices would range during the day. It was reasonable that, under these circumstances, they should desire to know before business began whether they were to be at liberty in case of need to make any and what concession as to the time or times of delivery, which would be the time or times of payment, or whether the defendant was determined to adhere to the terms of his letter; and it was highly unreasonable that the plaintiffs should have intended to close the negotiation while it was uncertain whether they could find a buyer or not, having the whole of the business hours of the day to look for one. Then, again, the form of the telegram is one of inquiry. It is not 'I offer forty for delivery over two months,' which would have likened the case to *Hyde v. Wrench* [3 Beav. 334], where one party offered his estate for £1,000, and the other answered by offering £950. Lord Langdale, in that case, held that after the £950 had been refused, the party offering it could not, by then agreeing to the original proposal, claim the estate, for the negotiation was at an end by the refusal of his counter proposal. Here there is no counter proposal. The words are, 'Please wire whether you would accept forty for delivery over two months, or, if not, the longest limit you would give.' There is nothing specific by way of offer or rejection, but a mere inquiry, which should have been answered and not treated as a rejection of the offer. This ground of objection therefore fails."

A second objection, based upon the fact that the revoking telegram at 1:25 was started nine minutes before the accepting telegram was started, was also disapproved. Among other cases, the court cited with approval *Tayloe v. Merchants' Insurance Company*, 50 U.S. (9 How.) 390, 13 L.Ed. 187.

Judgment was given for the plaintiffs.

NOTE

In *Johnson v. Federal Union Surety Co.*, 187 Mich. 454, 153 N.W. 788 (1915), the court said: "A mere inquiry as to the terms of the proposal, or a request to modify or change the offer, does not have the effect of rejecting the offer; and if the offer has not been revoked a party may accept it, although he previously asked the proposer to modify it." It was so held in *First N. Exchange Bank v. Roanoke Oil Co.*, 169 Va. 99, 192 S.E. 764 (1937).

An acceptance can be unconditional and effective, though it is accompanied by an inquiry as to the possibility of modifications or even by a definite offer of a substituted contract. Restatement, Contracts, § 62.

ACKERMAN v. CARPENTER.

Supreme Court of Vermont, 1943. 113 Vt. 77, 29 A.2d 922.

STURTEVANT, Justice. This is a bill for specific performance. A hearing was had, findings of fact made and filed and a decree was entered for the plaintiff. The case is here upon the defendants' exceptions. From the findings appear the following facts material to the questions presented.

The defendants, Frank O. Carpenter and George M. Carpenter, are brothers. On July 24, 1941, they gave to the plaintiff a written option in words and figures as follows:

"For and in consideration of One Hundred dollars, to us in hand paid, the receipt whereof is hereby acknowledged, we hereby grant unto Ruth A. Ackerman, an option for ten days from the 24th day of July, 1941, to purchase for the sum of thirteen thousand dollars (\$13,000) the following described land situated in the towns of Brattleboro and Dummerston, in the County of Windham and State of Vermont: Being those lands known as the home farm of Frank Carpenter and George Carpenter as Administrator of the Estate of Mary J. Carpenter, and such pieces of land that are immediately adjacent thereto. Meaning and intending to convey approximately two hundred fifty acres, more or less, together with the buildings thereon.

"The said option is given with the understanding that the said Ruth A. Ackerman shall signify her intention to take or reject the same by due notice in writing within the time specified, and the failure to serve said notice within the time specified shall terminate this option without further action, and the down payment, receipt of which is hereby acknowledged, is considered forfeited and the property of said Carpenters. As further consideration in this sale, the said Ruth A. Ackerman has agreed to purchase all the personal property located on said farm and said lands, excluding only the household furniture therein situated, said Ackerman to purchase said personal property at a price to be reached in the following manner: The said Frank Carpenter and George Carpenter as Administrator of the Mary J. Carpenter Estate to select one appraiser, the said Ruth A. Ackerman to select one appraiser, the two appraisers heretofore selected to select a third appraiser. The value placed upon the personal property by the said appraisers shall be considered as the purchase price of said personal property.

"In Witness Whereof, we have hereunto set our hands and seals, at Brattleboro, in the County of Windham, and State of Vermont, this 24th day of July, A. D. 1941.

"In presence of:

Charles H.
Perkins
May A. Taylor

Frank O. Carpenter
George M. Carpenter"

On August 2, 1941, the plaintiff, accompanied by her husband and two other persons, called at the defendants' farm. On that occasion the following notice addressed to both defendants was delivered to the defendant, Frank O. Carpenter, by the plaintiff.

"In accordance with the provisions of an option signed by you on the 24th day of July, 1941, I am hereby notifying you that it is my intention to take up said option and that on the second day of August, 1941, I will be in Brattleboro, for the purpose of entering into a contract with you for the purchase of the property as mentioned in said option, the said contract to contain the terms as enclosed in the option, and these terms I am now ready and willing to carry out.

"Very truly yours,

Ruth A. Wellman
Ruth W. Ackerman"

"August 1, 1941.

The plaintiff's maiden name was Ruth A. Wellman. At some time between July 24, 1941, and August 2 of that year she was married to Ackerman. This accounts for the use of two names signed at the bottom of the above quoted notice.

When the plaintiff was at the Carpenter farm August 2, 1941, she also presented to the defendants a proposed agreement in writing which she asked them to sign. The defendant, Frank O. Carpenter, and the plaintiff signed this agreement. The defendant, George M. Carpenter, refused to sign it and stated that he had been advised by an attorney not to sign anything. We will hereinafter refer to the provisions of this proposed agreement. * * *

The questions raised by the defendants under II, III, V, VI, VII and IX in their brief may be stated briefly as follows. No contract capable of specific performance was made by the parties because the plaintiff's alleged acceptance of the defendants' offer was conditional and was a counter-proposal at variance with the terms of the offer. The option given July 24, 1941, was a continuing offer, for a ten-day period, to sell to the plaintiff the property therein designated on the terms therein stated. *Durfee House Furnishing Co., Inc., v. Great Atlantic & Pacific Tea Co.*, 100 Vt. 204, 207, 136 A. 379, 50 A.L.R. 1309. It provided that the plaintiff should, within the ten-day period, "signify her intention to take or reject the same by due notice in writing * * *". The offer did not specifically fix the time for delivery of the property nor the time for payment of the purchase price. Under such circumstances the law settled those matters. The time for delivery of the property is a reasonable time after acceptance of the offer. *Smead v. Lampher*, 87 Vt. 1, 3, 86 A. 1005; *Capron v. Capron*, 44 Vt. 410, 412. Also the law construes the offer to be for cash on delivery and before title passes. *Hambleton v. U. Aja Granite Co.*, 95 Vt. 295, 297, 115 A. 102, and cases cited. So, too, there is an implied condition that

the vendor of land will transfer to the vendee the title unencumbered with defect unless the contract expressly states the contrary. *Drew v. Bowen et al.*, 102 Vt. 124, 127, 146 A. 254.

We agree with the defendants' contention that an acceptance which varies from the offer will not conclude a contract. *Purrington v. Grimm*, 83 Vt. 466, 469, 76 A. 158; *Hill v. Bell*, 111 Vt. 131, 134, 11 A.2d 211.

But the reply may go beyond the terms of the proposal without qualifying the acceptance. The addition may be such as fairly to import a request instead of a condition. In determining what one party intended and the other ought to have understood, regard must be had to the situation and purpose of the parties, the subject matter and course of the negotiations. *Purrington v. Grimm*, 83 Vt. 466, 469, 76 A. 158.

The question whether there was a contract between the parties does not depend alone upon the specified facts found but also upon the reasonable inferences to be drawn from them. Every reasonable intentment is in support of the decree and we will assume that the chancellor drew such inferences in favor of the prevailing party. *Travelers Insurance Co. v. Gebo et al.*, 106 Vt. 155, 162, 170 A. 917, and cases cited.

The letter which the plaintiff delivered to the defendants August 2, 1941, has been hereinbefore set out. In that letter it appears that the plaintiff gave the defendants notice of her intention to accept their offer strictly in accordance with the provisions of the offer. While the letter also stated that the plaintiff would be in Brattleboro on August 2, 1941, for the purpose of entering into a contract for the purchase of the property mentioned in the option, it specifically stated that such contract was "to contain the terms as enclosed in the option" and that the plaintiff was ready and willing to carry out those terms. * * *

Whether the proposed contract which the plaintiff asked the defendants to sign August 2, 1941, was or was not in accordance with the terms of the offer we need not consider. We have seen that her acceptance of the defendants' offer brought about an executory contract of sale and purchase. It follows that under such circumstances the plaintiff could make proposals either to vary or make more specific the terms of the executory contract without jeopardizing her rights thereunder. Such proposals made by one party and not accepted by the other would leave the contract exactly as though the proposals had not been made. * * *

The decree of the lower court enforcing the contract was affirmed.

NOTE

Where the offeree wrote: "I am accepting your offer to take \$2,500 cash for this land and am inclosing deed for you to make and have acknowledged before a notary public, attach draft to deed and send to Merchants' Bank and I will take care of same," it was held that a contract was made. *Skinner v. Stone*, 144 Ark. 353, 222 S.W. 360, 11 A.L.R. 808 (1920).

There was a like decision where the offeree wrote: "I hereby notify you that your offer is accepted and request you to deliver deed with abstract of title at Morgantown." *Turner v. McCormick*, 56 W.Va. 161, 49 S.E. 28, 67 L.R.A. 853, 107 Am.St.Rep. 904 (1904).

Other similar cases: *Simpson v. Emmons*, 116 Me. 14, 99 A. 658 (1917), a request to "rush shipment" does not invalidate acceptance; *Wilkins v. Vass Cotton Mills*, 176 N.C. 73, 97 S.E. 151 (1918), "accept offer; make it 25,000 if can make sixteens," held valid; *Culton v. Gilchrist*, 92 Iowa 718, 61 N.W. 384 (1894), acceptance of lease, with request to build a small cook room.

In *C. W. Hull Co. v. Marquette Cement Mfg. Co.*, 208 F. 260, 264, 125 C.C.A. 460 (1913), the court said: "counsel for appellant builds up an imposing argument in this way: He starts with the basic principle that in order to create a contract there must be a definite proposal on one side and an unconditional acceptance on the other. He then takes up the letters and shows that each offer was met by some new term and, applying his rule, lays aside each letter as a nullity because it failed to produce a complete agreement. Parties, however, have the right to reach their agreements in their own way. They may settle upon one term at a time, and, if it is reasonably clear that this has been their method, then, when the last term is agreed upon, their contract is just as complete and binding as if all its terms had been settled by a single act. Here the parties first agree upon territory, then upon quantity, then upon general features, such as terms of payment, return of sacks, etc., then upon the amount of the monthly deliveries, and finally upon the price. At every stage, as the negotiations advance, it seems clear to us that the parties carry forward the terms as to which they have already agreed." See, also, *Kehlor Flour Mills Co. v. Linden*, 230 Mass. 119, 119 N.E. 698 (1918); *Purrington v. Grimm*, 83 Vt. 466, 76 A. 158 (1910).

In *Dougherty v. Briggs*, 231 Pa. 68, 75, 79 A. 924 (1911), the court said: "When it is sought to establish a contract by letters which pass between the parties, containing proposals, answers and counter proposals, it must be made to appear that at some point in the correspondence there was a definite and unqualified proposal by one party which was unconditionally and without qualification accepted by the other party."

SECTION 8.—LAPSE OF OFFER—POWER OF REVOCATION

STARKWEATHER v. GLEASON.

Supreme Judicial Court of Massachusetts, 1915. 221 Mass. 552, 109 N.E. 635.

Actions by Helen Burr Starkweather and by William G. Starkweather against Frederick J. Gleason. There was a verdict for defendant, and the case was reported to the Supreme Judicial Court. Judgment ordered on the verdict.

BRALEY, J. The correspondence between the parties would have warranted the jury in finding that the plaintiffs invested in the preferred and common shares of the Walpole Rubber & Tire Company in reliance on the advice and judgment of the defendant, its vice president and general superintendent. And having called his attention to the decline in market value of the stock, he wrote them from the company's office, on March 26, 1913:

If "at any time you feel really worried why come out and you can get your money to the value you paid for the stock from me."

To which they replied, March 27, 1913:

"For the present * * * we will not take advantage of your willingness to protect us, but will wait to see if the value of the preferred drops any further, for if this continues we would not care to retain our small holdings."

If this had been an unconditional acceptance the transaction would have been closed and the plaintiffs, upon delivery of the certificates, properly indorsed, would have been entitled to the amount invested. It was not, however, until August 26, 1913, after a receiver for the company had been appointed, that they accepted the offer and notified the defendant of their readiness to deliver the stock, but he refused performance. While the offer to buy was evidently for the purpose of protecting them from loss on the investment, and was not intended by the defendant as a purely business transaction, the words, "at any time," do not cover an unlimited period to be measured by the alternating hopes or fears of the plaintiffs, but must be construed as limited to a reasonable time. *Holland v. Cheshire R. R.*, 151 Mass. 231, 236, 24 N.E. 206. And the facts not being in dispute this was a question of law for the court. *Holbrook v. Burt*, 22 Pick. 546, 555. The plaintiffs, with knowledge of the fluctuating financial condition of the company, and the corresponding decline in the market price of the stock, having remained inactive for five months, we are of opinion that under these circumstances the presiding judge correctly ruled that the option had expired. *Park v. Whitney*, 148 Mass. 278, 19 N.E.

161. We find nothing in the remaining contents of these letters that calls for discussion. By the terms of the report, judgment on the verdict is to be entered for the defendant.

So ordered.

QUESTIONS:

1. Was the defendant's promise to repurchase a binding contract, making the power of the plaintiff irrevocable? See Restatement, Contracts, § 46.
2. How long would the plaintiff's power continue to exist, assuming that the defendant's promise was only a revocable offer, in the absence of any notice of revocation?
3. Would the plaintiff's power last longer than in question 2, if we assume that the defendant's promise was a binding contract, giving the plaintiff an irrevocable option?

NOTE

See Restatement, Contracts, § 40.

In *Kaplan v. Reid Bros., Inc.*, 104 Cal.App. 268, 285 P. 868 (1930), the defendant sold 10 shares to the plaintiff and promised to repurchase them at par "at any time" on 30 days' notice. The plaintiff gave this notice more than six years later. The court held that this was effective, saying: "Literally construed, it would give respondent the right to exercise the option in perpetuity; and even though it will not bear this interpretation as a matter of law, its inclusion in the contract is to be taken into consideration in determining what is a reasonable time for the exercise of the option under all the circumstances."

MINNESOTA LINSEED OIL CO. v. COLLIER WHITE LEAD CO.

Circuit Court of the United States, D. Minnesota, 1876.

4 Dill. 431, Fed.Cas.No.9,635.

This action was removed from the state court and a trial by jury waived. The plaintiff seeks to recover the sum of \$2,151.50, with interest from September 20, 1875—a balance claimed to be due for oil sold to the defendant. The defendant, in its answer, alleges that on August 3d, 1875, a contract was entered into between the parties, whereby the plaintiff agreed to sell and deliver to the defendant, at the city of St. Louis, during the said month of August, twelve thousand four hundred and fifty (12,450) gallons of linseed oil for the price of fifty-eight (58) cents per gallon, and that the plaintiff has neglected and refused to deliver the oil according to the contract; that the market value of oil after August 3d and during the month was not less than seventy (70) cents per gallon, and therefore claims a set-off or

counter-claim to plaintiff's cause of action. The reply of the plaintiff denies that any contract was entered into between it and defendant.

The plaintiff resided at Minneapolis, Minnesota, and the defendant was the resident agent of the plaintiff, at St. Louis, Missouri. The contract is alleged to have been made by telegraph.

The plaintiff sent the following dispatch to the defendant: "Minneapolis, July 29, 1875. To Alex. Easton, Secretary Collier White Lead Company, St. Louis, Missouri: Account of sales not enclosed in yours of 27th. Please wire us best offer for round lot named by you—one hundred barrels shipped. Minnesota Linseed Oil Company."

The following answer was received: "St. Louis, Mo., July 30, 1875. To the Minnesota Linseed Oil Company: Three hundred barrels fifty-five cents here, thirty days, no commission, August delivery. Answer. Collier Company."

The following reply was returned: "Minneapolis, July 31, 1875. Will accept fifty-eight cents (58c), on terms named in your telegram. Minnesota Linseed Oil Company."

This dispatch was transmitted Saturday, July 31, 1875, at 9:15 p. m., and was not delivered to the defendant in St. Louis, until Monday morning, August 2, between eight and nine o'clock.

On Tuesday, August 3, at 8:53 a. m., the following dispatch was deposited for transmission in the telegraph office: "St. Louis, Mo., August 3, 1875. To Minnesota Linseed Oil Company, Minneapolis: Offer accepted—ship three hundred barrels as soon as possible. Collier Company."

The following telegrams passed between the parties after the last one was deposited in the office at St. Louis: "Minneapolis, August 3, 1875. To Collier Company, St. Louis: We must withdraw our offer wired July 31st. Minnesota Linseed Oil Company."

Answered: "St. Louis, August 3, 1875. Minnesota Linseed Oil Company: Sale effected before your request to withdraw was received. When will you ship? Collier Company."

It appeared that the market was very much unsettled, and that the price of oil was subject to sudden fluctuations during the month previous and at the time of this negotiation, varying from day to day, and ranging between fifty-five and seventy-five cents per gallon. It is urged by the defendant that the dispatch of Tuesday, August 3d, 1875, accepting the offer of the plaintiff transmitted July 31st, and delivered Monday morning, August 2d, concluded a contract for the sale of the twelve thousand four hundred and fifty gallons of oil. The plaintiff, on the contrary, claims, 1st, that the dispatch accepting the proposition made July 31st, was not received until after the offer had been withdrawn; 2d, that the acceptance of the offer was not in due time; that the delay was unreasonable, and therefore no contract was completed.

NELSON, District Judge. It is well settled by the authorities in this country, and sustained by the later English decisions, that there is no difference in the rules governing the negotiation of contracts by correspondence through the post-office and by telegraph, and a contract is concluded when an acceptance of a proposition is deposited in the telegraph office for transmission. See 14 Am.Law Reg. 401, "Contracts by Telegraph," article by Judge Redfield, and authorities cited; also, *Trevor v. Wood*, 36 N.Y. 307, 93 Am.Dec. 511.

The reason for this rule is well stated in *Adams v. Lindsell*, 1 Barn. & Ald. 681. The negotiation in that case was by post. The court said:

"That if a bargain could not be closed by letter before the answer was received, no contract could be completed through the medium of the post-office; that if the one party was not bound by his offer when it was accepted (that is, at the time the letter of acceptance is deposited in the mail), then the other party ought not to be bound until after they had received a notification that the answer had been received and assented to, and that so it might go on *ad infinitum*." See, also, *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. 339; *Vassar v. Camp*, 11 N.Y. 441; *Mactier v. Frith*, 6 Wend. (N.Y.) 103, 21 Am.Dec. 262; *Abbott v. Shepard*, 48 N.H. 14; 8 C.B. 225. In the case at bar the delivery of the message at the telegraph office signified the acceptance of the offer. If any contract was entered into, the meeting of minds was at 8:53 of the clock, on Tuesday morning, August 3d, and the subsequent dispatches are out of the case. 1 Pars.Cont. 482, 483.

This rule is not strenuously dissented from on the argument, and it is substantially admitted that the acceptance of an offer by letter or telegraph completes the contract, when such acceptance is put in the proper and usual way of being communicated by the agency employed to carry it; and that when an offer is made by telegraph, an acceptance by telegraph takes effect when the dispatch containing the acceptance is deposited for transmission in the telegraph office, and not when it is received by the other party. Conceding this, there remains only one question to decide, which will determine the issues: Was the acceptance of defendant deposited in the telegraph office Tuesday, August 3d, within a reasonable time, so as to consummate a contract binding upon the plaintiff?

It is undoubtedly the rule that when a proposition is made under the circumstances in this case, an acceptance concludes the contract if the offer is still open, and the mutual consent necessary to convert the offer of one party into a binding contract by the acceptance of the other is established, if such acceptance is within a reasonable time after the offer was received.

The better opinion is, that what is, or is not, a reasonable time, must depend upon the circumstances attending the negotiation, and the character of the subject matter of the contract, and in no better way

can the intention of the parties be determined. If the negotiation is in respect to an article stable in price, there is not so much reason for an immediate acceptance of the offer, and the same rule would not apply as in a case where the negotiation related to an article subject to sudden and great fluctuations in the market.

The rule in regard to the length of the time an offer shall continue, and when an acceptance completes the contract, is laid down in Parsons on Contracts (volume 1, p. 482). He says: "It may be said that whether the offer be made for a time certain or not, the intention or understanding of the parties is to govern. * * * If no definite time is stated, then the inquiry as to a reasonable time resolves itself into an inquiry as to what time it is rational to suppose the parties contemplated; and the law will decide this to be that time which as rational men they ought to have understood each other to have had in mind." Applying this rule, it seems clear that the intention of the plaintiff, in making the offer by telegraph, to sell an article which fluctuates so much in price, must have been upon the understanding that the acceptance, if at all, should be immediate, and as soon after the receipt of the offer as would give a fair opportunity for consideration. The delay here was too long, and manifestly unjust to the plaintiff, for it afforded the defendant an opportunity to take advantage of a change in the market, and accept or refuse the offer as would best subserve its interests.

Judgment will be entered in favor of the plaintiff for the amount claimed. The counter-claim is denied. Judgment accordingly.

NOTE

When no limit is specified, the power of acceptance lasts only a reasonable time, this varying with the circumstances. *Averill v. Hedge*, 12 Conn. 424 (1838), offer made, and after two weeks' delay renewed on the 18th; acceptance mailed on 20th held too late. As to when an offer of a reward would lapse, see *Loring v. City of Boston*, 7 Metc. (Mass.) 409 (1844); *Matter of Kelly*, 39 Conn. 159 (1872). Where a reward is offered for information, the power of acceptance lapses as soon as the information is given by the first informer. *Lancaster v. Walsh* (Exch.) 4 M. & W. 16 (1838).

Where there is a time limit specified, the power ends instantly at the expiration of this time. This is also usually true in the case of irrevocable powers, called option contracts. *Berg Co. v. Thomas & Son Co.*, 256 Pa. 584, 100 A. 951 (1917); *Mackey Wall Plaster Co. v. United States Gypsum Co.* (D.C.) 244 F. 275 (1917). But cf. *Xanthakey v. Hayes*, 107 Conn. 459, 140 A. 808 (1928), where a lessee had an option to buy the leased premises, with the privilege of making improvements. Having made costly improvements in expectation of exercising his option to buy, his notice of acceptance was held to be effective, even though he had inadvertently failed to give it within the exact period specified.

MACTIER'S ADM'RS v. FRITH.

Court of Errors of New York, 1830. 6 Wend. 103, 21 Am. Dec. 262.

Appeal from chancery.

At New York, in the autumn of 1822, the respondent and Henry Mactier the intestate, agreed to embark in a commercial adventure, in which they were to be jointly and equally interested. Frith was to direct a shipment of 200 pipes of brandy from France to N. Y., to be consigned to Mactier, who was to ship to the respondent at Jacmel in St. Domingo, provisions to the amount of the invoice cost of the brandy, and the respondent was to place the shippers of the brandy in funds by shipments of coffee to France in French vessels, and the parties were to share equally in result of the speculation all around. In pursuance of this arrangement, Frith, Sept. 5, 1822, wrote Firebrace, Davidson & Co., a mercantile house at Havre, to ship 200 pipes of brandy to N. Y. to the consignment of Mactier. Dec. 24, Frith, who had returned to Jacmel, where he did business as a merchant, wrote a letter to Mactier on a variety of subjects, in which was contained a paragraph in these words: "I also have the pleasure of handing you copies of Messrs. Firebrace, Davidson & Co.'s letters regarding the brandy order. By-the-bye, as your brother, before I left New York, declined taking the interest I offered him in this speculation, and wishing to confine myself in business as much as possible, so as to bring my concerns to a certain focus, I would propose to you to take the adventure solely to your own account, holding the value to cover the transaction to my account in New York."

Jan. 17, 1823, Mactier wrote to Frith, acknowledging the receipt of his letter of the 24th ult.; thanks him for sending the copy of Firebrace, Davidson & Co.'s letter on the subject of the brandy order; says that he has received a letter from them, informing that the brandy would be shipped and leave Bordeaux about Dec. 1 then past; and adds: "This has been from the first a favorite speculation with me, and am pleased to say it still promises a favorable result; but to render it complete, I am desirous the speculation should go forward in the way first proposed, thereby making it a treble operation; as you have, however, expressed a wish that I should take the adventure to my own account, I shall delay coming to any determination till I again hear from you. The prospect of war between France and Spain may defeat the object of this speculation, as far as relates to the shipment of provisions hence to Hayti to be invested in coffee for France, in which case I will at once decide to take the adventure to my own account. Our London accounts, down to the fifth of December, speak confidently of a war between France and Spain, a measure which, if carried into effect, would operate to your disadvantage." Also: "The next arrival from Europe will probably decide the question of peace or war, and I

will lose no time in communicating the same to you"; and also, "let what will happen, I trust you will in no way be a sufferer."

March 7, 1823, Frith wrote Mactier, making no other allusion to the last letter of Mactier than the following: "I have received your esteemed favors of the 17th and 31st January, and note their respective contents." March 12, 1823, the ship *La Claire* arrived at N. Y., laden with the brandy in question, and was at the wharf on the morning of March 13.

A clerk of Mactier testified that he had a conversation with Mactier about the time the brandy arrived, perhaps the morning after, and Mactier then said he should take it to himself. A merchant of N. Y. also testified that Mactier consulted with him on the subject of some brandy which he expected to arrive; there was some offer for his taking it on his own account, and he appeared inclined to take it. From the state of things, he advised Mactier to take it, and there was a letter drafted by Mactier upon the subject, in which the merchant made some alterations. The letter stated that he, Mactier, should take the brandy to his own account. March 17, Mactier entered the brandy at the custom-house as owner, and not as consignee, took the usual oath, and gave bond for the duties. March 22, he sold 150 pipes of the brandy on the wharf to several commercial houses, and took their notes for the price of the same. The remaining 50 pipes were put in the public store, and remained there in bond, the liquidated duties not having been secured to be paid by Mactier.

March 25, Mactier wrote a letter, directed to Frith, at Jacmel, in which he said, "I have now to advise the arrival of French ship *La Claire* with the 200 pipes of brandy, and that in consequence of the probability of war between France and Spain, and in compliance with the wish expressed in your regarded favor of the 24th December and my answer thereto of the 17th January last, I have decided to take this adventure to my own account. I, therefore, credit you with the amount of the invoice," amounting to \$14,254.57. To this letter was attached a postscript, dated March 31.

March 28, Frith wrote a letter to Mactier, dated at Jacmel, in which, speaking of the brandy in question he says: "With regard to this adventure, I would wish to confirm, if altogether satisfactory to you, what I mentioned to you some time ago, and which I omitted to repeat to you in my previous letter, in reply to yours of the 17th January. I find the more one does in this country, in the present state of trade, the more one's affairs get shackled." Previous to the arrival of these last two letters at their respective places of direction, Mactier was dead, he having departed this life April 10, 1823. April 21, Frith again wrote a letter addressed to Mactier, in which he acknowledges the receipt of his letter of March 25, says he has noted its contents, and requests Mactier to charter on his account a staunch first-class vessel, and send out

to Jacmel by her 400 barrels of flour and other goods. Meantime, Mactier having died, his administrator obtained the rest of the brandy from the custom house and sold it at auction.

The respondent, unwilling to come in as a general creditor of Mactier and receive a pro rata distribution, filed his bill in the court of chancery, on April 1, 1824, alleging that the brandy was shipped from France on his sole account, and that Mactier was only the consignee thereof. He admits having offered to sell the brandy to Mactier, but declares that he regarded his offer as declined by the letter of Jan. 17. He sets forth a letter written by Mactier on March 13, 1823, in which he writes of the brandy as follows: "I am looking daily for its arrival; it is to be regretted the order was not more promptly executed, as the delay, I fear, will operate to our disadvantage. War between France and Spain may now be considered inevitable; France has recalled her minister, and 100,000 Frenchmen have been ordered to march into Spain." He alleges that the letter of Mactier to him of March 25 was not received until several days after the death of Mactier, and that his letter to Mactier of April 21 was written in ignorance of the death of Mactier, and that he did not intend thereby, and he conceives he did not finally consummate the sale as claimed.

The bill concludes by praying an account of the sales of the brandy, and a decree directing the defendants to retain in their hands sufficient of the funds belonging to the estate of Mactier to pay and satisfy the respondent when his accounts shall be settled and adjudged upon by the court.

The defendants put in their answer, insisting that the brandy, on its arrival at the port of New York, was the sole and exclusive property of Mactier, and that the portion thereof which came to their hands at his decease, and the proceeds of that part thereof which was sold by him in his lifetime, and which came to their hands, rightfully belonged to his estate, and was subject to be disposed of in a due course of administration.

On March 1, Mactier had effected an insurance on his commissions as consignee of the brandy, to the amount of \$1,500; but on March 17, he had entered the brandy in the custom house as his own, using an invoice stating that the brandy was shipped "to the address and for the account of Henry Mactier." On the date of such entry, a clerk had charged a small custom house fee to "John A. Frith's sales of brandy" on Mactier's books; but later Mactier directed the account to be made out to himself, and on March 28 Frith was credited on the books with the invoice price of the brandy.

On May 20, 1825, Chancellor Sanford made an order referring the case to a master to examine witnesses and report. The master reported on Oct. 10, 1825, that the sale had been consummated and that Frith

had no lien on the brandy and no rights other than those of a general creditor. The complainant excepted to this report, and the Chancellor subsequently sustained the exceptions and decreed that Frith was entitled to the specific proceeds of the sale of the brandy. From this decree the defendants appealed.

MARCY, J. The object of the bill filed in this case is to obtain from the administrators of Mactier the proceeds of the 50 pipes of brandy which came to their possession after his death, and the amount of such notes taken on the sale of the 150 pipes, March 22, 1823, as were uncollected and undisposed of at the death of Mactier, or, at least, so much thereof as may be necessary to pay the balance due the respondent for disbursements on account of the adventure. The question on which the decision in this case, as I apprehend, mainly depends, relates to the alleged sale of the brandy to Mactier. There are many definitions of what constitutes a contract, but all of them are, of course, substantially alike. Powell states a contract to be a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. *Pow. Cont.* 4. In testing the validity of contracts, many things are to be considered. The contract that the appellant sets up in this case is alleged by the respondent to be deficient in several essential requisites. When that was done which, on the assumption of there being parties capable of contracting, was necessary, as the respondent contends, to complete it, Mactier was dead. If the contract was only in progress of execution, and there remained but a single act to be done to complete it, his death rendered the performance of that act impossible; it suspended the proceedings at the very point where they were when it occurred.

[The learned judge here discussed the question whether an act performed after Mactier's death might not be operative by the doctrine of "relation back" as if performed prior to his death.]

My conclusion, in regard to this objection to the alleged contract, is, that if any act was required to be done, even by Frith, to complete the sale when Mactier died, that act could not be subsequently performed.

I am now to consider whether there was a contract, before Mactier's death, which had the consent of the contracting parties so given and made known as to be binding on them. That a consent is necessary all agree, but what shall constitute it in a given case may admit of much diversity of opinion. The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. *Poth. Cont. de Vente*, pl. 1, § 2, art. 3, No. 31. Delvincourt, another eminent French writer on the Civil Code of France, says, that although it is impossible that there should be a contract without the consent of

all parties, it is not indispensable that the wills of the parties should concur at the same instant, provided the will of the one that did not concur at first, is declared before the will of the other is revoked. 5 Cours de Code Civil, 93. Although the will of the party making the offer may precede that of the party accepting, yet it must continue down to the time of the acceptance. Where parties are together chaffering about an article of merchandise, and one expresses a present willingness to accept of certain terms, that willingness is supposed to continue, unless it is revoked, to the close of their interview and negotiation on the same subject, and if during this time the other party says he will take the article on the terms proposed, the bargain is thereby closed. Poth.Cont. de Vente p. 1, § 2, art. 3, No. 31. What I mean by its being closed is, that nothing mutual between the parties remains to be done to give to either a right to have it carried into effect; either can enforce it against the other, or recover damages for the nonfulfillment of it; but if there be conditions expressed or implied to be performed by the purchaser, he cannot compel the delivery until they are performed. If the price is to be immediately paid or security given, he cannot have the property until payment made, or security given, or a tender thereof. Touch. 204, 205; Noy, Max. c. 42; 2 Bl.Comm. 447.

Where the negotiation between the contracting parties residing at a distance from each other is conducted, as it usually is by letters, it is necessary, in order that their minds may meet, that the will of the party making the proposition to sell should continue until his letter shall have reached the other, and he shall have signified, or at least had an opportunity to signify his acceptance of the proposition. This Pothier holds to be the legal presumption unless the contrary appears. His language is: "*Cette volonté est présumée tant qu'il ne paraît rien de contraire.*" This doctrine, which presumes the continuance of a willingness to contract after it has been manifested by an offer is not confined to the civil law and the codes of those nations which have constructed their systems with the materials drawn from that exhaustless storehouse of jurisprudence: it is found in the common law; indeed, it exists, of necessity, wherever the power to contract exists in parties separated from each other. The rule of the common law is, that wherever the existence of a particular subject-matter or relation has been once proved, its continuance is presumed till proof be given to the contrary, or till a different presumption be afforded by the nature of the subject-matter. 16 East, 55; 3 Starkie, Ev. 1252. The case of *Adams v. Lindsell*, 1 Barn. & Ald. 681, proceeds upon and affirms the principle that the willingness to contract thus manifested is presumed to continue for the time limited, and, if that be not indicated by the offer, until it is expressly revoked or countervailed by a contrary presumption. In that case it was said, "The defendants must be considered in law as making during every instant of time their letter was traveling the

same identical offer to the plaintiffs; and then the contract is complete by the acceptance of it by the latter."

Against the authority of the case of *Adams v. Lindsell*, we have urged on us a decision of a court of the highest respectability in one of our sister states. The case of *McCulloch v. Insurance Co.*, 1 Pick. (Mass.) 278, conflicts in principle, according to my views of it, with the case decided by the King's Bench. I should have been pleased to see these tribunals harmonize upon a question of no small importance to the commercial world; and I have, therefore, deliberately weighed the ingenious attempts made to reconcile these decisions upon this point; but these attempts appear to me to have been unsuccessful. A refinement which would distinguish between a contract for insurance, and one for the sale of goods in relation to the assent of the parties, might relieve us from the embarrassment which the different principles of these decisions is calculated to produce; but to apply such a distinction hereafter would doubtless involve courts in a still more distressing embarrassment. Distinctions, which are not founded on a difference in the nature of things, are not entitled to indulgence; they tend to make the science of law a collection of arbitrary rules appealing to factitious reasons for their support, consequently difficult to be acquired, and often of uncertain application. The two cases referred to should have had applied to them the same rule of law, and we are required to say what that rule is in deciding the case now under consideration.

The principle of the decision of the King's Bench is simply that the acceptance of an offer made, through the medium of a letter, binds the bargain if the party making the offer has not revoked it, as he has a right to do before it is accepted. The rule laid down by the supreme court of Massachusetts regards the contract as incomplete until the party making the offer is notified of the acceptance, or until the time when he should have received it, the party accepting having done what was incumbent on him to give notice. The chancellor in deciding this case gave his sanction to the latter rule: "To make a valid contract," he says, "it is not only necessary that the minds of the contracting parties should meet on the subject of the contract, but they must know that fact." The decision of the court of Massachusetts makes knowledge by the party tendering the offer of the other's acceptance essential to the completion of the contract. If one party is not bound till he knows or might know, and therefore is presumed to know that the other has accepted, the accepting party, on the same principle, ought not to be bound till he knows the offering party has not recalled the offer before knowledge of the acceptance. The principle of that case would bring the matter to the point stated by the chancellor, viz.: the parties must know that their minds meet on the subject of the contract. If a bargain can be completed between absent parties, it must be when

one of them cannot know the fact whether it be or be not completed. It cannot begin to be obligatory on the one before it is on the other; there must be a precise time when the obligation attaches to both, and this time must happen when one of the parties cannot know that the obligation has attached to him; the obligation does not, therefore, arise from a knowledge of the present concurrence of the wills of the contracting parties.

All the authorities state a contract or an agreement (which is the same thing) to be *aggregatio mentium*. Why should not this meeting of the minds, which makes the contract, also indicate the moment when it becomes obligatory? I might rather ask, is it not and must it not be the moment when it does become obligatory? If the party making the offer is not bound until he knows of this meeting of minds, for the same reason the party accepting the offer ought not to be bound when his acceptance is received, because he does not know of the meeting of the minds, for the offer may have been withdrawn before his acceptance was received. If more than a concurrence of minds upon a distinct proposition is required to make an obligatory contract, the definition of what constitutes a contract is not correct. Instead of being the meeting of the minds of the contracting parties, it should be a knowledge of this meeting. It was said on the argument that if concurrence of minds alone would make a valid contract, one might be constructed out of mere volitions and uncommunicated wishes; I think such a result would not follow. The law does not regard bare volitions and pure mental abstractions. When it speaks of the operations of the mind it means such as have been made manifest by overt acts; when it speaks of the meeting of minds it refers to such a meeting as has been made known by proper acts, and when thus made known it is effective although the parties who may claim the benefit of or be bound by a contract thus made, may for a season remain ignorant of its being made. * * *

What shall constitute an acceptance will depend, in a great measure, upon circumstances. The mere determination of the mind, unacted on can never be an acceptance. Where the offer is by letter, the usual mode of acceptance is the sending of a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him, or sent by another, would seem to be all the law requires, if the contract may be consummated without writing. There are other modes which are equally conclusive upon the parties; keeping silence, under certain circumstances, is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in a proper way to be communicated to the party making the offer, would doubtless complete the contract; but a letter written would not be an acceptance, so long as it remained in the possession or under the control of the writer. An

acceptance is the distinct act of one party to the contract as much as the offer is of the other; the knowledge by the party making the offer, of the determination of the party receiving it, is not an ingredient of an acceptance. It is not compounded of an assent by one party to the terms offered, and a knowledge of that assent by the other.

I will now apply this law to the facts of this case. Frith's offer to sell his interest in the brandy certainly continued till his letter of Dec. 24 was received at New York and Mactier had a fair opportunity to answer it. If the answer of Jan. 17 had contained an unqualified acceptance, the bargain would have been closed when it was sent away for Jacmel; but the offer was not then accepted; there was a promise to accept upon a contingency, for Mactier says, after alluding to the prospect of a war between France and Spain, "in which case," that is in case of such a war, "I will at once decide to take the adventure to my own account." This concluded nothing. If the event had actually happened, and Frith had insisted on enforcing this conditional acceptance, it would not have been in his power to do so. The most that Mactier said was, that if an expected event happened, he would do an act which would complete the bargain. The happening of the event could not, without the act, complete it. The Roman law regarded the tense of the verb used by the contracting parties to determine whether the bargain was concluded: "*Verbum imperfecti temporis rem adhuc imperfectam significat.*" There is a wide difference between a promise to give an assent to a proposition for a contract on the happening of a contingency, and the annunciation of a present assent to it. If the expected event happens, and the act promised is performed, the bargain is closed; but it is the promised acceptance, and not the happening of the event, that gives validity to the contract. If in this case the offer of Frith had been to Mactier to take the brandy on the happening of a French and Spanish war, and Mactier had promised to decide to take it in such an event, the simple fact of his taking it after the war would have enabled Frith to treat him as the purchaser of it. Such an act would have been a valid acceptance; but a conditional acceptance of an unconditional offer, followed up by acts of the acceptor after the condition was fulfilled on which the acceptance depended, might not be considered as completing the bargain without the acquiescence of the party making the offer in those acts, because the minds of the parties would not have met on the precise terms of the contract.

To conclude the bargain, Mactier must have accepted the offer as tendered to him by Frith, and that acceptance must have been while the offer, in contemplation of law, was still held out to him. That there was an acceptance, or rather that Mactier did all that was incumbent on him to do, to effect an acceptance, was not denied; but it was insisted, on the part of the respondent, that it was made after the offer was withdrawn. It will be necessary to consider when this acceptance

took place, as preparatory to settling the fact of the continuance of the offer down to that time. There is not the slightest evidence of the determination on the part of Mactier to take the brandy before March 17. The insurance that he effected on his commissions March 1 disproves the existence of such a determination on that day; but if the situation of the parties was changed, and Frith was now endeavoring to set up the contract, I am at a loss to conceive how Mactier's representatives could withstand the force of the facts which took place March 17. In answer to the offer, Mactier delayed coming to a determination thereon, but promised to accept it if there should be a war; March 17, when that event was considered as settled, he entered the brandy as his own property, and told his clerk that he had determined to take it. But if there should be any doubt as to the effect of this conduct, there can be none as to his subsequent acts. By a letter dated the 25th with a postscript of March 31, he accepted the offer. This letter was immediately transmitted to Frith, and as soon as March 28, entries were made in his books showing that he had become the purchaser. Enough was done by the 31st to constitute an acceptance of Frith's offer and to complete the bargain, if the offer can be considered as standing till that day.

An offer, when once made, continues, as I have heretofore shown, to the satisfaction of my own mind at least, until it is expressly revoked, or until circumstances authorize a presumption that it is revoked. The offer itself may show very clearly when the presumption of revocation attaches. Where it is made to be replied to by return mail, the party to whom it is addressed must at once perceive that it is not to stand for an acceptance, to be transmitted after that mail. If an offer stands until it is expressly withdrawn, or is presumed to be withdrawn, whether it is held out to a party at a particular period or not, is a matter of fact. Then we are to determine, as a matter of fact, whether Frith's offer was held out for Mactier's acceptance until March 31; if Frith intended it should stand on, and he viewed himself as tendering it to Mactier down to that time, we are bound to regard it as standing, unless his intention was the result of the fraudulent conduct of Mactier. The acts of Frith, after the death of Mactier, could do nothing towards completing an unfinished contract; but I think they may be fairly adverted to for the purpose of ascertaining his intentions in relation to the continuance of his offer. March 7, he acknowledges Mactier's letter of Jan. 17, which did not decline, as it has been construed to do, the offer, but apprised him that it was kept under advisement; and by using the expression, "noting the contents," Frith is, I think, to be understood as yielding to the proposed delay. If a doubt as to this construction of that letter could spring up in the mind, it would be at once removed by the perusal of the letter of the 28th of the same month. In that he expresses a wish to confirm what

he had said in the letter making the offer to sell, and declares that he had in a previous letter, which must mean that of the 7th, omitted to communicate the same thing. In answering Mactier's letter which contained the acceptance of his offer, he recognizes the bargain as closed, and gives directions as to investing the proceeds of the brandy. All the subsequent correspondence acquiesces in the sale. It appears to me to be impossible to say, after reading the letters of Frith written subsequent to his knowledge of Mactier's acceptance, that he did not consider the offer as held out to Mactier down to the time when it was accepted, and the bargain closed by that acceptance; and I think we must adjudge it to have been closed, unless the agreement was nugatory by reason that the thing to which it related had not an actual or potential existence when the contract was consummated. • • •

Reversed.⁴

QUESTIONS:

1. On what date was a contract for the sale of the brandy consummated?
2. Was not Mactier's letter of January 17 either a counter offer or a conditional acceptance?
3. What made Frith's offer of December 24 remain operative as late as the day in March when Mactier accepted?
4. Did Frith's letters of March 28 (never seen by Mactier) and April 21 (written after Mactier's death) have any legal operation?
5. When and why did Frith change his mind with respect to selling the brandy to Mactier?
6. What had Frith to gain by establishing that no contract was consummated?
7. Can this decision be justified if we adopt the subjective theory of contract, requiring an *aggregatio mentium* (or concurrence of wills)?
8. What are the purpose and effect of "presuming" that an offeror's assent continued, even though at the trial he clearly proves that it did not continue?

TINN v. HOFFMANN & CO.

In the Exchequer Chamber, 1873. 29 Law T.R.[N.S.] 271.

This was an action brought by the plaintiff against the defendants to recover damages in respect of a breach of contract to deliver 800 tons of iron; and by the consent of the parties, and by order of Martin, B.,

⁴ The statement of facts has been re-written in part, the opinion of Marcy, J., has been abbreviated, and several opinions of other judges have been omitted.

dated May 30th, 1872, the facts were stated for the opinion of the Court of Exchequer in the following special case:

1. The plaintiff, Mr. Joseph Tinn, is an iron manufacturer, carrying on business at the Ashton Row Rolling Mills, near Bristol; and the defendant, who trades under the name and style of Hoffmann & Co., is an iron merchant, carrying on business at Middlesbro'-on-Tees.

2. In the months of November and December, 1871, the following correspondence passed between the plaintiff and the defendant relating to the proposed purchase and sale of certain iron, the particulars of which fully appear in the letters hereinafter set forth:

The plaintiff to the defendant:

"November 22, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: Please quote your lowest price for 800 tons No. 4 Cleveland, or other equally good brand, delivered at Portishead at the rate of 200 tons per month, March, April, May, and June, 1872. Payment by four months' acceptance.

"Yours truly,

J. Tinn."

3. The defendants' reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"November 24, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: We are obliged by your inquiry of the 22d inst., and by the present beg to offer you 800 tons No. 4 forge Middlesbro' pig iron (brand at our option, Cleveland if possible), at 69s. per ton delivered at Portishead, delivery 200 tons per month, March, April, May, and June, 1872, payment by your four months' acceptance from date of arrival.

"We shall be very glad if this low offer would induce you to favor us with your order, and waiting your reply by return, we remain, dear Sir, yours truly,

A. Hoffmann & Co."

4. The plaintiff to the defendant:

"Bristol, November 27, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: The price you ask is high. If I made the quantity 1200 tons, delivery 200 tons per month for the first six months of next year I suppose you would make the price lower? Your reply per return will oblige

J. Tinn."

5. The defendant to the plaintiff in reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"November 28, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: In reply to your favor of yesterday, we beg to state that we are willing to make you an offer of further 400 tons No. 4 forge

Middlesbro' pig iron, 200 tons in January, 200 tons in February, at the same price we quoted you by ours of the 24th inst., though the rate of freight at the above-named time will doubtless be considerably higher than that of the following months.

"Our today's market was very firm again, and we feel assured we shall see a further rise ere long.

"Kindly let us have your reply by return of post as to whether you accept our offers of together 1200 tons and oblige yours truly,

"A. Hoffmann & Co."

6. The plaintiff to the defendant:

"Bristol, November 28, 1871.

"Messrs. Hoffmann & Co.:

"No. 4 Pig iron.

"Dear Sirs: You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton. Yours faithfully,

Joseph Tinn."

7. The defendants' reply:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"November 29, 1871.

"Joseph Tinn, Esq.:

"Dear Sir: We are obliged by your favor of yesterday, in reply to which we are sorry to state that we are not able to book your esteemed order for 1200 tons No. 4 forge at a lower price than that offered to you by us of yesterday—viz., 69s., and even that offer we can only leave you on hand for reply by to-morrow before twelve o'clock. Waiting your reply, we remain, dear sir, yours truly,

"A. Hoffmann & Co."

8. On December 1st, 1871, the plaintiff sent a telegram to the defendant, of which the following is a copy:

"From Tinn, Ashton.

"To Hoffmann & Co., Middlesbro'-on-Tees.

"Book other 400 tons pig iron for me, same terms and conditions as before."

And on the same day the plaintiff sent a letter to the defendant, of which the following is a copy:

"December 1, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: I have your favor of the 29th ult. Please enter the remaining 400 tons No. 4 Forge Pig at 69s. ex-ship Portishead, delivery to commence January, 1872, payment by four months' acceptance against delivery. Kindly send me sold note for the 800 and 400 tons, and oblige, yours truly,

J. Tinn."

9. The following correspondence then took place between the plaintiff and the defendants' clerk, duly authorized in that behalf.

The defendants' clerk to the plaintiff:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"December 1, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: We have your telegram on this day, 'Book other 400 tons Pig iron, same terms and conditions as before,' which we note and shall lay before our Mr. Hoffmann on his return next week. Yours truly,
for A. Hoffman & Co. C. Jerveland."

10. Memorandum.

"December 2, 1871.

"From A. Hoffman & Co., Middlesbro'-on-Tees.

"To Joseph Tinn, Esq., Bristol:

"The contents of your yesterday's favor is noted, and we shall lay same before our principal on his return next week."

11. The defendants to the plaintiff:

"The Queen's Hotel, Manchester, December 4, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: I am in receipt of telegram 'Book other 400 tons, same terms and conditions as before,' and favor of 1st inst. addressed to my firm, in reply to which I very much regret to state that I am not able to book the 1200 tons in question, as your reply to ours of November 28th and 29th did not reach us within the stipulated time; and as I had other offers for the same lot, I disposed of the latter previous to my leaving Middlesbro' and receiving your decision.

"Trusting to be more fortunate in future, I remain, dear sir, yours truly,
A. Hoffmann & Co."

12. The plaintiff to the defendant:

"December 5, 1871.

"Messrs. Hoffmann & Co.:

"Dear Sirs: I regret you cannot enter me the 400 tons No. 4 Forge Pig on the same terms as the 800 tons. Please send me sold note for 800 tons per return. Yours truly,
J. Tinn."

13. The reply of the defendants:

"Royal Exchange Buildings, Middlesbro'-on-Tees,

"December 6, 1871.

"Joseph Tinn, Esq., Bristol:

"Dear Sir: Your favor of yesterday to hand, in reply to which we have to state that we cannot send you contract for pig iron, having sold you none.

"The quotation for 1200 tons in our respect of 29th ult. was for your acceptance by 12 o'clock the 30th; and failing to receive such we disposed of the iron, being under other offers, as already intimated to you

by our Mr. Hoffmann, and it is now utterly impossible for us to book you the quantity you require, or you may rest assured that we willingly would do so. We are, dear sir, yours truly,

“Pro. A. Hoffmann & Co.

C. Jerveland.”

14. It is agreed that all the facts and circumstances mentioned in the above correspondence are true, and that the court are to have power to draw all inferences of facts in the same way as a jury might do.

15. The course of post between Bristol and Middlesbrough is one day.

16. The plaintiff contends that he has a binding contract with the defendant whereby the defendants are bound to deliver to him 800 tons of iron. The defendants, on the other hand, contend that there is no such contract, and refuse to deliver any of the said iron.

The questions for the opinion of the Court are, first, whether, upon the facts stated and documents set out in the case, there is any binding contract on the part of the defendants to deliver 800 tons of iron to the plaintiff; secondly, whether, upon the facts and documents set out in the case, there is any binding contract on the part of the defendants to deliver any quantity of iron to the plaintiff, and if yea, what quantity and on what terms and conditions.

[The Court of Exchequer (BRAMWELL, CHANNELL, and PIGOTT, BB.) gave judgment for the defendant; the Lord Chief BARON (KELLY) dissenting in the belief that there was a contract for 800 tons. The plaintiff brought error to this Court.]

HONYMAN, J. I am of opinion that the judgment of the Court below was wrong, and that judgment ought to be entered for the plaintiff in respect of 800 tons. The question depends entirely on the construction and effect of the defendants' letter of the 24th and the two letters of November 28th, 1871, one written by the plaintiff and the other by the defendants. The plaintiff had been inquiring at what price the defendants would let him have 800 tons of iron, and by their letter of November 24th they named 69s. per ton as the price for the 800 tons, to be delivered at the rate of 200 tons per month, in the four months of March, April, May, and June, 1872; and that letter concluded thus, “waiting your reply by return.” Mr. Kingdon, on the part of the plaintiff, admitted, and I think very properly, that the meaning of that was, we offer you that price, provided you accept it by return. Inasmuch as it was not accepted by return, as it stood, I presume had it stopped there, there would have been no contract. The plaintiff not only did not accept by return, but, on the contrary, he objected to the price, for on November 27th he wrote saying that the price was too high, and asking whether if he increased the quantity to 1200 tons, to be deliverable 200 tons per month—that is to say, in addition to the quantity he had already proposed for, to be delivered in March, April,

May, and June, 1872, 400 tons more, to be delivered 200 tons in January and 200 in February, 1872, that would make the price lower. Upon that, on November 28th, the defendants wrote the following letter, on the construction of which I believe the difference of opinion among the members of the Court mainly arises [Reads letter of that date.] What is the meaning of that letter? It amounts to this: On November 24 we offered you 800 tons for delivery at 69s.; we now repeat to you that offer, and in addition to that, we make a further offer of 400 tons more—that is, we renew the offer of November 24th, and we make you a further offer of 400 tons, provided you accept those offers “by return of post.” That does not mean exclusively a reply by letter by return of post, but you may reply by telegram or by verbal message, or by any means not later than a letter written and sent by return of post would reach us. If that is so, then comes the plaintiff’s letter, written on the same day, November 28th, which crosses the defendants’ letter of the same date, in which the plaintiff said, “You can enter me 800 tons on the terms and conditions named in your favor of the 24th inst., but I trust you will enter the other 400, making in all 1200 tons, referred to in my last, at 68s. per ton, ex ship Portishead.”

I cannot agree in the opinion said to have been expressed by my Brothers Pigott and Channell in the Court below. As I understand, my Brother Pigott certainly says this is not a clean offer, or a clean acceptance of 800 tons, but that it is 800 tons on the condition or hope or trust that they would lower the price of the other 400 tons. I cannot accede to that view of the case. I assume that it plainly amounts to this, “I will take your 800 tons on the terms and conditions mentioned in the letter of the 24th inst., but I hope you will let me have the other lot at 68s. per ton; if you choose to do that, well and good.” I cannot understand how it can be said that that is not an absolute acceptance of the 800 tons, supposing it was competent to the plaintiff to accept that quantity. In the Court below it seems to have been treated as if the offer of November 28th was one offer of 1200 tons. I do not think so. I think it is a repetition of the offer of 800 tons coupled with a further offer of 400 tons, and that it was competent to the plaintiff to accept one and not accept the other. My Brother Bramwell appears to have thought that it was not material to consider whether it was two separate offers of 400 tons and 800 tons, or an offer of 1200 tons, because in either view of the case, the plaintiff could not accept the one and reject the other. If it is to be construed as strictly one offer of 1200 tons, I can understand it, and then of course he could not accept the one and reject the other. But I do not think it is one offer of 1200 tons, nor two offers one of 400, and the other of 800 tons, but that it is a repetition of the offer of 800 tons, with a further offer of further 400 tons. To say that he could not accept the 400 tons without the 800 tons seems, in my view of the matter, to throw no light

on the question whether he might accept the 800 tons without the 400 tons. That being so, it being in my judgment a separate offer of 800 tons, and 400 tons in addition, I should have thought, had the plaintiff's letter of the 28th been written on November 29th, that nobody, but for the opinions which have been expressed here to-day, could have entertained a doubt that it would have been an acceptance. What, then, is the effect when the two letters are written on the same day and crossed each other in the post? Does that make any difference?

On this part of the case, as far as I can gather from the notes that have been given us of the judgments below, my Brother Bramwell is of the same opinion as I am, because I understand him to say that, if he had thought that these were two offers, and that the two offers were capable of being accepted the one without the other, then the fact of the acceptance crossing the offer would have been no bar to the contract. After the plaintiff had written the letter of November 28th mentioning the 800 tons, it could not be said that he would not have been bound by the defendants' letter of the same date, if it had been written on November 29th. I do not see how it can be contended that there would not then have been a valid contract for 800 tons, except with regard to the question of whether it were one offer, or two offers. Of course, if it is one offer, that is one thing; but if it be two offers, then, if the defendants' letter of November 28th had been written on the 29th, after he had received the plaintiff's letter of the 28th, it could not be said that that did not make a good contract for 800 tons. I cannot see why the fact of the letters crossing each other should prevent their making a good contract. If I say I am willing to buy a man's house on certain terms, and he at the same moment says that he is willing to sell it, and these two letters are posted so that they are irrevocable with respect to the writers, why should not that constitute a good contract? The parties are *ad idem* at one and the same moment. On these grounds it appears to me that the judgment of the Court below was wrong, and ought to be reversed. I speak with some hesitation in this case when I find that the opinion of the majority of my Brothers is against me, and also when the question turns entirely on the construction of a somewhat ambiguously written letter.

BRETT, J. The question is, whether upon a true construction of this correspondence, there is a binding contract between the plaintiff and the defendants for the 800 tons of iron at 69s. It is argued on the one side that such a contract is disclosed because it is said that the defendants' letter of November 24th is an offer for the sale of 800 tons of iron, and this letter of November 28th leaves open the time for accepting that offer of November 24th, and makes a new offer with regard to another 400 tons; and that the defendants' offer of November 24th being thus opened by their letter of the 28th, the plaintiff's letter of the 28th is an acceptance of the defendants' offer of the 24th. On the other side

It is argued that the defendants' letter of November 28th is not an opening of their offer of the 24th, but that it is an offer with regard to 1200 tons; and that even if it were a separate offer with regard to 800 tons and 400 tons, still that the true view of the matter is not that it re-opens the letter of the 24th, but that it makes a new offer with regard to the 800 tons, and another separate offer, with regard to 400 tons; and that, upon such a view, the renewed offer with regard to 800 tons is not accepted, because the letter of the plaintiff of November 28th was not in answer to that offer, but was a letter crossing it. Now with regard to the construction of the defendants' letter of November 28th, it seems to me that we must consider that the defendants' letter of November 24th is in answer to a request of the plaintiffs of November 22d for an offer with regard to 800 tons, and is therefore an offer by them with regard to 800 tons. That offer left it open to the plaintiff to accept it within a period which is to be computed by the return of post. I agree that the words, "Your reply by return of post" fix the time for acceptance, and not the manner of accepting. But that time elapsed; there was no acceptance within the limited time. So far from there being an acceptance, it seems to me that the plaintiff's letter of November 27th rejects that offer; it rejects it on the ground the price is higher than the plaintiff is willing to give. That offer is, therefore, not accepted within the limited time, but is rejected, and it seems to me is at once dead. The letter of the 27th then asks for an offer with respect to 1200 tons, and the letter of November 28th is a letter written "In reply to your favor of yesterday," that is, In reply to your request for an offer with regard to 1200 tons. "I now make you this offer." That seems to me to show that the letter of November 28th of the defendants is an offer with regard to 1200 tons, and not with regard to 800 tons and 400 tons separately. The way in which the offer with regard to the 1200 tons is made is this: "With regard to the first 800 of them, I make you a new offer upon the same terms as I made in the former offer on the 24th. With regard to the remaining 400 tons, I offer you to deliver them at the same price, but at different periods of delivery."

I think that the defendants' letter of November 28th, being a letter in answer to a request with regard to 1200 tons, is an offer with regard to 1200 tons, and that no such offer was ever accepted; but even if it could be taken that it was a separate offer with regard to 800 tons and 400 tons, I cannot accede to the view that it reopened the offer of November 24th. That offer was dead, and was no longer binding upon the defendants at all, and therefore it seems to me to be a wrong phrase to say that it reopened the offer of November 24th. The only legal way of construing it is to say that it is a new offer with regard to 800 tons. If it were a separate offer, which I should think it was not, it then would be a new offer with regard to 800 tons, and a separate

offer with regard to 400 tons, but, even if it were so, I should think that the new offer with regard to the 800 tons had never been accepted, so as to make a binding contract. The new offer would not, in my opinion, be accepted, by the fact of the plaintiff's letter of November 28th crossing it. If the defendants' letter of November 28th is a new offer of the 800 tons, that could not be accepted by the plaintiff until it came to his knowledge, and his letter of November 28th could only be considered as a cross offer. Put it thus: If I write to a person and say, "If you can give me £6000 for my house, I will sell it to you," and on the same day, and before that letter reaches him, he writes to me, saying, "If you will sell me your house for £6000 I will buy it," that would be two offers crossing each other, and cross offers are not an acceptance of each other, therefore there will be no offer of either party accepted by the other. That is the case where the contract is to be made by the letters, and by the letters only. I think it would be different if there were already a contract in fact made in words, and then the parties were to write letters to each other, which crossed in the post, those might make a very good memorandum of the contract already made, unless the Statute of Frauds intervened. But where the contract is to be made by the letters themselves, you cannot make it by cross offers, and say that the contract was made by one party accepting the offer which was made to him. It seems to me, therefore, in both views, that the judgment of the Court below was right.

Judgment of the Court below affirmed.⁵

⁵ The dissenting opinion of Quain, J., and the opinions of Archibald, Blackburn, Grove, and Keating, JJ., concurring with Brett, J., have been omitted. In the course of his opinion, Blackburn, J., said: "When a contract is made between two parties, there is a promise by one, in consideration of the promise made by the other; there are two assenting minds, the parties agreeing in opinion, and one having promised in consideration of the promise of the other—there is an exchange of promises; but I do not think exchanging offers would, upon principle, be at all the same thing. There is, I believe, a total absence of authority on the point. I do not think, though I am not sure, that the question has ever been raised before. The promise or offer being made on each side in ignorance of the promise or the offer made on the other side, neither of them can be construed as an acceptance of the other. Either of the parties may write and say, 'I accept your offer,

and, as you perceive, I have already made a similar offer to you,' and then people would know what they were about; I think either side might revoke."

In the Court of Exchequer below and in the Exchequer Chamber on appeal the issues of this case were considered by eleven judges in all. They considered the following questions:

1. Do crossed letters, identical in terms, make a contract, even though neither was an acceptance of the other?

Yes: Honyman, Bramwell.

No: Brett, Blackburn, Keating, Archibald, Grove.

See Restatement, Contracts, § 23.

2. Was the letter numbered 5 one offer or two offers?

One: Bramwell, Brett, Archibald, Keating, Blackburn, Grove.

Two: Quain, Kelly, Honyman (and possibly Pigott and Channell).

PAYNE v. CAVE.

In the King's Bench, 1789. 3 Term R. 148.

This was an action, tried at the sittings after last term at Guildhall before Lord Kenyon, wherein the declaration stated that the plaintiff on 22d September, 1788, was possessed of a certain worm-tub, and a pewter worm in the same, which were then and there about to be sold by public auction by one S. M., the agent of the plaintiff in that behalf, the conditions of which sale were to be the usual conditions of sale of goods sold by auction, &c. of all which premises the defendant afterwards, to wit, &c. had notice; and thereupon the defendant in consideration that the plaintiff, at the special instance and request of the defendant, did then and there undertake, and promise to perform the conditions of the said sale, to be performed by the plaintiff, as seller, &c. undertook, and then and there promised the plaintiff to perform the conditions of the sale, to be performed on the part of the buyer, &c. And the plaintiff avers, that the conditions of sale, hereinafter mentioned, are usual conditions of sale of goods sold by auction, to wit, that the highest bidder should be the purchaser, and should deposit five shillings in the pound, and that if the lot purchased were not paid for and taken away in two days time, it should be put up again and resold, &c. [stating all the conditions]. It then stated that the defendant became the purchaser of the lot in question for £40, and was requested to pay the usual deposit which he refused, &c. At the trial, the plaintiff's counsel opened the case thus;—The goods were put up in one lot at an auction; there were several bidders, of whom the defendant was the last, who bid £40; the auctioneer dwelt on the bidding, on which the defendant said "why do you dwell, you will not get more"; the auctioneer said that he was informed the worm weighed at least 1,300 cwt., and was worth more than £40; the defendant then asked him whether he would warrant it to weigh so much, and receiving an answer in the negative, he then declared that he would not take it, and refused to pay for it. It was resold on a subsequent day's sale for £30 to the defendant, against whom the action was brought for the difference. Lord Kenyon, being of opinion on this statement of the case, that the defendant was at liberty to withdraw his bidding any time before the hammer was knocked down, nonsuited the plaintiff.

Walton now moved to set aside the nonsuit, on the ground that the bidder was bound by the conditions of the sale to abide by his bidding,

3. Was letter numbered 4 a counter-offer?

Yes: Grove. Others silent.

4. Was letter numbered 4 a rejection?

Yes: Blackburn, Brett, Keating.
Others silent.

See Restatement, Contracts, § 36.

5. Was letter numbered 6 a conditional acceptance?

Yes: Pigott, Channell, Grove.

See Restatement, Contracts, § 62.

6. Was a contract consummated?

Yes: Kelly, Quain, Honyman.

No: All the eight others.

and could not retract. By the act of bidding he acceded to those conditions, one of which was, that the highest bidder should be the buyer. The hammer is suspended, not for the benefit of the bidder, or to give him an opportunity of repenting, but for the benefit of the seller: in the meantime the person who bid last is a conditional purchaser, if nobody bids more. Otherwise it is in the power of any person to injure the vendor, because all the former biddings are discharged by the last: and, as it happened in this very instance, the goods may thereby ultimately be sold for less than the person who was last out-bid would have given for them. The case of *Simon v. Motivos*, 3 Burrows, 1921, which was mentioned at the trial, does not apply. That turned on the statute of frauds.

The Court thought the nonsuit very proper. The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the seller, by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called *locus poenitentiae*. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed.

Rule refused.

NOTE

In *Anderson v. Wisconsin Cent. R. Co.*, 107 Minn. 296, 120 N.W. 39, 20 L.R.A., N.S., 1133, 181 Am.St.Rep. 464, 16 Ann.Cas. 379 (1909), the auctioneer refused to accept the highest bid and accepted the next lower (apparently with the assent of that bidder). It was held that the highest bidder had no cause of action for breach of contract. His bid was a mere offer and was never accepted. The court doubts the soundness of the decision in *Warlow v. Harrison*, 1 El. & El. 309 (1859), holding that, where the goods are offered for sale "without reserve," each bid consummates a contract, conditional on there being no higher bid, and that the owner is bound to sell to the highest bidder. The decision in *Warlow v. Harrison* is sustained by the American Law Institute, *Restatement of Contracts*, § 27; but it is there stated that the bidder has power to revoke his bid prior to the fall of the hammer even though the seller is already bound to sell.

Bids on public contracts are sometimes made irrevocable by statute. See *City of Baltimore v. J. L. Robinson Const. Co.*, 123 Md. 660, 91 A. 682, L.R.A.1915A, 225, Ann.Cas.1916C, 425 (1914).

COOKE v. OXLEY.

In the King's Bench, 1790. 3 Term R. 653.

This was an action upon the case; and the third count in the declaration, upon which the verdict was taken, stated that on, etc., a certain discourse was had, etc., concerning the buying of 266 hogsheads of tobacco; and on that discourse the defendant proposed to the plaintiff that the former should sell and deliver to the latter the said 266 hogsheads [at a certain price]; whereupon the plaintiff desired the defendant to give him (the plaintiff) time to agree to or dissent from the proposal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant proposed to the plaintiff to sell and deliver the same upon the terms aforesaid, if the plaintiff would agree to purchase them upon the terms aforesaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day; the plaintiff averred that he did agree to purchase the same upon the terms aforesaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he also averred that he requested the defendant to deliver to him the said hogsheads, and offered to pay to the defendant the said price for the same, yet that the defendant did not, etc.

A rule having been obtained to show cause why the judgment should not be arrested, on the ground that there was no consideration for the defendant's promise,

Erskine and Wood now showed cause. This was a bargain and sale on condition; and though the plaintiff might have rescinded the contract before 4 o'clock, yet not having done so, the condition was complied with, and both parties were bound by the agreement. The declaration considered this as a complete bargain and sale; for the breach of the agreement is for not delivering the tobacco, and not for not selling it.

LORD KENYON, C. J. (stopping Bearcroft, who was to have argued in support of the rule). Nothing can be clearer than that at the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore nudum pactum.

BULLER, J. It is impossible to support this declaration in any point of view. In order to sustain a promise, there must be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was first made. Then as to the subsequent time, the promise can only be supported on the ground of a new contract made at 4 o'clock; but there is no pretence for that. It has been argued that this must be taken to be a complete sale from the time when the condition was complied with; but it was not complied with,

for it is not stated that the defendant did agree at 4 o'clock to the terms of the sale; or even that the goods were kept till that time.

GROSE, J. The agreement was not binding on the plaintiff before 4 o'clock; and it is not stated that the parties came to any subsequent agreement; there is therefore no consideration for the promise.

Rule absolute.

BOSTON & MAINE R. R. v. BARTLETT et al.

Supreme Judicial Court of Massachusetts, 1849. 3 Cush. 221.

This was a bill in equity for the specific performance of a contract in writing.

The plaintiffs alleged that the defendants on April 1, 1844, being the owners of certain land situated in Boston, and particularly described in the bill, "in consideration that said corporation would take into consideration the expediency of buying said land for their use as a corporation, signed a certain writing dated April 1, 1844," whereby they agreed to convey to the plaintiffs "the said lot of land, for the sum of \$20,000, if the said corporation would take the same within thirty days from that date"; that afterward and within the thirty days, the defendants, at the request of the plaintiffs, "and in consideration that the said corporation agreed to keep in consideration the expediency of taking said land," etc., extended the said term of thirty days, by a writing underneath the written contract above mentioned, for thirty days from the expiration thereof; that, on May 29, 1844, while the extended contract was in full force, and unrescinded, the plaintiffs elected to take the land on the terms specified in the contract, and notified the defendants of their election, and offered to pay them the agreed price (producing the same in money) for a conveyance of the land, and requested the defendants to execute a conveyance thereof, which the plaintiffs tendered to them for that purpose; and that the defendants refused to execute such conveyance, or to perform the contract, and had ever since neglected and refused to perform the same.

The defendants demurred generally.

FLETCHER, J. In support of the demurrer, in this case, the only ground assumed and insisted on by the defendants is, that the agreement on their part was without consideration, and therefore not obligatory. In the view taken of the case by the Court, no importance is attached to the consideration set out in the bill—namely, "that the plaintiffs would take into consideration the expediency of buying the land." The argument for the defendants, that their agreement was not binding, because without consideration, erroneously assumes that the writing executed by the defendants is to be considered as constitut-

ing a contract at the time it was made. The decision of the Court in Maine in the case of *Bean v. Burbank*, 16 Me. 458, 33 Am.Dec. 681, which was referred to for the defendants, seems to rest on the ground assumed by them in this case.

In the present case, though the writing signed by the defendants was but an offer, and an offer which might be revoked, yet while it remained in force and unrevoked, it was a continuing offer during the time limited for acceptance; and, during the whole of that time, it was an offer every instant, but as soon as it was accepted, it ceased to be an offer merely, and then ripened into a contract. The counsel for the defendants is most surely in the right, in saying that the writing when made was without consideration, and did not therefore form a contract. It was then but an offer to contract, and the parties making the offer most undoubtedly might have withdrawn it at any time before acceptance.

But when the offer was accepted, the minds of the parties met, and the contract was complete. There was then the meeting of the minds of the parties, which constitutes and is the definition of a contract. The acceptance by the plaintiffs constituted a sufficient legal consideration for the engagement on the part of the defendants. There was then nothing wanting, in order to perfect a valid contract on the part of the defendants. It was precisely as if the parties had met at the time of the acceptance, and the offer had then been made and accepted and the bargain completed at once.

A different doctrine, however, prevails in France and Scotland and Holland. It is there held that whenever an offer is made, granting to a party a certain time within which he is to be entitled to decide, whether he will accept it or not, the party making such offer is not at liberty to withdraw it before the lapse of the appointed time. There are certainly very strong reasons in support of this doctrine. Highly respectable authors regard it as inconsistent with the plain principles of equity, that a person, who has been induced to rely on such an engagement, should have no remedy in case of disappointment. But whether wisely and equitably or not, the common law unyieldingly insists upon a consideration, or a paper with a seal attached.

The authorities, both English and American, in support of this view of the subject, are very numerous and decisive; but it is not deemed to be needful or expedient to refer particularly to them, as they are collected and commented on in several reports as well as in the text-books. The case of *Cooke v. Oxley*, 3 T.R. 653, in which a different doctrine was held, has occasioned considerable discussion, and in one or two instances has probably influenced the decision. That case has been supposed to be inaccurately reported, and that in fact there was in that case no acceptance. But however that may be, if the case has

not been directly overruled, it has certainly in later cases been entirely disregarded, and cannot now be considered as of any authority.

As therefore in the present case the bill sets out a proposal in writing, and an acceptance and an offer to perform, on the part of the plaintiffs, within the time limited, and while the offer was in full force, all of which is admitted by the demurrer, so that a valid contract in writing is shown to exist, the demurrer must be overruled.

NOTE

In *Ellis' Adm'r v. Durkee*, 79 Vt. 341, 65 A. 94 (1906), the court said: "The only importance of inquiring whether or not an offer is supported by a consideration is to determine whether it can be withdrawn by the party making it before it is accepted by the party to whom it is made. If it is based upon a consideration, the power of revocation is not attached to it. But, though it be without consideration, it may be accepted so as to make a binding contract if not sooner revoked, but it may be revoked at any time before it is accepted—and this is so though it states a certain time during which it is to remain open."

BYRNE & CO. v. VAN TIENHOVEN & CO.

In the High Court of Justice, Common Pleas Division, 1880.
L.R. 5 C.P.Div. 344.

LINDLEY, J. This was an action for the recovery of damages for the non-delivery by the defendants to the plaintiffs of 1000 boxes of tinplates, pursuant to an alleged contract, which I will refer to presently. The action was tried at Cardiff before myself without a jury; and it was agreed at the trial that in the event of the plaintiffs being entitled to damages they should be £375.

The defendants carried on business at Cardiff and the plaintiffs at New York, and it takes ten or eleven days for a letter posted at either place to reach the other. The alleged contract consists of a letter written by the defendants to the plaintiffs on October 1st, 1879, and received by them on the 11th, and accepted by telegram and letter sent to the defendants on October 11th and 15th respectively. [The letter of October 1st, 1879, from the defendants to the plaintiffs contained a reference to the price of tinplates, and made an "offer of 1000 boxes of this brand 14x20 at 15s. 6d per box f. o. b. here with 1 per cent for our commission; terms, four months' banker's acceptance on London or Liverpool against shipping documents, but subject to your cable on or before the 15th inst. here." The plaintiffs accepted by cable sent on October 11th, 1879, and confirmed it by letter sent October 15th, 1879, On October 8th the defendants mailed to the plaintiffs a letter withdrawing their offer of the 1st. This letter was received by the plain-

tiffs on October 20th. The plaintiffs refused to recognize the revocation, demanded performance by both cable and mail, and later brought this action.] * * *

There is no doubt that an offer can be withdrawn before it is accepted, and it is immaterial whether the offer is expressed to be open for acceptance for a given time or not—*Routledge v. Grant* [4 Bing. 653]. For the decision of the present case, however, it is necessary to consider two other questions—viz.: 1. Whether a withdrawal of an offer has any effect until it is communicated to the person to whom the offer has been sent? 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent?

It is curious that neither of these questions appears to have been actually decided in this country. As regards the first question, I am aware that Pothier and some other writers of celebrity are of opinion that there can be no contract if an offer is withdrawn before it is accepted, although the withdrawal is not communicated to the person to whom the offer has been made. The reason for this opinion is that there is not, in fact, any such consent by both parties as is essential to constitute a contract between them. Against this view, however, it has been urged that a state of mind not notified cannot be regarded in dealings between man and man; and that an uncommunicated revocation is for all practical purposes and in point of law no revocation at all. This is the view taken in the United States. See *Taylor v. Merchants' Fire Insurance Co.* [9 How. 390, 13 L.Ed. 187] cited in *Benjamin on Sales*, pp. 56-58, and it is adopted by Mr. Benjamin. The same view is taken by Mr. Pollock in his excellent work on *Principles of Contract*, 2d ed., p. 10, and by Mr. Leake in his *Digest of the Law of Contracts*, p. 43. This view, moreover, appears to me much more in accordance with the general principles of English law than the view maintained by Pothier. I pass, therefore, to the next question—viz., whether posting the letter of revocation was a sufficient communication of it to the plaintiff. The offer was posted on October 1st, the withdrawal was posted on the 8th, and did not reach the plaintiff until after he had posted his letter of the 11th, accepting the offer. It may be taken as now settled that where an offer is made and accepted by letters sent through the post, the contract is completed the moment the letter accepting the offer is posted (*Harris's Case*, L. R. 7 Ch. 587; *Dunlop v. Higgins*, 1 H.L.C. 381) even although it never reaches its destination. When, however, these authorities are looked at, it will be seen that they are based upon the principle that the writer of the offer has expressly or impliedly assented to treat an answer to him by a letter duly posted as a sufficient acceptance and notification to himself, or, in other words, he has made the post-office his agent to receive the acceptance and notification of it.

But this principle appears to me to be inapplicable to the case of the withdrawal of an offer. In this particular case I can find no evidence of any authority in fact given by the plaintiffs to the defendants to notify a withdrawal of their offer by merely posting a letter; and there is no legal principle or decision which compels me to hold, contrary to the fact, that the letter of October 8th is to be treated as communicated to the plaintiff on that day or on any day before the 20th, when the letter reached them. But before that letter had reached the plaintiffs they had accepted the offer, both by telegram and by post; and they had themselves resold the tinplates at a profit. In my opinion the withdrawal by the defendants on October 8th of their offer of the 1st was inoperative; and a complete contract binding on both parties was entered into on October 11th, when the plaintiffs accepted the offer of the 1st, which they had no reason to suppose had been withdrawn. Before leaving this part of the case it may be as well to point out the extreme injustice and inconvenience which any other conclusion would produce. If the defendants' contention were to prevail, no person who had received an offer by post and had accepted it would know his position until he had waited such a time as to be quite sure that a letter withdrawing the offer had not been posted before his acceptance of it. It appears to me that both legal principles and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and acceptance constitute a contract binding on both parties. • • •

Judgment for plaintiffs.

NOTE

In accord: *Patrick v. Bowman*, 149 U.S. 411, 13 S.Ct. 811, 866, 37 L.Ed. 790 (1893).

In some of the attempts at codifying the law of contracts there is a provision that a revocation of an offer is operative just as soon as it is put in the course of transmission through the post. See *Watters v. Lincoln*, 29 S.D. 98, 135 N.W. 712 (1912); also a criticism of the California Code provision, by Lewinsohn, "Mutual Assent in California," 2 Cal.L.Rev. 341 (1914).

See Restatement, Contracts, §§ 35, 41.

DICKINSON v. DODDS.

In the Court of Appeal, Chancery Division, 1876. 2 Ch.Div. 463.

On Wednesday, the 10th of June, 1874, the defendant John Dodds signed and delivered to the plaintiff, George Dickinson, a memorandum, of which the material part was as follows:

"I hereby agree to sell to Mr. George Dickinson the whole of the dwelling-houses, garden ground, stabling, and outbuildings thereto belonging, situate at Croft, belonging to me, for the sum of £800. As witness my hand this tenth day of June, 1874.

"£800.

[Signed] John Dodds."

"P. S.—This offer to be left over until Friday, 9 o'clock a. m. J. D. (the twelfth), 12th June, 1874.

[Signed] J. Dodds."

The bill alleged that Dodds understood and intended that the plaintiff should have until Friday, 9 a. m., within which to determine whether he would or would not purchase, and that he should absolutely have until that time the refusal of the property at the price of £800, and that the plaintiff in fact determined to accept the offer on the morning of Thursday, the 11th of June, but did not at once signify his acceptance to Dodds, believing that he had the power to accept it until 9 a. m. on the Friday.

In the afternoon of the Thursday the plaintiff was informed by a Mr. Berry that Dodds had been offering or agreeing to sell the property to Thomas Allan, the other defendant. Thereupon the plaintiff, at about half past seven in the evening, went to the house of Mrs. Burgess, the mother-in-law of Dodds, where he was then staying, and left with her a formal acceptance in writing of the offer to sell the property. According to the evidence of Mrs. Burgess this document never in fact reached Dodds, she having forgotten to give it to him.

On the following (Friday) morning, at about seven o'clock, Berry, who was acting as agent for Dickinson, found Dodds at the Darlington railway station, and handed to him a duplicate of the acceptance by Dickinson, and explained to Dodds its purport. He replied that it was too late as he had sold the property. A few minutes later Dickinson himself found Dodds entering a railway carriage, and handed him another duplicate of the notice of acceptance, but Dodds declined to receive it, saying: "You are too late. I have sold the property."

It appeared that on the day before, Thursday, the 11th of June, Dodds had signed a formal contract for the sale of the property to the defendant Allan for £800, and had received from him a deposit of £40.

The bill in this suit prayed that the defendant Dodds might be decreed specifically to perform the contract of the 10th of June, 1874; that he might be restrained from conveying the property to Allan; that Allan might be restrained from taking any such conveyance; that, if any such conveyance had been or should be made, Allan might be declared a trustee of the property for, and might be directed to convey the property to, the plaintiff; and for damages.

The cause came on for hearing before Vice Chancellor Bacon on the 25th of January, 1876. [It was his opinion that Dodds could withdraw only by giving notice to Dickinson, in spite of *Cooke v. Oxley*, 3 T.R.

653, and that the contract took effect by the doctrine of relation back as of the time of the offer and hence was prior to the sale to Allan. He therefore decreed specific performance in favor of the plaintiff. From the decision both of the defendants appealed.]

JAMES, L. J., after referring to the document of the 10th of June, 1874, continued:

The document, though beginning "I hereby agree to sell," was nothing but an offer, and was only intended to be an offer, for the plaintiff himself tells us that he required time to consider whether he would enter into an agreement or not. Unless both parties had then agreed, there was no concluded agreement then made; it was in effect and substance only an offer to sell. The plaintiff, being minded not to complete the bargain at that time, added this memorandum: "This offer to be left over until Friday, 9 o'clock a. m. 12th June, 1874." That shows it was only an offer. There was no consideration given for the undertaking or promise, to whatever extent it may be considered binding, to keep the property unsold until 9 o'clock on Friday morning; but apparently Dickinson was of opinion, and probably Dodds was of the same opinion, that he (Dodds) was bound by that promise, and could not in any way withdraw from it, or retract it, until 9 o'clock on Friday morning, and this probably explains a good deal of what afterwards took place. But it is clear settled law, on one of the clearest principles of law, that this promise, being a mere nudum pactum, was not binding, and that at any moment before a complete acceptance by Dickinson of the offer, Dodds was as free as Dickinson himself. Well, that being the state of things, it is said that the only mode in which Dodds could assert that freedom was by actually and distinctly saying to Dickinson, "Now I withdraw my offer." It appears to me that there is neither principle nor authority for the proposition that there must be an express and actual withdrawal of the offer, or what is called a retraction. It must, to constitute a contract, appear that the two minds were at one, at the same moment of time, that is, that there was an offer continuing up to the time of the acceptance. If there was not such a continuing offer, then the acceptance comes to nothing. Of course it may well be that the one man is bound in some way or other to let the other man know that his mind with regard to the offer has been changed; but in this case, beyond all question, the plaintiff knew that Dodds was no longer minded to sell the property to him as plainly and clearly as if Dodds had told him in so many words, "I withdraw the offer." This is evident from the plaintiff's own statements in the bill.

The plaintiff says in effect that, having heard and knowing that Dodds was no longer minded to sell to him, and that he was selling or had sold to some one else, thinking that he could not in point of law withdraw his offer, meaning to fix him to it, and endeavoring to bind

him: "I went to the house where he was lodging, and saw his mother-in-law, and left with her an acceptance of the offer, knowing all the while that he had entirely changed his mind. I got an agent to watch for him at 7 o'clock the next morning, and I went to the train just before 9 o'clock, in order that I might catch him and give him my notice of acceptance just before 9 o'clock, and when that occurred he told my agent, and he told me, 'You are too late,' and he then threw back the paper." It is to my mind quite clear that before there was any attempt at acceptance by the plaintiff, he was perfectly well aware that Dodds had changed his mind, and that he had in fact agreed to sell the property to Allan. It is impossible, therefore, to say there was ever that existence of the same mind between the two parties which is essential in point of law to the making of an agreement. I am of opinion, therefore, that the plaintiff has failed to prove that there was any binding contract between Dodds and himself.

MELLISH, L. J. I am of the same opinion. The first question is whether this document of the 10th of June, 1874, which was signed by Dodds, was an agreement to sell, or only an offer to sell, the property therein mentioned to Dickinson; and I am clearly of opinion that it was only an offer, although it is in the first part of it, independently of the postscript, worded as an agreement. I apprehend that, until acceptance, so that both parties are bound, even though an instrument is so worded as to express that both parties agree it is in point of law only an offer, and, until both parties are bound, neither party is bound. It is not necessary that both parties should be bound within the statute of frauds, for, if one party makes an offer in writing, and the other accepts it verbally, that will be sufficient to bind the person who has signed the written document. But, if there be no agreement, either verbally or in writing, then, until acceptance, it is in point of law an offer only, although worded as if it were an agreement. But it is hardly necessary to resort to that doctrine in the present case, because the postscript calls it an offer, and says, "This offer to be left over until Friday, 9 o'clock a. m." Well, then, this being only an offer, and the law says—and it is a perfectly clear rule of law—that, although it is said that the offer is to be left open until Friday morning at 9 o'clock, that did not bind Dodds. He was not in point of law bound to hold the offer over until 9 o'clock on Friday morning. He was not so bound either in law or in equity. Well, that being so, when on the next day he made an agreement with Allan to sell the property to him, I am not aware of any ground on which it can be said that that contract with Allan was not as good and binding a contract as ever was made. Assuming Allan to have known (there is some dispute about it, and Allan does not admit that he knew of it, but I will assume that he did) that Dodds had made the offer to Dickinson, and had given him till Friday morning at 9 o'clock to accept it, still in point of law that could not pre-

vent Allan from making a more favorable offer than Dickinson, and entering at once into a binding agreement with Dodds.

Then Dickinson is informed by Berry that the property has been sold by Dodds to Allan. Berry does not tell us from whom he heard it, but he says that he did hear it, that he knew it, and that he informed Dickinson of it. Now, stopping there, the question which arises is this: If an offer has been made for the sale of property, and before that offer is accepted the person who has made the offer enters into a binding agreement to sell the property to somebody else, and the person to whom the offer was first made receives notice in some way that the property has been sold to another person, can he after that make a binding contract by the acceptance of the offer? I am of opinion that he cannot. The law may be right or wrong in saying that a person who has given to another a certain time within which to accept an offer is not bound by his promise to give that time; but, if he is not bound by that promise, and may still sell the property to some one else, and if it be the law that, in order to make a contract, the two minds must be in agreement at some one time, that is, at the time of the acceptance, how is it possible that when the person to whom the offer has been made knows that the person who has made the offer has sold the property to some one else, and that, in fact, he has not remained in the same mind to sell it to him, he can be at liberty to accept the offer and thereby make a binding contract? It seems to me that would be simply absurd. If a man makes an offer to sell a particular horse in his stable, and says, "I will give you until the day after to-morrow to accept the offer," and the next day goes and sells the horse to somebody else, and receives the purchase money from him, can the person to whom the offer was originally made then come and say, "I accept," so as to make a binding contract, and so as to be entitled to recover damages for the non-delivery of the horse? If the rule of law is that a mere offer to sell property, which can be withdrawn at any time, and which is made dependent on the acceptance of the person to whom it is made, is a mere nudum pactum, how is it possible that the person to whom the offer has been made can by acceptance make a binding contract after he knows that the person who has made the offer has sold the property to some one else? It is admitted law that, if a man who makes an offer dies, the offer cannot be accepted after he is dead; and parting with the property has very much the same effect as the death of the owner, for it makes the performance of the offer impossible. I am clearly of opinion that, just as when a man who has made an offer dies before it is accepted it is impossible that it can then be accepted, so when once the person to whom the offer was made knows that the property has been sold to some one else, it is too late for him to accept the offer, and on that ground I am clearly of opinion that there was no binding contract for the sale of this property by Dodds to Dickinson; and, even if

there had been, it seems to me that the sale of the property to Allan was first in point of time. However, it is not necessary to consider, if there had been two binding contracts, which of them would be entitled to priority in equity, because there is no binding contract between Dodds and Dickinson.

BAGGALLAY, J. A. I entirely concur in the judgments which have been pronounced.

JAMES, L. J. The bill will be dismissed, with costs.

NOTE

Information, known by the offeree to be trustworthy, that the offeror has changed his mind, terminates the power of acceptance. *Cartwright v. Hoogstoel*, 105 L.T. 628 (1911); *Coleman v. Applegarth*, 68 Md. 21, 11 A. 284, 6 Am.St.Rep. 417 (1887); *Frank v. Stratford-Handcock*, 13 Wyo. 37, 77 P. 134, 67 L.R.A. 571, 110 Am.St.Rep. 963 (1904); *Watters v. Lincoln*, 29 S.D. 98, 135 N.W. 712 (1912).

See Restatement, Contracts, § 42.

SHUEY v. UNITED STATES.

Supreme Court of the United States, 1875. 92 U.S. 73, 23 L.Ed. 697.

Appeal from the Court of Claims.

Henry B. Ste. Marie filed his petition in the Court of Claims to recover the sum of \$15,000, being the balance alleged to be due him of the reward of \$25,000 offered by the Secretary of War, on April 20th, 1865, for the apprehension of John H. Surratt, one of Booth's alleged accomplices in the murder of President Lincoln.

The Court below found the facts as follows:

1. On April 20th, 1865, the Secretary of War issued, and caused to be published in the public newspapers and otherwise, a proclamation, whereby he announced that there would be paid by the War Department "for the apprehension of John H. Surratt, one of Booth's accomplices," \$25,000 reward, and also that "liberal rewards will be paid for any information that shall conduce to the arrest of either of the above-named criminals or their accomplices"; and such proclamation was not limited in terms to any specific period, and it was signed "Edwin M. Stanton, Secretary of War." On November 24th, 1865, the President caused to be published his order revoking the reward offered for the arrest of John H. Surratt. 13 Stat. 778.

2. In April, 1866, John H. Surratt was a zouave in the military service of the Papal Government, and the claimant was also a zouave in the same service. During that month he communicated to Mr. King,

the American Minister at Rome, the fact that he had discovered and identified Surratt, who had confessed to him his participation in the plot against the life of President Lincoln. The claimant also subsequently communicated further information to the same effect, and kept watch, at the request of the American Minister, over Surratt. Thereupon certain diplomatic correspondence passed between the Government of the United States and the Papal Government relative to the arrest and extradition of Surratt; and on November 6th, 1866, the Papal Government, at the request of the United States, ordered the arrest of Surratt, and that he be brought to Rome, he then being at Veroli. Under this order of the Papal Government, Surratt was arrested; but, at the moment of leaving prison at Veroli, he escaped from the guard having him in custody, and, crossing the frontier of the Papal territory, embarked at Naples, and escaped to Alexandria in Egypt. Immediately after his escape, and both before and after his embarkation at Naples, the American Minister at Rome, being informed of the escape by the Papal Government, took measures to trace and rearrest him, which was done in Alexandria. From that place he was subsequently conveyed by the American Government to the United States; but the American Minister, having previously procured the discharge of the claimant from the Papal military service, sent him forward to Alexandria to identify Surratt. At the time of the first interview between the claimant and the American Minister, and at all subsequent times until the final capture of Surratt, they were ignorant of the fact that the reward offered by the Secretary of War for his arrest had been revoked by the President. The discovery and arrest of Surratt were due entirely to the disclosures made by the claimant to the American Minister at Rome; but the arrest was not made by the claimant, either at Veroli, or subsequently at Alexandria.

3. There has been paid to the claimant by the defendants, under the Act of July 27th, 1868 (15 Stat. 234, § 3), the sum of \$10,000. Such payment was made by a draft on the Treasury payable to the order of the claimant, which draft was by him duly indorsed.

The Court found as a matter of law that the claimant's service, as set forth in the foregoing findings, did not constitute an arrest of Surratt within the meaning of the proclamation, but was merely the giving of information which conduced to the arrest. For such information the remuneration allowed to him under the Act of Congress was a full satisfaction, and discharges the defendants from all liability.

The petition was dismissed accordingly, whereupon an appeal was taken to this Court.

Ste. Marie having died *pendente lite*, his executor was substituted in his stead.

STRONG, J. We agree with the Court of Claims, that the service rendered by the plaintiff's testator was, not the apprehension of John

H. Surratt, for which the War Department had offered a reward of \$25,000, but giving information that conduced to the arrest. These are quite distinct things, though one may have been a consequence of the other. The proclamation of the Secretary of War treated them as different; and, while a reward of \$25,000 was offered for the apprehension, the offer for information was only a "liberal reward." The findings of the Court of Claims also exhibit a clear distinction between making the arrest and giving the information that led to it. It is found as a fact, that the arrest was not made by the claimant, though the discovery and arrest were due entirely to the disclosures made by him. The plain meaning of this is, that Surratt's apprehension was a consequence of the disclosures made. But the consequences of a man's act are not his acts. Between the consequence and the disclosure that leads to it there may be, and in this case there were, intermediate agencies. Other persons than the claimant made the arrest—persons who were not his agents, and who themselves were entitled to the proffered reward for his arrest, if any persons were. We think, therefore, that at most the claimant was entitled to the "liberal reward" promised for information conducing to the arrest; and that reward he has received.

But, if this were not so, the judgment given by the Court of Claims is correct.

The offer of a reward for the apprehension of Surratt was revoked on November 24th, 1865; and notice of the revocation was published. It is not to be doubted that the offer was revocable at any time before it was accepted, and before anything had been done in reliance upon it. There was no contract until its terms were complied with. Like any other offer of a contract, it might, therefore, be withdrawn before rights had accrued under it; and it was withdrawn through the same channel in which it was made. The same notoriety was given to the revocation that was given to the offer; and the findings of fact do not show that any information was given by the claimant, or that he did anything to entitle him to the reward offered, until five months after the offer had been withdrawn. True, it is found that then, and at all times until the arrest was actually made, he was ignorant of the withdrawal; but that is an immaterial fact. The offer of the reward not having been made to him directly, but by means of a published proclamation, he should have known that it could be revoked in the manner in which it was made.

Judgment affirmed.

QUESTION:

What reason had Ste. Marie to know that the offer could be revoked by proclamation?

NOTE

A railroad can change its time-table by giving proper published notice, even though tickets have been bought. *Sears v. Eastern R. Co.*, 14 Allen (Mass.) 433 (1867). See Restatement, Contracts, § 43.

OFFORD v. DAVIES et al.

In the Court of Common Pleas, 1862. 12 C.B.N.S. 748.

This was an action upon a guarantee.

The first count of the declaration stated that, by a certain instrument in writing signed by the defendants, and addressed and delivered by the defendants to the plaintiff, the defendants undertook, promised, and agreed with the plaintiff in the words and figures following—that is to say: “We, the undersigned, in consideration of your discounting, at our request, bills of exchange for Messrs. Davies & Co., of Newtown, Montgomeryshire, drapers, hereby jointly and severally guarantee for the space of twelve calendar months the due payment of all such bills of exchange, to the extent of £600. And we further jointly and severally undertake to make good any loss or expenses you may sustain or incur in consequence of advancing Messrs. Davies & Co. such moneys.” Averment, that the plaintiff, relying on the said promise of the defendants, after the making of the said promise, and within the space of twelve calendar months thereafter, did discount divers bills of exchange for the said Messrs. Davies & Co., of Newtown aforesaid, certain of which bills of exchange became due and payable before the commencement of this suit, but were not then or at any other time duly paid, and the said bills respectively were dishonored; and that the plaintiff, after the making of the said promise, and within the said twelve calendar months, advanced to the said Messrs. Davies & Co. divers sums of money on and in respect of the discount of the said last-mentioned bills so dishonored as aforesaid, certain of which moneys were due and owing to the plaintiff before and at the time of the commencement of this suit; and that all things had happened and all times had elapsed necessary, etc.; yet that the defendants broke their said promise, and did not pay to the plaintiff or to the respective holders for the time being of the said bills of exchange so dishonored as aforesaid, or to any other person entitled to receive the same, the respective sums of money payable by the said bills of exchange; nor did the defendants pay to the plaintiff the said sums of money so advanced by the plaintiff as aforesaid, or any part thereof; whereby the sums payable by the said bills of exchange so dishonored as aforesaid became lost to the plaintiff, and he became liable to pay and take up certain of the said bills of exchange, and did pay and take up certain of

the said bills of exchange, and was forced and obliged to and did expend certain moneys in endeavoring to obtain part of certain of the said bills of exchange, and the plaintiff lost the interest which he might have made of his moneys if the said bills had been duly paid at maturity.

Fourth plea to the first count—so far as the same relates to the sums payable by the defendants in respect of the sums of money payable by the said bills of exchange and the said sums so advanced—that, after the making of the said guarantee, and before the plaintiff had discounted such bills of exchange, and before he had advanced such sums of money, the defendants countermanded the said guarantee, and requested the plaintiff not to discount such bills of exchange, and not to advance such moneys.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the fourth plea offers no defense to that part of the declaration to which it is pleaded, for that a party giving a guarantee [for a definite period] has no power to countermand it without the assent of the person to whom it is given." Joinder.

Prentice (with whom was Brandt), in support of the demurrer. A guarantee like this, to secure advances for twelve months, is a contract which cannot be rescinded or countermanded within that time without the assent of the person to whom it is given. [Byles, J. What consideration have these defendants received?] For anything disclosed by the plea the plaintiff might have altered his position in consequence of the guarantee, by having entered into a contract with Davies & Co., of Newtown, to discount their bills for twelve months. * * * Here, the defendants have stipulated that their liability shall discontinue at the end of twelve calendar months. What pretence is there for relieving them from that bargain? [Byles, J. Suppose a man gives an open guarantee, with a stipulation that he will not withdraw it,—what is there to bind him to that?] If acted upon by the other party, it is submitted that that would be a binding contract. * * *

E. James, Q. C. (with whom was T. Jones), contra. The cases upon bonds for guaranteeing the honesty of clerks or servants are inapplicable: there the contract attaches as soon as the clerk or servant enters the service, and it is not separable. This, however, is not a case of contract at all. It is a mere authority to discount, and a promise to indemnify the plaintiff in respect of each bill discounted; and it was perfectly competent to the defendants at any time to withdraw that authority as to future transactions of discount. * * * Suppose Davies & Co., of Newtown, had become notoriously insolvent, would the defendants continue bound by their guarantee if the plaintiffs, with notice of that fact, chose to go on discounting for them? [Williams J. Suppose I guarantee the price of a carriage to be built for a third party who,

before the carriage is finished and consequently before I am bound to pay for it, becomes insolvent,—may I recall my guarantee?] Not after the coach-builder has commenced the carriage. [Erle, C. J. Before it ripens into a contract, either party may withdraw, and so put an end to the matter. But the moment the coach-builder has prepared the materials, he would probably be found by the jury to have contracted.] * * * [Erle, C. J. What meaning do you attribute to the words “at our request” in this guarantee?] As and when we request. The notice operated a retraction of the request, and any discount which took place after that notice was not a discount at the request of the defendants.

Brandt in reply. The Court of Exchequer have decided in this term, in a case of *Bradbury v. Morgan*, 31 Law J. Exch. 462 (1 H. & C. 249), that the death of the surety does not operate a revocation of a continuing guarantee. If that be so, it is plain that the guarantee is not a mere *mandatum*, but a contract. * * * The fourth plea does not allege that notice of revocation was given before any bills had been discounted by the plaintiffs. It must therefore be assumed that some discounts had taken place. (T. Jones. The fact undoubtedly is so.) Cur. adv. vult.

ERLE, C. J., now delivered the judgment of the Court.

The declaration alleged a contract by the defendants, in consideration that the plaintiff would at the request of the defendants discount bills for Davies & Co., not exceeding £600, the defendants promised to guarantee the repayment of such discounts for twelve months, and the discount, and no repayment. The plea was a revocation of the promise before the discount in question; and the demurrer raises the question whether the defendants had a right to revoke the promise. We are of opinion that they had, and that consequently the plea is good.

This promise by itself creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants, or to the detriment of himself. But, until the condition has been at least in part fulfilled, the defendants have the power of revoking it. In the case of a simple guarantee for a proposed loan, the right of revocation before the proposal has been acted on did not appear to be disputed. Then, are the rights of the parties affected either by the promise being expressed to be for twelve months, or by the fact that some discounts had been made before that now in question, and repaid? We think not.

The promise to repay for twelve months creates no additional liability on the guarantor, but, on the contrary, fixes a limit in time beyond which his liability cannot extend. And, with respect to other discounts, which had been repaid, we consider each discount as a separate transaction, creating a liability on the defendant till it is repaid, and,

after repayment, leaving the promise to have the same operation that it had before any discount was made, and no more.

Judgment for the defendants.

QUESTIONS:

Consider the use of terms by court and counsel in this case:

1. After the plaintiff had discounted one bill, did the defendant have remaining any (a) "right to revoke"? (b) "power of revoking"? (c) privilege of revoking?
2. Was the document signed by the defendants (a) a contract? (b) an offer? (c) an "authority to discount"?
3. Did that signed document create in the defendants (a) a "liability" for 12 months? (b) a legal duty?
4. Did the discount of a bill by the plaintiff create "a liability on the defendant till it is repaid"?
5. Does commencing the building of a carriage cause a contract to "ripen" (see argument of counsel)?
6. How many "contracts" did the signed document empower the plaintiff to make? See Restatement, Contracts, §§ 30, 44.

CONSOLIDATED PORTRAIT & FRAME CO. v. BARNETT et al.

Supreme Court of Alabama, 1910. 165 Ala. 655, 51 So. 936.

Action by the Consolidated Portrait & Frame Company against M. P. Barnett and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The letter of credit referred to is in the following language: "Letter of Credit. Town of Goodwater, State of Alabama, May 28, 1907. Consolidated Portrait & Frame Co.—Gentlemen: Should T. W. Adair order goods of you at one or more times within the next twelve months from the date of this letter of credit, we jointly and severally request that you ship said goods to his order, allowing credit of thirty days from date of shipment; and if the said T. W. Adair shall fail to pay for such goods within thirty days after date of shipment, we agree to pay for said goods at the price you charged him for same, provided our responsibility shall not exceed \$200.00. We waive all notice to us of shipment made to said T. W. Adair on the faith of this letter of credit, as well as notice that he failed to pay for such goods; and in case the collection of the amount due to you by virtue of the credit you extend the said T. W. Adair by virtue of this letter of credit is forced by suit, we agree to pay all court costs, attorney's fees, and the attorney's fees may be included in the judgment [and the plaintiff claims \$10 attor-

ney's fee for bringing this suit]. For the purpose of enabling T. W. Adair to obtain credit from your house, we represent that we are worth not less than \$1,000.00 over and above exemptions, liabilities, and obligations of all kinds which we now have. M. P. Barnett & Bros. J. U. Bridges."

Plea 3 is as follows: "The defendants M. P. Barnett and J. U. Bridges signed said letter of credit without any consideration money to them, same being purely an accommodation paper so far as they were concerned, and on or about the 21st of September, 1907, said defendants J. U. Bridges and M. P. Barnett demanded back said letter of credit, and at that time the said T. W. Adair was not indebted to the plaintiff in any sum which said letter of credit was given to secure; and, if defendant T. W. Adair is indebted to plaintiffs in any sum, it is an indebtedness created after said demand by said defendants for said letter of credit."

SIMPSON, J. • • • A consideration is necessary to the binding efficacy of a contract, and a contract in which one party offers to do something or to pay money when the other party does something else, and does not contain any promise or obligation of the other party to do or pay anything, is unilateral, without mutuality, and subject to revocation at any time before the party to whom it is addressed does or performs any act on the faith of said proposition. 9 Cyc. 327 et seq.; *Chambliss v. Smith*, 30 Ala. 367; *Borst v. Simpson*, 90 Ala. 373, 376, 7 So. 814.

There was no error in overruling the demurrers to the plea. The judgment of the court is affirmed.

Affirmed.

HOPKINS v. RACINE MALLEABLE & WROUGHT IRON CO.

Supreme Court of Wisconsin, 1909. 137 Wis. 583, 119 N.W. 301.

Action by Floyd Hopkins against the Racine Malleable & Wrought Iron Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions to dismiss.

The plaintiff having secured a patent upon a certain farm gate and having had some undisclosed negotiations with the defendant, a manufacturer of malleable irons, the latter on March 10, 1905, mailed to him the following writing: "Hopkins' Gate Contract. The Racine Malleable & Wrought Iron Company of the city of Racine, state of Wisconsin, hereby agrees with Floyd Hopkins of the town of Belvidere, county of Boone, state of Illinois, to furnish, at any time hereafter during the life of the patent, castings for the patent improved farm gate of said Hopkins, known as the Hopkins' gate, patented January

3, 1905, as follows, to wit: * * * We agree to furnish the above-named castings for forty cents per set at our shops to be shipped to any point of the United States or Canada, the price aforesaid to be for cash at Racine, Wis. * * *” There was no reply, but from time to time, up to July, 1906, the plaintiff ordered castings in quantities from 50 to 150 sets, and they were supplied by the defendant, who seems to have manufactured a quantity in order to be able to furnish them as ordered.

On April 30, 1906, defendant wrote plaintiff that by reason of reorganization of its business it was a question whether it could continue to make or furnish the gate castings, and that it wrote in order to give plaintiff an opportunity to find some other place to have them made; that, while it still had same irons on hand, it did not care to carry on the business in the old way by carrying stock and shipping all over the country when wanted; that it had no room for storage nor facilities for packing and shipping. Again, on October 29, 1906, the defendant, wrote him that it had approximately 400 sets of castings on hand, but was unwilling to continue the business after that stock was exhausted by carrying other stock, saying that the plaintiff would have to make arrangements to carry the stock elsewhere, and also stating: “We do not object to making your castings for you, but after the goods are made, they must be shipped out of here. We cannot carry a stock. * * * Orders that are placed after the stock on hand now is exhausted will be billed at revised prices.” December 14th it wrote again: “The time is drawing near when we can no longer accept such contracts. * * * What stock we have made up, which is about 350 sets, we will close out, but we can no longer make these castings and carry them in stock for you, and have you draw them from this stock. You will have to make arrangements to carry the stock elsewhere.”

On December 27, 1906, plaintiff mailed to the defendant, what is called an order, the following letter: “I wish one thousand sets of Farmer Hopkins’ gate castings patented January 3, 1905, manufactured and ready for delivery May 1, 1907. Will give you shipping directions later.” To which the defendant replied January 30th: “It is not possible for us to make the thousand set of Farmer Hopkins’ gate castings at the present time”—asserting as a reason the quantity of other work. * * * Plaintiff, on April 9, 1907, entered into a contract with another manufacturer to manufacture a thousand sets of castings for the same purpose, at a price of 55 cents per set. Plaintiff brought suit for damages for defendant’s refusal to comply with the order of December 27, 1906, and judgment was rendered by the court, without a jury, for damages at the rate of 15 cents per set, or \$150, from which the defendant appeals.

DODGE, J. (after stating the facts as above). No principle is more elementary in the law of contracts than that consideration is essential

to their validity, and that a wholly executory contract for mutual acts is of no binding force upon one party unless and until the other has become bound thereby. In such a contract mutuality is an essential of validity. *Dodge v. Hopkins*, 14 Wis. 636; *Moulton v. Kershaw*, 59 Wis. 316, 18 N.W. 172, 48 Am.Rep. 516; *Teipel v. Meyer*, 106 Wis. 41, 81 N.W. 982. That rule has received modification to the extent that an executory promise by one party may be construed to evince his intention to make a continuing offer of such performance which, when accepted, in whole or in part, by the other party, becomes a contract pro tanto to the extent of the acceptance. Such offers are very common in the mercantile world and are a basis on which mercantile business is largely transacted. Being in a sense a departure from the fundamental principle of the necessity for consideration, in the form of mutuality or otherwise, the exception is carried no further than to bind the offerer so long as he sees fit to keep the offer open.

In the present case, the promise of the defendant to furnish castings was wholly executory and upon condition that the plaintiff should do acts in the future. There is not the slightest suggestion that the plaintiff ever, even in the most informal manner, bound himself to the conditions expressed in that offer. With him it was entirely optional at all times to purchase his supplies of irons wherever he chose. True, as he from time to time ordered a shipment from the defendant, he became bound to pay for such shipment according to the terms of the offer, and then, for the first time, did defendant become bound to fill his order. This is the vital and fundamental distinction between the present case and the authorities from this and other courts cited by the respondent. In each of those cases there were express words on the part of the purchaser binding him to performance upon his part to the full extent responsive to the offer made, albeit the promise was in some of the cases ambiguous. *Shadbolt v. Topliff*, 85 Wis. 513, 55 N.W. 854; *Walsh v. Myers*, 92 Wis. 397, 66 N.W. 250; *McCall v. Icks*, 107 Wis. 232, 83 N.W. 300; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 554, 93 N.W. 459; *Taylor Co. v. Bannerman*, 120 Wis. 189, 97 N.W. 918; *Eastern Ry. Co. v. Tuteur*, 127 Wis. 382, 105 N.W. 1067; *Minn. L. Co. v. Whitebreast Co.*, 160 Ill. 85, 43 N.E. 774, 31 L.R.A. 529; *Lima, etc., Co. v. Natl. Steel, etc., Co.*, 155 F. 77, 83 C.C.A. 593, 11 L.R.A., N.S., 713. In each of these cases were promises by the purchaser to be bound by the contract either by acceptance or otherwise.

This element of consideration in the form of mutuality being wholly lacking in the instant case, it is unnecessary to consider many other objections urged to the validity of a contract resulting from defendant's letter of March 10, 1905. We deem it clear that that letter at most constituted a continuing offer to furnish castings upon payment of the specified price, and might be revoked at any time by the defendant, except as to orders thereunder prior to the revocation. The let-

ters referred to in the statement of facts of April, October, and December, 1906, are open to no construction but that of revocation of the offer, except to the extent of the irons then manufactured and on hand, so that the plaintiff could not by an order on December 27th impose upon the defendant any duty to manufacture for him other castings at the price named in the offer of March 10, 1905, and therefore is entitled to no damages for refusal so to do.

Judgment reversed, and cause remanded, with directions to dismiss the action.

QUESTIONS:

1. Was the "Hopkins Gate Contract" (a) a contract? (b) an offer? (c) a "binding" option? (d) a unilateral contract?
2. Did it "bind the offeror so long as he sees fit to keep the offer open"?
3. Is "mutuality" an "essential to validity"?
4. Did the defendant have power to revoke before receiving an order?

PETTERSON v. PATTBERG

Court of Appeals of New York, 1928. 248 N.Y. 86, 161 N.E. 428.

Action by Jennie Petterson, as executrix of last will and testament of John Petterson, deceased, against George Pattberg. Judgment for plaintiff, entered at Trial Term, Kings County, was affirmed by the Appellate Division, Second Department (222 App.Div. 693, 224 N.Y.S. 889), and defendant appeals. Reversed and rendered.

KELLOGG, J. The evidence given upon the trial sanctions the following statement of facts: John Petterson, of whose last will and testament the plaintiff is the executrix, was the owner of a parcel of real estate in Brooklyn, known as 5301 Sixth avenue. The defendant was the owner of a bond executed by Petterson, which was secured by a third mortgage upon the parcel. On April 4, 1924, there remained unpaid upon the principal the sum of \$5,450. This amount was payable in installments of \$250 on April 25, 1924, and upon a like monthly date every three months thereafter. Thus the bond and mortgage had more than five years to run before the entire sum became due. Under date of the 4th of April, 1924, the defendant wrote Petterson as follows:

"I hereby agree to accept cash for the mortgage which I hold against premises 5301 6th Ave., Brooklyn, N. Y. It is understood and agreed as a consideration I will allow you \$780 providing said mortgage is paid on or before May 31, 1924, and the regular quarterly payment due April 25, 1924, is paid when due."

On April 25, 1924, Petterson paid the defendant the installment of principal due on that date. Subsequently, on a day in the latter part of May, 1924, Petterson presented himself at the defendant's home, and knocked at the door. The defendant demanded the name of his caller. Petterson replied: "It is Mr. Petterson. I have come to pay off the mortgage." The defendant answered that he had sold the mortgage. Petterson stated that he would like to talk with the defendant, so the defendant partly opened the door. Thereupon Petterson exhibited the cash, and said he was ready to pay off the mortgage according to the agreement. The defendant refused to take the money. Prior to this conversation, Petterson had made a contract to sell the land to a third person free and clear of the mortgage to the defendant. Meanwhile, also, the defendant had sold the bond and mortgage to a third party. It therefore became necessary for Petterson to pay to such person the full amount of the bond and mortgage. It is claimed that he thereby sustained a loss of \$780, the sum which the defendant agreed to allow upon the bond and mortgage, if payment in full of principal, less that sum, was made on or before May 31, 1924. The plaintiff has had a recovery for the sum thus claimed, with interest.

Clearly the defendant's letter proposed to Petterson the making of a unilateral contract, the gift of a promise in exchange for the performance of an act. The thing conditionally promised by the defendant was the reduction of the mortgage debt. The act requested to be done, in consideration of the offered promise, was payment in full of the reduced principal of the debt prior to the due date thereof. "If an act is requested, that very act, and no other, must be given." Williston on Contracts, § 73. "In case of offers for a consideration, the performance of the consideration is always deemed a condition." Langdell's Summary of the Law of Contracts, § 4. It is elementary that any offer to enter into a unilateral contract may be withdrawn before the act requested to be done has been performed. Williston on Contracts, § 60; Langdell's Summary, § 4; *Offord v. Davies*, 12 C.B.(N.S.) 748. A bidder at a sheriff's sale may revoke his bid at any time before the property is struck down to him. *Fisher v. Seltzer*, 23 Pa. 308, 62 Am.Dec. 335. The offer of a reward in consideration of an act to be performed is revocable before the very act requested has been done. *Shuey v. United States*, 92 U.S. 73, 23 L.Ed. 697; *Biggers v. Owen*, 79 Ga. 658, 5 S.E. 193; *Fitch v. Snedaker*, 38 N.Y. 248, 97 Am.Dec. 791. So, also, an offer to pay a broker commissions, upon a sale of land for the offeror, is revocable at any time before the land is sold, although prior to revocation the broker performs services in an effort to effectuate a sale. *Stensgaard v. Smith*, 43 Minn. 11, 44 N.W. 669, 19 Am.St.Rep. 205; *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844.

An interesting question arises when, as here, the offeree approaches the offeror with the intention of proffering performance and, before

actual tender is made, the offer is withdrawn. Of such a case Williston says:

"The offeror may see the approach of the offeree and know that an acceptance is contemplated. If the offeror can say 'I revoke' before the offeree accepts, however brief the interval of time between the two acts, there is no escape from the conclusion that the offer is terminated." Williston on Contracts, § 60b.

In this instance Petterson, standing at the door of the defendant's house, stated to the defendant that he had come to pay off the mortgage. Before a tender of the necessary moneys had been made, the defendant informed Petterson that he had sold the mortgage. That was a definite notice to Petterson that the defendant could not perform his offered promise, and that a tender to the defendant, who was no longer the creditor, would be ineffective to satisfy the debt. "An offer to sell property may be withdrawn before acceptance without any formal notice to the person to whom the offer is made. It is sufficient if that person has actual knowledge that the person who made the offer has done some act inconsistent with the continuance of the offer, such as selling the property to a third person." *Dickinson v. Dodds*, 2 Ch.Div. 463, headnote. To the same effect is *Coleman v. Applegarth*, 68 Md. 21, 11 A. 284, 6 Am.St.Rep. 417. Thus it clearly appears that the defendant's offer was withdrawn before its acceptance had been tendered. It is unnecessary to determine, therefore, what the legal situation might have been had tender been made before withdrawal. It is the individual view of the writer that the same result would follow. This would be so, for the act requested to be performed was the completed act of payment, a thing incapable of performance, unless assented to by the person to be paid. Williston on Contracts, § 60b. Clearly an offering party has the right to name the precise act performance of which would convert his offer into a binding promise. Whatever the act may be until it is performed, the offer must be revocable. However, the supposed case is not before us for decision. We think that in this particular instance the offer of the defendant was withdrawn before it became a binding promise, and therefore that no contract was ever made for the breach of which the plaintiff may claim damages.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

LEHMAN, J. (dissenting). The defendant's letter to Petterson constituted a promise on his part to accept payment at a discount of the mortgage he held, provided the mortgage is paid on or before May 31, 1924. Doubtless, by the terms of the promise itself, the defendant made payment of the mortgage by the plaintiff, before the stipulated time, a condition precedent to performance by the defendant of his

promise to accept payment at a discount. If the condition precedent has not been performed, it is because the defendant made performance impossible by refusing to accept payment, when the plaintiff came with an offer of immediate performance. "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure." Williston on Contracts. § 677. The question in this case is not whether payment of the mortgage is a condition precedent to the performance of a promise made by the defendant, but, rather, whether, at the time the defendant refused the offer of payment, he had assumed any binding obligation, even though subject to condition.

The promise made by the defendant lacked consideration at the time it was made. Nevertheless, the promise was not made as a gift or mere gratuity to the plaintiff. It was made for the purpose of obtaining from the defendant something which the plaintiff desired. It constituted an offer which was to become binding whenever the plaintiff should give, in return for the defendant's promise, exactly the consideration which the defendant requested.

Here the defendant requested no counter promise from the plaintiff. The consideration requested by the defendant for his promise to accept payment was, I agree, some act to be performed by the plaintiff. Until the act requested was performed, the defendant might undoubtedly revoke his offer. Our problem is to determine from the words of the letter, read in the light of surrounding circumstances, what act the defendant requested as consideration for his promise.

The defendant undoubtedly made his offer as an inducement to the plaintiff to "pay" the mortgage before it was due. Therefore, it is said, that "the act requested to be performed was the completed act of payment, a thing incapable of performance, unless assented to by the person to be paid." In unmistakable terms the defendant agreed to accept payment, yet we are told that the defendant intended, and the plaintiff should have understood, that the act requested by the defendant, as consideration for his promise to accept payment, included performance by the defendant himself of the very promise for which the act was to be consideration. The defendant's promise was to become binding only when fully performed; and part of the consideration to be furnished by the plaintiff for the defendant's promise was to be the performance of that promise by the defendant. So construed, the defendant's promise or offer, though intended to induce action by the plaintiff, is but a snare and delusion. The plaintiff could not reasonably suppose that the defendant was asking him to procure the performance by the defendant of the very act which the defendant promised to do, yet we are told that, even after the plaintiff had done all else

which the defendant requested, the defendant's promise was still not binding because the defendant chose not to perform.

I cannot believe that a result so extraordinary could have been intended when the defendant wrote the letter. "The thought behind the phrase proclaims itself misread when the outcome of the reading is injustice or absurdity." See opinion of Cardozo, C. J., in *Surace v. Dana*, 248 N.Y. 18, 161 N.E. 315. If the defendant intended to induce payment by the plaintiff and yet reserve the right to refuse payment when offered he should have used a phrase better calculated to express his meaning than the words: "I agree to accept." A promise to accept payment, by its very terms, must necessarily become binding, if at all, not later than when a present offer to pay is made.

I recognize that in this case only an offer of payment, and not a formal tender of payment, was made before the defendant withdrew his offer to accept payment. Even the plaintiff's part in the act of payment was then not technically complete. Even so, under a fair construction of the words of the letter, I think the plaintiff had done the act which the defendant requested as consideration for his promise. The plaintiff offered to pay, with present intention and ability to make that payment. A formal tender is seldom made in business transactions, except to lay the foundation for subsequent assertion in a court of justice of rights which spring from refusal of the tender. If the defendant acted in good faith in making his offer to accept payment, he could not well have intended to draw a distinction in the act requested of the plaintiff in return, between an offer which, unless refused, would ripen into completed payment, and a formal tender. Certainly the defendant could not have expected or intended that the plaintiff would make a formal tender of payment without first stating that he had come to make payment. We should not read into the language of the defendant's offer a meaning which would prevent enforcement of the defendant's promise after it had been accepted by the plaintiff in the very way which the defendant must have intended it should be accepted, if he acted in good faith.

The judgment should be affirmed.

CARDOZO, C. J., and POUND, CRANE, and O'BRIEN, JJ., concur with KELLOGG, J.

LEHMAN, J., dissents in opinion, in which ANDREWS, J., concurs.
Judgments reversed, etc.

QUESTIONS:

1. Is the decision of the court in this case in conflict with Restatement, Contracts, § 45?
2. If it is in conflict, which should be followed?
3. Can you construct a better rule?

LOS ANGELES TRACTION CO. v. WILSHIRE et al.

Supreme Court of California, 1902. 135 Cal. 654, 67 P. 1086.

Action by the Los Angeles Traction Company against W. B. Wilshire and others. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

GRAY, C. The action is based on a written instrument signed by appellants and reading as follows: "\$2,000. Los Angeles, Cal., July 19th, 1895. Thirty days after the completion of the double track street railway of the Los Angeles Traction Company to the intersection of Seventh and Hoover streets, for value received, I promise to pay to the order of the Los Angeles Traction Company, the sum of two thousand (2,000) dollars, negotiable and payable at Citizens' Bank, with interest at the rate of eight per cent per annum, payable after maturity. I further promise and agree to pay a reasonable attorney's fee if suit should be instituted for the collection of this note." The above instrument was placed in the hands of the Citizens' Bank, together with a duly signed written escrow agreement as follows:

"To the Citizens' Bank, Los Angeles, Cal.: Herewith is handed you by the undersigned the following named notes, to be held in escrow upon the terms and conditions herein stated: You are requested to hold said notes in escrow until the completion of the line of railroad of the Los Angeles Traction Company, now being constructed in the city of Los Angeles. * * * Upon completion and operation of the same with electric power, you are instructed to deliver said notes to said Los Angeles Traction Company. In case a franchise for such street car line to said Hoover street is not obtained by said Traction Company within——months from the date hereof, then, in that event, said notes shall be returned to their respective makers upon demand, to be canceled. Said notes are made by the following named persons, and in the sums set opposite their names." Then follow the names of the parties giving the notes, including the names of these appellants, who also signed the said agreement.

The findings show that, on the faith of the foregoing instruments and other instruments of like character executed by other parties, who, like defendants, were the owners of property that would be made valuable by the construction of the proposed road, the plaintiff in November, 1895, less than four months from the execution of said instrument, bid and paid to the city of Los Angeles \$1,505 for a franchise to construct the road over that part of the course agreed upon and within the city limits. Before the 28th of April, 1896, the plaintiff commenced work upon said railway, but said work was not performed with the intention of prosecuting the construction of said

railway continuously and with diligence to completion, and the plaintiff did not so commence work upon said railway with said purpose until after the 1st day of July, 1897. On July 1, 1897, defendants served upon plaintiff a written notice to the effect that they did not recognize any liability on account of the foregoing written contracts, for the reason that the road had not been completed within the time agreed upon. Soon after the service of this notice the plaintiff actively engaged in the construction of the road, and completed it, and commenced operating the same to the intersection of Seventh and Hoover streets, as provided for in said instruments, before the expiration of the year 1897. Thereafter, and on May 17, 1898, plaintiff completed its railway to First and Virgil streets. Upon these facts plaintiff had judgment for \$2,000 besides interest and attorney's fees. Defendants appeal from this judgment and from an order denying them a new trial. * * *

3. The contract at the date of its making was unilateral, a mere offer that if subsequently accepted and acted upon by the other party to it would ripen into a binding enforceable obligation. When the respondent purchased and paid upwards of \$1,500 for a franchise it had acted upon the contract, and it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn. The promised consideration had then been partly performed, and the contract had taken on a bilateral character, and if appellant thereafter thought he discovered a ground for rescinding the contract, it was, as it always is, a necessary condition to the rescission that the other party should be made whole as to what he had parted with on the strength of the contract. The notice of withdrawal from the contract was ineffectual, therefore, for several reasons. In the first place, it was based on a wrong theory; the reason given for it was that the road was not constructed within the agreed time, when, as was determined subsequently by the court, there was no time agreed upon. Again, it came too late, after the obligations of the parties had become fixed.

* * *

Judgment affirmed

QUESTIONS:

1. What is the meaning of "the contract at the date of its making was unilateral, a mere offer"?
2. Also of the words, "the contract had taken on a bilateral character"?
3. How can an "obligation" become "fixed"?

NOTE

The above case and other similar ones were at first criticised as erroneous. See *Zwolanek v. Baker Mfg. Co.*, 150 Wis. 517, 137 N.W. 769,

44 L.R.A.,N.S., 1214, Ann.Cas.1914A, 793 (1912); 26 Harv.L.Rev. 274. A decision to the contrary, *Biggers v. Owen*, 79 Ga. 658, 5 S.E. 193 (1887), was taught as correct. See Restatement, Contracts, § 45.

In *Wachtel v. National Alfalfa Journal Co.*, 190 Iowa 1293, 176 N.W. 801 (1920), the defendant opened a circulation contest, offering prizes to those winning the most votes by securing subscriptions, but later discontinued the contest when the plaintiff was the leader therein. The plaintiff was held entitled to damages for breach of contract. Other voting contest cases are: *Hertz v. Montgomery Journal Pub. Co.*, 9 Ala.App. 178, 62 So. 564 (1913); *Mooney v. Daily News Co. of Minneapolis*, 116 Minn. 212, 133 N.W. 573, 37 L.R.A.,N.S., 183 (1911).

BRACKENBURY et al. v. HODGKIN et al.

Supreme Judicial Court of Maine, 1917. 116 Me. 399, 102 A. 106.

Suit by Joseph A. Brackenburg and another against Sarah D. P. Hodgkin and Walter C. Hodgkin. From a decree for plaintiffs, defendants appeal. Appeal dismissed, and decree affirmed as to Walter C. Hodgkin.

CORNISH, C. J. The defendant Mrs. Sarah D. P. Hodgkin on the 8th day of February, 1915, was the owner of certain real estate—her home farm, situated in the outskirts of Lewiston. She was a widow and was living alone. She was the mother of six adult children, five sons, one of whom, Walter, is the codefendant, and one daughter, who is the coplaintiff. The plaintiffs were then residing in Independence, Mo. Many letters had passed between mother and daughter concerning the daughter and her husband returning to the old home and taking care of the mother, and finally on February 8, 1915, the mother sent a letter to the daughter and her husband which is the foundation of this bill in equity. In this letter she made a definite proposal, the substance of which was that if the Brackenburgs would move to Lewiston, and maintain and care for Mrs. Hodgkin on the home place during her life, and pay the moving expenses, they were to have the use and income of the premises, together with the use of the household goods, with certain exceptions, Mrs. Hodgkin to have what rooms she might need. The letter closed, by way of postscript, with the words, "you to have the place when I have passed away."

Relying upon this offer, which was neither withdrawn nor modified, and in acceptance thereof, the plaintiffs moved from Missouri to Maine late in April, 1915, went upon the premises described and entered upon the performance of the contract. Trouble developed after a few weeks, and the relations between the parties grew most disagreeable. The mother brought two suits against her son-in-law on trifling matters, and finally ordered the plaintiffs from the place, but they refused

to leave. Then on November 7, 1916, she executed and delivered to her son, Walter C. Hodgkin, a deed of the premises, reserving a life estate in herself. Walter, however, was not a bona fide purchaser for value without notice, but took the deed with full knowledge of the agreement between the parties and for the sole purpose of evicting the plaintiffs. On the very day the deed was executed he served a notice to quit upon Mr. Brackenbury, as preliminary to an action of forcible entry and detainer which was brought on November 13, 1916. This bill in equity was brought by the plaintiffs to secure a return of the farm from Walter to his mother to restrain and enjoin Walter from further prosecuting his action of forcible entry and detainer, and to obtain an adjudication that the mother holds the legal title impressed with a trust in favor of the plaintiffs in accordance with their contract.

The sitting justice made an elaborate and carefully considered finding of facts and signed a decree, sustaining the bill with costs against Walter C. Hodgkin, and granting the relief prayed for. The case is before the law court on the defendants' appeal from this decree.

Four main issues are raised.

1. As to the completion and existence of a valid contract.

A legal and binding contract is clearly proven. The offer on the part of the mother was in writing, and its terms cannot successfully be disputed. There was no need that it be accepted in words, nor that a counter promise on the part of the plaintiffs be made. The offer was the basis, not of a bilateral contract, requiring a reciprocal promise, a promise for a promise, but of a unilateral contract requiring an act for a promise. "In the latter case the only acceptance of the offer that is necessary is the performance of the act. In other words, the promise becomes binding when the act is performed." 6 R.C.L. 607. This is elementary law.

The plaintiffs here accepted the offer by moving from Missouri to the mother's farm in Lewiston and entering upon the performance of the specified acts, and they have continued performance since that time so far as they have been permitted by the mother to do so. The existence of a completed and valid contract is clear. * * *

Appeal dismissed.

QUESTIONS:

1. Is there any less reason for holding that a bilateral contract was made in this case than there was in *Los Angeles Traction Co. v. Wilshire*?
2. At what moment in the progress of the *Brackenburys* did Mrs. Hodgkin become "bound" by contract?

3. Were the Brackenburys ever "bound" to continue to support Mrs. Hodgkin?
4. If the Brackenburys do not actually support Mrs. Hodgkin for the rest of her life, should they get the land?

NOTE

A similar case is *Davis v. Jacoby*, 1 Cal.2d 370, 34 P.2d 1026 (1934), in which the offeror was held to have requested and received a return promise to move from Canada to California and to render service during the lives of the offeror and his wife. While the offeree was closing up his affairs in Canada, the offeror committed suicide.

Death or insanity of the offeror, occurring prior to acceptance and before the offer has become irrevocable, is generally said to terminate the power of acceptance, even though the offeree has no knowledge of the fact. See Restatement, Contracts, §§ 35, 45, 48, 49.

STENSGAARD v. SMITH.

Supreme Court of Minnesota, 1890.
43 Minn. 11, 44 N.W. 669, 19 Am.St.Rep. 205.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real-estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form: "St. Paul, Dec. 11, 1886. In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, the following property, to-wit: [Here follows a description of the property, the terms of sale, and some other provisions not necessary to be stated.] I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent on the first \$2,000, and two and one-half per cent on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above \$17,000 for such property, if the property is sold. John Smith." The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes

the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465); *Tarbox v. Gotzian*, 20 Minn. 139 (Gil. 122). If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance. *Andreas v. Holcombe*, 22 Minn. 339; *Ellsworth v. Extension Co.*, 31 Minn. 543, 18 N.W. 822. But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause, in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between those parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract

with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon him that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and, if he should succeed in effecting a sale before the power should be revoked, he would earn the commission specified. In other words, the instrument was presently effectual, and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself for about a month of the naked present right to sell, if he could do so. He cannot now complain that the land-owner then revoked the authority, which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it. The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other thing to be done, for which, by the terms of the promise compensation was to be made. Such was the case of *Goward v. Waters*, 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.

QUESTIONS:

1. Why was not the document signed by Smith a bilateral contract?
 2. Would Stensgaard have helped his case by proving on the trial that he orally or tacitly promised Smith to use diligence in finding a buyer?
 3. Did the signed document create in Stensgaard a power to make a unilateral contract? a bilateral contract?
 4. Even if we do not "imply," from Stensgaard's efforts to find a buyer, a promise on his part to make diligent effort, should not those efforts at least deprive Smith of the power of revocation?
 5. Is this case in conflict with the cases that precede and follow it?
 6. Would the case be decided otherwise under the rule in Restatement, Contracts, § 45?
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BRANIFF et al. v. BAIER et al.

Supreme Court of Kansas, 1917. 101 Kan. 117, 165 P. 816, L.R.A.1917E, 1036.

Action by T. J. Braniff and others against Henry F. Baier and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

JOHNSTON, C. J. This was an action by T. J. Braniff, G. E. Holmberg, and A. Lynn against Henry F. Baier and Charles A. Baier to recover an agent's commission for procuring a purchaser for defendant's real estate. Holmberg and Lynn are the assignees of C. W. Talmadge's interest in the commission claimed, who was associated with Braniff in the transaction. Plaintiffs were awarded judgment in the sum of \$702, and the defendants appeal.

Defendants engaged the services of Braniff and Talmadge on July 1, 1913 and signed the following memorandum:

"We, the undersigned, H. F. Baier and C. A. Baier, do hereby appoint and constitute C. W. Talmadge and T. J. Braniff, or either of them, as our only agents to sell our forty acres of farm land in Fellsmere, Florida, known as tracts No. 1232, 1233, 1260 and 1261 in township 31, range 37, in St. Lucie county, Florida; and we also agree to accept from the above-named agents or either of them, the actual cash we have already paid on the above-mentioned contracts, plus \$50.00 plus \$8.00 for transferring contracts, as full payment to us for our interest in the above-named lands; the purchaser to assume all future payments. The above-named contract to remain good until October 1, 1913. Dated July 1, 1913."

After this appointment was made, the agents acted upon the authority by advertising the land, interviewing parties, and writing letters, and they spent considerable time and effort to find a purchaser. As a result of correspondence begun about August 1, 1913, George W. Auber of Fellsmere, Fla., on August 25th agreed to buy the land, and he sent the following letter inclosing payment:

"Farmers' National Bank, Salina, Kansas: Inclosed you will find a check for \$950.00 in favor of Henry and Charles Baier for their interest in tracts south range 37, east of the Fellsmere Farms, Fla., of land No. 1232, 1233, 1260 and 1261, township 31, said check to be given to said Henry and Chas. Baier when contracts or certificates of purchase have been properly transferred and signed by them in favor of me, George W. Auber. You will also find inclosed a check for \$750 in favor of C. W. Talmadge and T. J. Braniff when said contracts are properly transferred to me and mailed and registered to my address being Fellsmere, Florida."

About 10 days before the Auber letter was written, the defendants told Braniff that they did not desire to sell the land, and on August 26th they wrote a letter stating that the land was withdrawn from sale and the authority of the agents revoked as of the date of the oral notice. When defendants were informed by the agents that a purchaser had been found in accordance with the terms of their contract, defendants replied that the lands were no longer for sale and that the money sent would not be accepted. The jury found, in effect, that the agents had found a purchaser and had complied with the terms of the written contract, and that the only reason given by defendants for not complying with the contract was that the land had been withdrawn from sale and that they did not care to sell it at that time.

Defendants contend that the contract of agency was unilateral and subject to revocation at any time before a purchaser was produced. The employment or agency, it will be observed, was exclusive and for a fixed time. It is true, as defendants contend, that, when the promise of one party is the consideration for the promise of another, they must be obligatory upon both parties at the same time or they will not bind. The appointment or promise of defendants was unilateral when made; but, when it was accepted by the agents and they had spent time, effort, and money in carrying out its provisions, there was thereafter no lack of consideration. When the agents accepted the proposal and proceeded to perform the services which the appointment contemplated were to be performed by them, it became a mutual and binding obligation. As soon as the promises of the parties ripened into a contract, Braniff and Talmadge became the sole agents for the sale of the defendants' land with the exclusive right to sell it, until October 1, 1913. The defendants could not thereafter, by withdrawing the land from sale or by an attempted revocation, set aside the contract nor escape responsibility for the violation of its conditions. [Several cases were here discussed.]

Stensgaard v. Smith, 43 Minn. 11, 44 N.W. 669, 19 Am.St.Rep. 205, is out of line with the cited cases, in this, that it appears to hold that the posting, advertising of property, and the individual soliciting of purchasers did not constitute an acceptance or convert a proposal into

a binding contract. That court, in the later case of *Lapham v. Flint*, 86 Minn. 376, 90 N.W. 780, stated that the only question before the court in the *Stensgaard Case* was whether the contract upon its face, unaided by evidence or allegations in the complaint, expressed a mutuality of obligation, and it was held that it did not, because there was nothing in the contract itself to indicate an acceptance of the obligation either in writing or by performance.

The general trend of authorities is that, if the agent proceeds in good faith to comply with the terms of the proposal or agreement like the one in question by advertising the property and spending time and effort to find a purchaser, these acts amount to an acceptance, and thereafter both parties are bound. Note, 19 L.R.A., N.S., 599. * * *

No material error being found in the record, the judgment is affirmed. All the Justices concurring.

QUESTIONS:

1. Was the document signed by Baier a contract?
2. If at some stage of the proceedings "both parties became bound," what was Braniff bound to do?
3. Is the court successful in distinguishing the *Stensgaard Case*?
4. Is Braniff entitled to the full agreed commission even though no sale was made and Braniff had notice of revocation before Auber agreed to buy?
5. Does Restatement, Contracts, § 45, apply to this case?
6. If the owner revokes after the broker has performed substantial acts toward earning his commission, but has not yet found a willing buyer, should the broker get judgment for the entire commission promised? Must he convince the court that he would have found a buyer?

UNATIN 7-UP CO. v. SOLOMON

Supreme Court of Pennsylvania, 1944.
350 Pa. 632, 39 A.2d 835, 157 A.L.R. 1304.

Bill in equity by Unatin 7-Up Company against Anna Solomon for specific performance of a contract to sell the contents of defendant's bottling works to the plaintiff. From a decree of dismissal plaintiff appeals.

Reversed and remanded with directions.

HORACE STERN, Justice. We are convinced that, from any standpoint of fair dealing and abstract justice, the merits of this case are wholly with the plaintiff, and furthermore we believe that there are

no principles, either of law or equity, which prevent our giving effect to that conviction. Accordingly, we are of opinion that the decree of the court below must be reversed.

Plaintiff, Unatin 7-Up Company, Inc., is engaged in the manufacture, bottling and distribution of a soft drink beverage, with its principal establishment in Beaver Falls, another plant in Sharon, and a warehouse in Pittsburgh. Defendant, Anna Solomon, trading under the name of Anchor Bottling Works, is engaged in Pittsburgh in the manufacture of soft drinks. On September 20, 1943, defendant gave a written ten days' option to one E. R. Pflug, who was representing plaintiff corporation as an undisclosed principal, to purchase "everything in Anchor Bottling Works * * * including machinery, trucks, sugar quota, gasoline quota, everything with the exception of bottles, cases, syrups, soda tanks, seltzer machine"; the purchase price was to be \$13,000; the consideration for the option was the sum of \$100 which Pflug then and there paid to defendant.

In the late afternoon of Wednesday, September 29th, Pflug went to defendant's establishment for the purpose of accepting the option and completing the transaction. Harry L. Unatin, the president of plaintiff corporation, came to Pittsburgh on the same day and remained at a hotel prepared to pay the purchase price. Pflug, however, was told by Morris Solomon, defendant's brother, who was then apparently in charge of the plant, that his sister had gone home on account of the immediate approach of important religious holidays which were to begin at sundown and extend over Thursday, September 30th, and Friday, October 1st. At Solomon's suggestion Pflug thereupon telephoned to Samuel Silverman, Esq., a member of the bar, and notified him of his desire and readiness to settle the transaction according to the terms of the option; the attorney told him to return to Pittsburgh on Monday, October 4th, when he (Silverman) "would have her (defendant) there and give us a clear title to it." Since, however, defendant denies that the attorney was, at that time, authorized to act for her, this conversation between him and Pflug must, for present purposes, be disregarded.

On Monday, October 4th, Pflug and Unatin came once more to Pittsburgh and Pflug telephoned to Silverman and again told him that they were there to "close the deal," whereupon Silverman said that "the deal was off" and that "she (defendant) wouldn't sell." This time there can be no question as to the attorney's authority because in her answer to plaintiff's bill of complaint defendant admitted that "about October 1, 1943, upon telephone inquiry by said Silverman, defendant advised him that, if said Pflug should again call said Silverman about the matter, he should advise said Pflug that she would not have any further dealings with him" because of certain alleged reasons, one of which obviously untrue, was that she "had not given said

Pflug any option." On the same day, Monday, October 4th, Pflug sent a letter to her by registered mail rehearsing the facts, notifying her that she was breaching the contract, and again expressing his readiness to consummate the transaction. She did not reply to this letter.

Plaintiff's bill in equity for specific performance was dismissed by the court on the ground that plaintiff had not accepted the option or made tender of the purchase money on or before Thursday, September 30th, the day on which the option expired according to its terms. It is true that time ordinarily is of the essence of an option, in equity as well as in law, whether expressly so stipulated or not, and therefore the failure of an optionee to make and communicate his election within the prescribed time terminates his rights. It is also true that, if the option does not specify the place of acceptance and settlement, the optionee must, for those purposes, exercise the utmost diligence and good faith in seeking the optionor at his place of residence or wherever else he may reasonably be found. But what the learned court below overlooked in this case are the circumstances which excused Pflug from a literal compliance with that rule. Having attempted to express his acceptance and complete the transaction toward the close of Wednesday, September 29th, he was told and it was admittedly the fact, that defendant was about to enter upon the observance of sacred religious holidays extending over Thursday, September 30th, and Friday, October 1st. His visit, therefore, to defendant's residence would apparently have been futile; the religious prohibition of engaging in worldly transactions during that period being presumably directed to the person and not to the place where they might be carried on, it was wholly unlikely that defendant would be available for secular matters at her home any more than at her business establishment. Pflug was reasonably justified, therefore, in abstaining from visiting her at her residence until her observance of the religious holidays had ended; he might well have considered it indelicate and improper to intrude on her under such circumstances. Certainly he had no possible interest of his own to serve by delay, for he was then and there ready to complete the deal and was at the plant for that very purpose. Thus it was defendant, not Pflug, who was responsible for the fact that the acceptance of the option, the execution of the appropriate documents, and the payment of the purchase money, were not consummated before the expiration of the option on Thursday, September 30th. Where a party who insists upon exact time has himself been the cause of delay, specific performance will be decreed. * * *

Once the exercise of the option within the stipulated period was prevented by defendant, plaintiff became entitled to a reasonable time for action after the condition which necessitated the delay had ceased: *Paralka v. Grummel*, 282 Pa. 237, 238, 127 A. 619, 620. Pflug pro-

ceeded well within such time, for he gave notice on Monday, October 4th, of his acceptance of the option and his desire and readiness to make settlement. Defendant having, through her attorney, unconditionally repudiated her obligation, she thereby waived the necessity of a tender; the law, which is eminently practical, does not require the doing of a vain thing. * * * True, her repudiation of the option did not excuse plaintiff from giving notice of its election to purchase, for until the option was accepted no contract of purchase existed and defendant was under no obligation to convey the property. But the required notice of acceptance was given by Pflug on October 4th.

Decree for specific performance.

QUESTIONS:

1. Was not a valid unilateral "option contract" consummated on September 20, 1943, creating a duty to convey the property conditional on notice within ten days and also on tender of the price?
2. Would the giving of notice of acceptance by Unatin create any new or different duty in the defendant?
3. Did Unatin give notice within ten days?
4. Had the "option" been no more than a ten day offer, revocable by defendant, would the defendant's absence on a religious holiday have extended the plaintiff's power to accept?

NOTE

If an option is granted for a consideration or under seal, a notice of revocation is quite inoperative, and any purchaser with notice takes subject to the power of the option holder. See *Smith v. Bangham*, 156 Cal. 359, 104 P. 689, 23 L.R.A.,N.S., 522 (1909); *Thomason v. Bescher*, 176 N.C. 622, 97 S.E. 654, 2 A.L.R. 626 (1918); *O'Brien v. Boland*, 166 Mass. 481, 44 N.E. 602 (1896); *Parker v. Beach*, 176 Cal. 172, 167 P. 871 (1917), option to return property if dissatisfied; *Olympia Bottling Works v. Olympia Brewing Co.*, 56 Or. 87, 107 P. 969 (1910), exclusive agency to sell beer, with option for 5-year extension; *Foulkes v. Sengstacken*, 83 Or. 118, 163 P. 311 (1917), death does not terminate power.

It was once asserted that an irrevocable offer is a "legal impossibility." See *Langdell, Summary of the Law of Contracts*, sec. 178. Some other writers agreed with *Langdell*. Such a view can be sustained either by assuming a definition of "offer" that would sustain it—a begging of the question, or by reverting to eighteenth century views of jurisprudence by which some doctrines were thought to be "natural law," unchangeable by men, and "contract" was believed to require a concurrence of wills. Court decisions became too numerous and too strong for these theories to continue to prevail. In line with the cases printed herein, see *Corbin, "Offer and Acceptance and Some of the Resulting Legal Relations,"* 26 *Yale L.Jour.* 169 (1917); *McGovney, "Irrevocable Offers,"* 27 *Harv.L.Rev.*

644 (1914). Our legal system and the social mores back of it are in continual evolution; and no rule within it is an unchangeable absolute.

Under the present-day law of contract, an offer may be made irrevocable by the offeror in several ways, the offeree's power of acceptance not being affected by notice of revocation. If in the offer a stated time is given within which to accept, revocation within that time is ineffective if a consideration has been given in return; and even if no consideration has been given, the offer may become irrevocable by reason of the offeree's action in reliance on it. Also, in the states where the common law of sealed instruments still prevails, an offer giving time for acceptance is irrevocable if it is under seal. A case of this kind is *McMillan v. Ames*, 33 Minn. 257, 22 N.W. 612 (1885). Irrevocable offers like the foregoing are commonly said to give to the offeree a "binding option"; and the promissory offer may properly be called an "option contract." See *Restatement, Contracts*, secs. 46, 47.

Again, if the offer, though stating no time limit, empowers the offeree to accept by actual rendition of a requested performance not promissory in character, it is now clear that a substantial beginning of that performance deprives the offeror of his power of revocation. *Restatement, Contracts*, sec. 45, goes even farther than this. It states: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

Before this "working rule" had been given expression, courts had made rather liberal use of the process of "implication," holding that the offeror impliedly requested a promise and that the offeree, by starting performance or otherwise, had made the promise. Such an "implication" is often quite reasonable, the offer then being an offer to make a bilateral contract. But it is no longer necessary to strain this process to include cases in which the "implication" is not reasonable.

Where the offer requests a performance by the offeree and that performance is begun, it may in some cases be quite reasonable to find that the offeree has "impliedly" promised to complete it. Thus, Sir Frederick Pollock, in 28 *Law Quarterly Review*, 100, reviewing Ashley on Contracts, said: "Some of Prof. Ashley's positions verge on paradox, as when he suggests that the doctrine of consideration may ultimately be devoured by relaxations and exceptions. One or two seem to us really paradoxical, as where he maintains that in a unilateral contract, where a promise is offered for an act requiring an appreciable time for performance, there is no consideration for the promise and no acceptance until the act is completed. If this be so, the promisor may withdraw his offer when the work is all but done, or the promisee may capriciously leave the work half done, and in either case without remedy, unless there be something in the circumstances which can be made to support an action of tort. A carter, for example, who is carrying goods to a wharf to be put on an outgoing ship, may abandon them in the middle of the journey. Both the

plain man and the average lawyer will say that, whatever Prof. Ashley's logic may be, the law really cannot be so absurd as that; and they will be right, and, what is more, any rational court before whom such a question is moved will surely find a way to make them so. It might easily be held that acting on a request for an act to be done for reward implies a promise to go through with the performance. At all events it seems to us that the offer is irrevocably accepted by the first unequivocal commencement of the act requested. In fact it does not often happen that a man sets about a job without writing or uttering some kind of word of acceptance. 'All right' is enough. Thus the practical outcome of Prof. Ashley's ingenious exercise may be to convince us that there are fewer unilateral contracts in the world than we supposed."

The following statute has been enacted in New York, Pers.Prop.Law, sec. 33: "When hereafter an offer to enter into a contract is made in writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because of the absence of consideration for the assurance of irrevocability. When such a writing states that the offer is irrevocable but does not state any period or time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time." Would this statute be held applicable to a written offer that does not contain the word "irrevocable" but merely says: "I make you this firm offer good for ten days", or "You shall have ten days within which to consider this offer"?

SECTION 9.—MEETING OF THE MINDS—MISTAKE

INTRODUCTORY NOTE

In the process of reaching agreement by bargaining either party may be mistaken as to some factor of greater or less importance. The word "mistake" as used herein is a state of mind that is not in accord with the facts; it is an erroneous thought—one that, when compared with the thoughts of others, does not correspond with them or with what we are pleased to call the "facts" and the "truth."⁶ The dis-

⁶ "Thoughts" are fleeting. Is it possible for a court to determine what was the "thought" of a man at a time now gone by? In an ancient case, Y.B. 17 Edw. IV, 2, Chief Justice Brian remarked, perhaps erroneously, that "the devil himself knoweth not the thought of man." Everyday experience shows that man himself believes that he can

discover the thoughts of another man. This he does by inference from the other's external expressions—his words, his features, and his acts. Such evidence may indeed lead to woeful error; but it is the best that we have and we act upon it daily. The courts act upon it in every case in which "mistake" is a fact that is in issue.

cussions in Restatement, Contracts, §§ 71 and 500 may be helpful after having studied the cases herein printed (and others).

Our problem is to determine the legal effects of certain kinds of mistake. Is it such as to induce a court to hold that no contract was made? Or, if a contract was made, is the mistake such that it will be held to be voidable on behalf of the mistaken party? Also, which one of the various judicial remedies that are available will the court award? In the present Section we are concerned chiefly with the first of these three questions. The other two can not be wholly separated from the first; but at this point their consideration is subsidiary and incidental.

In analysing the cases, some of the following questions may be helpful:

1. Did both parties, or only one, have a mistaken thought?
2. What is the "fact" as to which a mistaken thought existed? [E.g. the words in fact spoken or written; the meaning given to words by one party; the identity of the other party, or his character, or financial standing; the existence of the subject matter, or its market value. Possibilities are myriad.]
3. Is the fact of substantial importance?
4. Did the mistake induce mutual expressions of agreement, or did it merely induce action by one party (e.g. the payment of money)?
5. If mutual expressions were induced, were the meanings given thereto by the parties themselves or by third persons identical?
6. Did one party know of the other's mistake, or have reason to know it?
7. Did one party cause the other's mistake, purposely or innocently?
8. Was the mistaken party "negligent"?
9. How soon was the mistake discovered and notice given?
10. Has either party, or a third party, changed his position, so that restoration is impossible?
11. Was the risk of the error assumed by one of the parties, by agreement or by custom?
12. What remedies are available? Among these are Damages, Restitution, Specific Performance, Rescission, Cancellation, Reformation.
13. Were there differences between Common Law and Equity, and do they still exist?

Later chapters, especially that on Interpretation, will have a bearing on the subject of this Chapter.

RAFFLES v. WICHELHAUS et al.

In the Court of Exchequer, 1864. 2 Hurl. & C. 906.

Declaration. For that it was agreed between the plaintiff and the defendants, to wit, at Liverpool, that the plaintiff should sell to the defendants, and the defendants buy of the plaintiff, certain goods, to wit, 125 bales of Surat cotton, guaranteed middling fair merchant's Dhol-lorah, to arrive ex Peerless from Bombay; and that the cotton should be taken from the quay, and that the defendants would pay the plaintiff for the same at a certain rate, to wit, at the rate of $17\frac{1}{4}d.$ per pound, within a certain time then agreed upon after the arrival of the said goods in England. Averments: that the said goods did arrive by the said ship from Bombay in England, to wit, at Liverpool, and the plaintiff was then and there ready and willing and offered to deliver the said goods to the defendants, etc. Breach: that the defendants refused to accept the said goods or pay the plaintiff for them.

Plea. That the said ship mentioned in the said agreement was meant and intended by the defendants to be the ship called the Peerless, which sailed from Bombay, to wit, in October; and that the plaintiff was not ready and willing, and did not offer to deliver to the defendants any bales of cotton which arrived by the last-mentioned ship, but instead thereof was only ready and willing, and offered to deliver to the defendants 125 bales of Surat cotton which arrived by another and different ship, which was also called the Peerless, and which sailed from Bombay, to wit, in December.

Demurrer, and joinder therein.

Milward, in support of the demurrer. The contract was for the sale of a number of bales of cotton of a particular description, which the plaintiff was ready to deliver. It is immaterial by what ship the cotton was to arrive, so that it was a ship called the Peerless. The words "to arrive ex Peerless," only mean that if the vessel is lost on the voyage, the contract is to be at an end. [POLLOCK, C. B. It would be a question for the jury whether both parties meant the same ship called the Peerless.] That would be so if the contract was for the sale of a ship called the Peerless; but it is for the sale of cotton on board a ship of that name. [POLLOCK, C. B. The defendant only bought that cotton which was to arrive by a particular ship. It may as well be said, that if there is a contract for the purchase of certain goods in warehouse A., that is satisfied by the delivery of goods of the same description in warehouse B.] In that case there would be goods in both warehouses; here it does not appear that the plaintiff had any goods on board the other Peerless. [MARTIN, B. It is imposing on the defendant a contract different from that which he entered into. POLLOCK, C. B. It is like a contract for the purchase of wine coming from a particular es-

tate in France or Spain, where there are two estates of that name.] The defendant has no right to contradict by parol evidence, a written contract good upon the face of it. He does not impute misrepresentation or fraud, but only says that he fancied the ship was a different one. Intention is of no avail, unless stated at the time of the contract. [POLLOCK, C. B. One vessel sailed in October and the other in December.] The time of sailing is no part of the contract.

Mellish (Cohen with him), in support of the plea. There is nothing on the face of the contract to show that any particular ship called the Peerless was meant; but the moment it appears that two ships called the Peerless were about to sail from Bombay there is a latent ambiguity, and parol evidence may be given for the purpose of showing that the defendant meant one Peerless and the plaintiff another. That being so, there was no consensus ad idem, and therefore no binding contract. He was then stopped by the Court.

PER CURIAM. There must be judgment for the defendants.

Judgment for the defendants.

QUESTIONS:

1. Does the declaration allege a bargain for the purchase and sale of 125 *specific* bales of cotton?
2. Were shipment on and arrival by a ship named Peerless factors of such importance that their occurrence was a condition precedent to the buyer's legal duty to receive and pay?
3. Was either party unreasonable or negligent in giving his meaning to the words of the agreement?

This case is referred to again in Chapter 5, Interpretation.

NOTE

In overseas transactions an agreement for the sale of goods "to arrive *ex* Peerless" is by long custom understood to mean that the seller promises to put the goods on board the Peerless but does not promise that the ship will arrive, and that the buyer promises to receive and pay for the goods if and when they arrive and not otherwise. Suppose that the seller knew of this customary usage and the buyer did not!

Cases worthy of comparison with this very much discussed case are *Neel v. Lang*, 236 Mass. 61, 127 N.E. 512 (1920), seller said \$6,000; buyer understood \$3,000 no negligence; *Snoderly v. Bower*, 30 Idaho, 484, 166 P. 265 (1917), hay to be measured according to "government rule," and there was no such rule; *Rovegno v. Defferari*, 40 Cal. 459 (1871); *Rupley v. Daggett*, 74 Ill. 351 (1874); *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560 (1869); *Stong v. Lane*, 66 Minn. 94, 68 N.W. 765 (1896); *Irwin v. Wilson*, 45 Ohio St. 426, 15 N.E. 209 (1887).

See Restatement, Contracts, § 71.

EMBRY v. HARGADINE-McKITTRICK DRY GOODS CO.

St. Louis Court of Appeals, Missouri, 1907. 127 Mo.App. 383, 105 S.W. 777.

Action by Charles R. Embry against the Hargadine-McKittrick Dry Goods Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

GOODE, J. We dealt with this case on a former appeal (115 Mo. App. 130, 91 S.W. 170). It has been retried, and is again before us for the determination of questions not then reviewed. The appellant was an employè of the respondent company under a written contract to expire December 15, 1903, at a salary of \$2,000 per annum. His duties were to attend to the sample department of respondent, of which he was given complete charge. It was his business to select samples for the traveling salesman of the company, which is a wholesale dry goods concern, to use in selling goods to retail merchants.

Appellant contends that on December 23, 1903, he was re-engaged by respondent, through its president, Thos. H. McKittrick, for another year at the same compensation and for the same duties stipulated in his previous written contract. On March 1, 1904, he was discharged, having been notified in February that, on account of the necessity of retrenching expenses, his services and that of some other employès would no longer be required. The respondent company contends that its president never re-employed appellant after the termination of his written contract, and hence that it had a right to discharge him when it chose. The point with which we are concerned requires an epitome of the testimony of appellant and the counter testimony of McKittrick, the president of the company, in reference to the alleged re-employment.

Appellant testified: That several times prior to the termination of his written contract on December 15, 1903, he had endeavored to get an understanding with McKittrick for another year, but had been put off from time to time. That on December 23d, eight days after the expiration of said contract, he called on McKittrick, in the latter's office, and said to him that as appellant's written employment had lapsed eight days before, and as there were only a few days between then and the 1st of January in which to seek employment with other firms, if respondent wished to retain his services longer he must have a contract for another year, or he would quit respondent's service then and there. That he had been put off twice before and wanted an understanding or contract at once so that he could go ahead without worry. That McKittrick asked him how he was getting along in his department, and appellant said he was very busy, as they were in the height of the season getting men out—had about 110 salesmen on the line and others in preparation. That McKittrick then said: "Go ahead, you're

all right. Get your men out, and don't let that worry you." That appellant took McKittrick at his word and worked until February 15th without any question in his mind. It was on February 15th that he was notified his services would be discontinued on March 1st.

McKittrick denied this conversation as related by appellant, and said that, when accosted by the latter on December 23d, he (McKittrick) was working on his books in order to get out a report for a stockholders' meeting, and, when appellant said if he did not get a contract he would leave, that he (McKittrick) said: "Mr. Embry, I am just getting ready for the stockholders' meeting to-morrow. I have no time to take it up now. I have told you before I would not take it up until I had these matters out of the way. You will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road.' I may have asked him one or two other questions relative to the department, I don't remember. The whole conversation did not take more than a minute."

Embry also swore that, when he was notified he would be discharged, he complained to McKittrick about it, as being a violation of their contract, and McKittrick said it was due to the action of the board of directors, and not to any personal action of his, and that others would suffer by what the board had done as well as Embry. Appellant requested an instruction to the jury setting out, in substance, the conversation between him and McKittrick according to his version, and declaring that those facts, if found to be true, constituted a contract between the parties that defendant would pay plaintiff the sum of \$2,000 for another year, provided the jury believed from the evidence that plaintiff commenced said work believing he was to have \$2,000 for the year's work. This instruction was refused, but the court gave another embodying in substance appellant's version of the conversation, and declaring it made a contract "if you (the jury) find both parties thereby intended and did contract with each other for plaintiff's employment for one year from and including December 23, 1903, at a salary of \$2,000 per annum." Embry swore that, on several occasions when he spoke to McKittrick about employment for the ensuing year, he asked for a renewal of his former contract, and that on December 23d, the date of the alleged renewal, he went into Mr. McKittrick's office and told him his contract had expired, and he wanted to renew it for a year, having always worked under year contracts. Neither the refused instruction nor the one given by the court embodied facts quite as strong as appellant's testimony, because neither referred to appellant's alleged statement to McKittrick that unless he was re-employed he would stop work for respondent then and there.

It is assigned for error that the court required the jury, in order to return a verdict for appellant, not only to find the conversation occur-

red as appellant swore, but that both parties intended by such conversation to contract with each other for plaintiff's employment for the year from December, 1903, at a salary of \$2,000. If it appeared from the record that there was a dispute between the parties as to the terms on which appellant wanted re-employment, there might have been sound reason for inserting this clause in the instruction; but no issue was made that they split on terms; the testimony of McKittrick tending to prove only that he refused to enter into a contract with appellant regarding another year's employment until the annual meeting of stockholders was out of the way. Indeed, as to the proposed terms McKittrick agrees with Embry, for the former swore as follows: "Mr. Embry said he wanted to know about the renewal of his contract. Said if he did not have the contract made he would leave." As the two witnesses coincided as to the terms of the proposed re-employment, there was no reason for inserting the above-mentioned clause in the instruction in order that it might be settled by the jury whether or not plaintiff, if employed for one year from December 23, 1903, was to be paid \$2,000 a year. Therefore it remains to determine whether or not this part of the instruction was a correct statement of the law in regard to what was necessary to constitute a contract between the parties; that is to say, whether the formation of a contract by what, according to Embry, was said, depended on the intention of both Embry and McKittrick. Or, to put the question more precisely: Did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?

Judicial opinion and elementary treatises abound in statements of the rule that to constitute a contract there must be a meeting of the minds of the parties, and both must agree to the same thing in the same sense. Generally speaking, this may be true; but it is not literally or universally true. That is to say, the inner intention of parties to a conversation subsequently alleged to create a contract cannot either make a contract of what transpired, or prevent one from arising, if the words used were sufficient to constitute a contract. In so far as their intention is an influential element, it is only such intention as the words or acts of the parties indicate; not one secretly cherished which is inconsistent with those words or acts. • • •

In *Smith v. Hughes*, L.R. 6 Q.B. 597, 607, it was said: "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." And that doctrine was adopted in *Phillip v. Gallant*, 62 N.Y. 256. In 9 Cyc. 245, we find the following text: "The law imputes to a person an intention corresponding to the reasonable meaning of his

words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real, but unexpressed, state of his mind on the subject." Even more pointed was the language of Baron Bramwell in *Brown v. Hare*, 3 Hurlst. & N. *484, *495: "Intention is immaterial till it manifests itself in an act. If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; and so there would be if neither had the intention."

In view of those authorities, we hold that, though McKittrick may not have intended to employ Embry by what transpired between them according to the latter's testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.

[The court then held that Embry was quite reasonable in giving the construction that he did to McKittrick's words and acts. The judgment was reversed and the case remanded for a new trial.]

NOTE

See Restatement, Contracts, §§ 70, 71.

In *Woburn Nat. Bank v. Woods*, 77 N.H. 172, 175, 89 A. 491 (1914), the court said: "A contract involves what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter in hand. The standard by which their conduct is judged and their rights are limited is not internal, but external. In the absence of fraud or incapacity, the question is: What did the party say and do? 'The making of a contract does not depend upon the state of the parties' minds; it depends on their overt acts.'" Was this true in *Raffles v. Wichelhaus*?

In accord, see *Holmes, Com.Law*, 307; *Mansfield v. Hodgdon*, 147 Mass. 304, 17 N.E. 544 (1888); *Carnegie Steel Co. v. Connelly*, 89 N. J.L. 1, 97 A. 774 (1916), telephone order for 50 tons, when only 10 tons intended; *Taplin & Rowell v. Clark*, 89 Vt. 226, 95 A. 491 (1915), sale of a lot of horses, seller including a particular horse by mistake; *New York Central R. Co. v. Beaham*, 242 U.S. 148, 37 S.Ct. 43, 61 L.Ed. 210 (1916), railway ticket plainly setting out terms of contract; *Goldstein v. D'Arcy*, 201 Mass. 312, 87 N.E. 584 (1909), defendant wrote, "All you get above \$2,000 per year you may have as your commission"; plaintiff got a tenant for 5 years at \$2,200; held, he was entitled to \$1,000.

Mistakes are often made in sending code telegrams. Where an offeror used the code word meaning 30,000 bushels, when he intended to offer only 3,000, he was bound to deliver 30,000, unless the offeree knew of the mistake at time of acceptance. *Cargill Commission Co. v. Mowery*, 99 Kan. 389, 161 P. 634, 162 P. 313 (1916). But if the code message is so

negligently worded as to be unintelligible, the offeree is equally negligent in giving it a meaning, and there is no contract. *Falck v. Williams*, [1900] A.C. 176. See Restatement, Contracts, § 71(b).

For a discussion of the "objective" theory of contract, see Chapter 5, Interpretation. No language ever has an "objective" meaning, independent of users and hearers. The question is: Whose meaning is to be given effect and How is it discovered? See discussion by Frank, J., in *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (1946).

AYER v. WESTERN UNION TEL. CO.

Supreme Judicial Court of Maine, 1887. 79 Me. 493, 10 A. 495, 1 Am.St.Rep. 353.

EMERY, J. On report. The defendant telegraph company was engaged in the business of transmitting messages by telegraph between Bangor and Philadelphia, and other points. The plaintiff, a lumber dealer in Bangor, delivered to the defendant company in Bangor, to be transmitted to his correspondent in Philadelphia, the following message: "Will sell 800 M laths, delivered at your wharf, two ten net cash. July shipment. Answer quick." The regular tariff rate was prepaid by the plaintiff for such transmission. The message delivered by the defendant company to the Philadelphia correspondent was as follows: "Will sell 800 M laths, delivered at your wharf, two net cash. July shipment. Answer quick." It will be seen that the important word "ten" in the statement of price was omitted.

The Philadelphia party immediately returned by telegraph the following answer: "Accept your telegraphic offer on laths. Cannot increase price spruce." Letters afterwards passed between the parties, which disclosed the error in the transmission of the plaintiff's message. About two weeks after the discovery of the error, the plaintiff shipped the laths, as per the message received by his correspondent, to-wit, at two dollars per M. He testified that his correspondent insisted he was entitled to the laths at that price, and they were shipped accordingly.

The defendant telegraph company offered no evidence whatever, and did not undertake to account for or explain the mistake in the transmission of the message. The presumption therefore is that the mistake resulted from the fault of the telegraph company. We cannot consider the possibility that it may have resulted from causes beyond the control of the company. In the absence of evidence on that point we must assume that for such an error the company was in fault. *Bartlett v. Telegraph Co.*, 62 Me. 221, 16 Am.Rep. 437.

The fault and consequent liability of the defendant company being thus established, the only remaining question is the extent of that liability in this case. The plaintiff claims it extends to the difference between the market price of the laths and the price at which they were

shipped. The defendant claims its liability is limited to the amount paid for the transmission of the message. It claims this limitation on two grounds. * * *

2. The defendant company also claims that the plaintiff was not in fact damaged to a greater extent than the price paid by him for the transmission. It contends that the plaintiff was not bound by the erroneous message delivered by the company to the Philadelphia party, and hence need not have shipped the laths at the lesser price. This raises the question whether the message written by the sender, and intrusted to the telegraph company for transmission, or the message written out and delivered by the company to the receiver at the other end of the line, as and for the message intended to be sent, is the better evidence of the rights of the receiver against the sender.

The question is important and not easy of solution. It would be hard that the negligence of the telegraph company, or an error in transmission resulting from uncontrollable causes, should impose upon the innocent sender of a message a liability he never authorized nor contemplated. It would be equally hard that the innocent receiver, acting in good faith upon the message as received by him, should through such error lose all claim upon the sender. If one, owning merchandise, write a message offering to sell at a certain price, it would seem unjust that the telegraph company could bind him to sell at a less price, by making that error in the transmission. On the other hand the receiver of the offer may in good faith, upon the strength of the telegram as received by him, have sold all the merchandise to arrive, perhaps at the same rate. It would seem unjust that he should have no claim for the merchandise. If an agent receive instructions by telegraph from his principal, and in good faith act upon them as expressed in the message delivered him by the company, it would seem he ought to be held justified, though there were an error in the transmission.

It is evident that in case of an error in the transmission of a telegram either the sender or receiver must often suffer loss. As between the two, upon whom should the loss finally fall? We think the safer and more equitable rule, and the rule the public can most easily adapt itself to, is that, as between sender and receiver, the party who selects the telegraph as the means of communication shall bear the loss caused by the errors of the telegraph. The first proposer can select one of many modes of communication, both for the proposal and the answer. The receiver has no such choice, except as to his answer. If he cannot safely act upon the message he receives through the agency selected by the proposer, business must be seriously hampered and delayed. The use of the telegraph has become so general, and so many transactions are based on the words of the telegram received, that any other rule would now be impracticable.

Of course, the rule above stated presupposes the innocence of the receiver, and that there is nothing to cause him to suspect an error. If there be anything in the message, or in the attendant circumstances, or in the prior dealings of the parties, or in anything else, indicating a probable error in the transmission, good faith on the part of the receiver may require him to investigate before acting. Neither does the rule include forged messages, for in such case the supposed sender did not make any use of the telegraph.

The authorities are few and somewhat conflicting, but there are several in harmony with our conclusion upon this point. In *Durkee v. Railroad Co.*, 29 Vt. 137, it was held that where the sender himself elected to communicate by telegraph, the message received by the other party is the original evidence of any contract. In *Saveland v. Green*, 40 Wis. 431, the message received from the telegraph company was admitted as the original and best evidence of a contract, binding on the sender. In *Morgan v. People*, 59 Ill. 58, it was said that the telegram received was the original, and it was held that the sheriff receiving such a telegram from the judgment creditor was bound to follow it as it read. There are dicta to the same effect in *Wilson v. Railway Co.*, 31 Minn. 481, 18 N.W. 291, and *Howley v. Whipple*, 48 N.H. 488.

Telegraph Co. v. Shotter, 71 Ga. 760, is almost a parallel case. The sender wrote his message: "Can deliver hundred turpentine at sixty-four." As received from the telegraph company it read: "Can deliver hundred turpentine at sixty," the word "four" being omitted. The receiver immediately telegraphed an acceptance. The sender shipped the turpentine, and drew for the price at 64. The receiver refused to pay more than 60. The sender accepted the 60, and sued the telegraph company for the difference between 60 and the market. It was urged, as here, that the sender was not bound to accept the 60, as that was not his offer. The court held, however, that there was a completed contract at 60, that the sender must fulfill it, and could recover his consequent loss of the telegraph company.

It follows that the plaintiff in this case is entitled to recover the difference between the two dollars and the market price, as to laths. The evidence shows that the difference was 10 cents per M.

Judgment for plaintiff for \$80, with interest from the date of the writ.

NOTE

In accord: *Butler v. Foley*, 211 Mich. 668, 179 N.W. 34 (1920), counter offeror bound by telegram as erroneously delivered, even though the other party had himself first sent an offer by wire; *Des Arc Oil Mill v. Western Union Tel. Co.*, 132 Ark. 335, 201 S.W. 273, 6 A.L.R. 1081 (1918); *Western Union Tel. Co. v. Shotter*, 71 Ga. 760 (1883); *Sherrerd v. Western Union Tel. Co.*, 146 Wis. 197, 131 N.W. 341 (1911).

The English rule is *contra*, and so are several American cases. *Henkel v. Pape*, L.R. 6 Ex. 7 (1870); *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 11 S.W. 783, 4 L.R.A. 660, 10 Am.St.Rep. 699 (1889); *Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 18 So. 425, 30 L.R.A. 444, 48 Am.St.Rep. 604 (1895); *Strong v. Western Union Tel. Co.*, 18 Idaho, 389, 109 P. 910, 30 L.R.A.,N.S., 409, Ann.Cas.1912A, 55 (1910).

If the offeree knew or ought to have known that there was an error, there is no contract. *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, 70 P. 658, 59 L.R.A. 575 (1902). Cf. *J. L. Price Brokerage Co. v. Chicago, B. & Q. R. R. Co.* (Mo.App.) 199 S.W. 732 (1917), and comment in 27 Yale L.Jour. 932.

In *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835, 26 L.R.A.,N.S., 810 (1909), an agent, in order to get a commission fraudulently, by a substitution of typewritten sheets caused a builder to promise to erect a building for \$33,500, and the owner to promise to pay \$23,000 for the work. The difference was discovered after completion of the building.

STEINMEYER et al. v. SCHROEPPPEL.

Supreme Court of Illinois, 1907.

226 Ill. 9, 80 N.E. 564, 10 L.R.A.,N.S., 114, 117 Am.St.Rep. 224.

Action by Henry Steinmeyer and others against John Schroepfel, which was consolidated with a suit by Schroepfel against Henry Steinmeyer and others. From a decree of the Appellate Court, reversing a decree, canceling a contract between the parties, Henry Steinmeyer and others appeal. Affirmed.

CARTWRIGHT, J. Appellants are in the lumber business at Collinsville, Ill., and appellee is a building contractor at the same place. On June 10, 1905, appellee was about to erect a building for himself, and left at the office of appellants an itemized list of lumber, containing 34 items, on which he desired them to give him a price. Appellants' bookkeeper set down upon that list, opposite each item, the selling price, but did not add up the column. If correctly added, the column would have footed up \$1,867. One of the appellants made the addition, and, by mistake, made the total \$1,446. The bookkeeper copied the list on one of appellants' billheads without the prices opposite the different items, and wrote at the bottom, "Above for \$1,446," and delivered the paper to appellee the same evening. Appellee received bids for the lumber from two other firms, which were in the neighborhood of \$1,890. On June 16th appellee called at the office of appellants and accepted their offer. He did not bring the paper with him, but the bookkeeper made another copy and at the bottom of it wrote the same memorandum, "Above for \$1,446." One of the appellants signed it, and a memorandum was then written below to the effect that if delivery was made within 30 days the appellants were to have \$20 more than the es-

timate, but if delivery was made after 30 days appellee was to have a rebate of \$20 from the estimate, and this was signed by both parties. The same evening one of the appellants, looking over the bill, found that he had not added the amounts correctly, and the next morning one of them notified appellee by telephone of the mistake, and refused to furnish the lumber for less than \$1,867. Appellants also sent appellee a notice that they had found an error of \$421, and the estimate should read \$1,867 instead of \$1,446. Appellants did not furnish the lumber, and appellee purchased it at the next lowest bid from another firm, and sued appellants for the difference between what he paid for the lumber, and what they had agreed to furnish it for.

Appellants then filed a bill to enjoin the prosecution of the suit at law, and to have the contract canceled on account of the mistake. The suits were consolidated and tried together without a jury. The circuit court entered a decree, canceling the contract, and restraining appellee from prosecuting his suit at law. The Appellate Court for the Fourth District reversed the decree, and remanded the cause to the circuit court, with directions to dissolve the injunction and dismiss the bill for want of equity. Appellants applied to the Appellate Court for a certificate of importance, which was granted, and this appeal was prosecuted.

The jurisdiction of equity to grant the remedy of cancellation because of a mistake of fact by one party to a contract is well recognized. Mutual consent is requisite to the creation of a contract, and if there is a mistake of fact by one of the parties going to the essence of the contract, no agreement is, in fact, made. 2 Kent's Com. 477. If there is apparently a valid contract in writing, but by reason of a mistake of fact by one of the parties, not due to his negligence, the contract is different with respect to the subject-matter or terms from what was intended, equity will give to such party a remedy by cancellation where the parties can be placed in statu quo. The ground for relief is, that by reason of the mistake there was no mutual assent to the terms of the contract. 24 Am. & Eng. Ency. of Law (2d Ed.) 618. The fact concerning which the mistake was made must be material to the transaction and affect its substance, and the mistake must not result from want of the care and diligence exercised by persons of reasonable prudence under the same circumstances. *Bonney v. Stoughton*, 122 Ill. 536, 13 N.E. 833.

In this case the mistake was in the addition of the figures set down by the bookkeeper. The price of each item was written correctly, but appellants claimed that one item of about \$400 was placed somewhat to the right, and in adding the column the 4 was counted in the 10-column instead of the 100-column. If that was done, it does not account for the difference of \$421. But if it did, it would only show a want of ordinary care and attention. If the figures were not exactly in

line, the fact could hardly escape notice by a competent business man giving reasonable attention to what he was doing. There was no evidence tending to prove any special circumstances excusing the blunder.

The case of *Board of School Com'rs v. Bender*, 36 Ind.App. 164, 72 N.E. 154 (decided by the Appellate Court of Indiana, Division No. 2), relied on by appellants, differs from this in various respects, one of which is that *Bender* was excusable for the mistake. His complaint alleged that he was misinformed by the architect that his bid must be in at or before 4 o'clock, when, in fact, he was allowed until 8 o'clock; that in ignorance of the fact and for want of time he was hurried in submitting his bid, and had no opportunity for verification of his estimate, and that under those circumstances he turned two leaves of his estimate book by mistake and omitted an estimate on a large part of the work. The case involved the question whether the bidder had forfeited a sum deposited as a guaranty that he would enter into a contract, and when notified that his bid was accepted, having discovered his mistake, he informed the architect and immediately gave notice that he would not enter into the contract. By the terms of the bid it was intended that if the bid was accepted a contract would be made, but the bid was not the contract contemplated by the parties and the bidder never did enter into the contract. The court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault. In the case of *Harran v. Foley*, 62 Wis. 584, 22 N.W. 837, there was no agreement, for the reason that the minds of the parties never met. The plaintiff claimed to have purchased of the defendant some cattle for \$161.50 but the defendant intended to state the price at \$261.50. When the defendant was informed that the plaintiff understood the price to be \$161.50 he refused to deliver the cattle and tendered back \$20 received on the purchase price. No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake.

A mistake which will justify relief in equity must affect the substance of the contract, and not a mere incident or the inducement for entering into it. The mistake of the appellants did not relate to the subject-matter of the contract, its location, identity, or amount, and there was neither belief in the existence of a fact which did not exist or ignorance of any fact material to the contract which did exist. The contract was exactly what each party understood it to be and it expressed what was intended by each. If it can be set aside on account of the error in adding up the amounts representing the selling price, it could be set aside for a mistake in computing the percentage of profits which appellants intended to make, or on account of a mistake in the cost of the lumber to them, or any other miscalculation on their part. If equity would relieve on account of such a mistake there would be no stability in contracts, and we think the Appellate Court was right in

concluding that the mistake was not of such a character as to entitle the appellants to the relief prayed for.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

QUESTIONS:

1. What was the "subject-matter" of the above contract? Lumber? Money?
2. Is the court successful in its attempt to distinguish the Indiana case?

GEREMIA v. BOYARSKY et al.

Supreme Court of Errors of Connecticut, 1928. 107 Conn. 387, 140 A. 749.

Action to recover damages for breach of building contract by Sylvester Geremia against Morris Boyarsky and others. Judgment for defendants, and plaintiff appeals. No error.

BANKS, J. The defendants are carpenters and building contractors, and in April, 1926, the plaintiff requested them to submit bids for the carpenter work and painting for a house that he was building for himself. The defendants met in the evening of April 25th for the purpose of making their estimates, but did not complete their figures, owing to the lateness of the hour. They wrote their estimates on two separate pieces of paper, but did not add the figures. The next morning the plaintiff called upon the defendants, and requested the defendant Boyarsky to stop the work that he was upon and complete the estimate. Boyarsky sat down with the plaintiff at a workbench, and proceeded to add up the various items upon the two sheets. In his haste, he made an error in adding the items on the first sheet, footing them up at \$99.10, when the correct footing should have been \$859.10. This error, being carried to the second sheet, made the apparent cost of the work \$1,450.40, instead of \$2,210.40. The plaintiff thereupon awarded the contract to the defendants, and later the same day they executed a written contract to do the work for the sum of \$1,450.40. The plaintiff, when the erroneous bid was given, and when he procured the signing of the contract, had good reason to believe and know that there must have been a substantial omission or error in the amount of the bid. That evening the defendants discovered their mistake, and, as soon as they could find the plaintiff, notified him of the mistake, and offered to go forward with the work according to the actual prices carried out in their estimate, and as low as any responsible contractor would do it for, if less than \$2,210.40. The plaintiff refused their offer, and insisted that they complete the work for \$1,450.40. The sum

of \$2,375 was a reasonable price for the work covered by the defendants' contract, and the plaintiff thereafter let the contract for the work to other contractors for that sum. The court found that the defendants had made a material mistake in their bid, that it would be inequitable to award the plaintiff damages for a breach of the contract, and that it should be rescinded.

The finding is not subject to correction in any material respect. In paragraph 12 the item \$959.10 should be \$859.10, and is corrected accordingly.

The finding discloses a case where the defendants, by reason of an error in computation, have obligated themselves to perform a contract for a sum substantially less than the sum which the actual figures of their estimate totaled, and less than the reasonable cost of the work contracted to be done. It is the contention of the plaintiff that equity should not relieve the defendants from the consequences of their mistake, because (a) it was a unilateral mistake; (b) it was not material to the making of the contract; and (c) it resulted from the defendants' own negligence. While the mistake of only one of the parties inducing him to sign a contract cannot be a ground for a reformation of the contract, it may be a ground for its cancellation. *Snelling v. Merritt*, 85 Conn. 83, 101, 81 A. 1039. Though the mistake was not induced by the conduct of the other party, equity will grant relief, if the latter, when he becomes aware of the mistake, seeks to take an unconscionable advantage of it. *Lieberum v. Nussenbaum*, 94 Conn. 276, 108 A. 662. The plaintiff, though he is found by the court not to have participated in the mistake, had good reason to believe that one had been made before the contract was signed, was notified of the mistake by the defendants before he had changed his position in any respect, and sought to take unfair advantage of it by insisting upon the performance of the contract at a price upon which the minds of the parties had never met. When the contract is still executory and the parties can be put in statu quo, one party to the contract will not be permitted to obtain an unconscionable advantage merely because the mistake was unilateral. 3 Williston on Contracts, §§ 1578, 1580.

That a mistake through which the defendants agreed to perform the contract for a price one-third less than the total of the actual figures of their estimate was of so essential and fundamental a character that the minds of the parties never met would not seem to require discussion.

As a general rule, a party will not be given relief against a mistake induced by his own culpable negligence. "But the rule is not inflexible, and in many cases relief may be granted although the mistake was not unmixed with some element of negligence, particularly where the other party has been in no way prejudiced." *Fountain Co. v. Stein*, 97 Conn. 619, 626, 118 A. 47, 49 (27 A.L.R. 976); *Petterson v. Weinstock*, 106 Conn. 436, 445, 138 A. 433, 437; 21 Corpus Juris, 88. "The con-

clusion from the best authorities seems to be that the neglect must amount to a violation of a positive legal duty. The highest possible care is not demanded. Even a clearly established negligence may not of itself be a sufficient ground for refusing relief if it appears that the other party was not prejudiced thereby." 2 Pomeroy's *Eq.Juris.* (4th Ed.) § 856. "If one of the parties through mistake names a consideration that is out of all proportion to the value of the subject of negotiations, and the other party, realizing that a mistake must have been made, takes advantage of it, and refuses to let the mistake be corrected when it is discovered, he cannot under these conditions claim an enforceable contract." 6 R.C.L. 623.

It may be conceded that the error in addition made by the defendant Boyarsky, when he hastily totaled the items of his estimate at the request of the plaintiff, involved some degree of negligence. It would be inequitable under the circumstances to permit the plaintiff, who had good reason to know, before the contract was signed, that there must have been a substantial omission or error in the amount of the bid, to take advantage of such error while the contract was still executory, and he had been in no way prejudiced, and to require the defendants to do the work for an amount much less than the actual cost. In similar situations when a price has been bid which, because of erroneous arithmetical processes, or by the omission of items, was based on a mistake, rescission has been allowed where the contract was still executory, and it would be inequitable to permit the other party to gain an unfair advantage from a mistake which has not prejudiced him in any way. *Moffett v. Rochester*, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108; *Bromagin v. Bloomington*, 234 Ill. 114, 84 N.E. 700; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N.W. 500, L.R.A.1917D, 741; *Board of School Com'rs v. Bender*, 36 Ind.App. 164, 72 N.E. 154; *Barlow v. Jones* (N.J.Ch.) 87 A. 649; *Everson v. Int. Granite Co.*, 65 Vt. 658, 27 A. 320.

The mistake of the defendants was of so fundamental a character that the minds of the parties did not meet. It was not, under the circumstances, the result of such culpable negligence as to bar the defendants of redress, and the plaintiff, before the contract was signed, had good reason to believe that a substantial error had been made, and, while the contract was still executory, and he had been in no way prejudiced, refused to permit the correction of the error, and attempted to take an unconscionable advantage of it. The defendants were clearly entitled to a decree canceling the contract.

There is no error.

All concur.

QUESTIONS:

1. When defendant submitted his bid, based upon an antecedent mistaken addition, did he not know the terms of the bid that he was making and intend to make that exact bid? If yes, was there not a "meeting of the minds" and a bilateral contract, even though it might be voidable?
2. Can this decision be reconciled with that in *Steinmeyer v. Schroepel*?
3. Was there a "mutual mistake" in either of the two preceding cases?

NOTE

Statements are very numerous to the effect that a bargain otherwise valid will not be set aside on the ground of mistake unless the mistake is "mutual." Generally we are not enlightened as to what is meant by the term "mutual" or as to the exact nature of the error in the thought of either party. See *Restatement, Contracts*, § 503.

Usually a mistake that is described as "unilateral" is such as to affect injuriously only the one party making the mistake. If he is willing to abide by the bargain, the other party must perform as agreed. If this is true, the bargain is certainly not "void," although it may be "voidable" by the party injuriously affected. There are altogether too many decisions in harmony with *Geremia v. Boyarsky* to be disregarded or disapproved. Among these cases are *State of Connecticut v. McGraw*, 41 F.Supp. 369 (1941, D.C.); *Union & Peoples Nat. Bank v. Anderson-Campbell Co.*, 256 Mich. 674, 240 N.W. 19, 80 A.L.R. 584 (1932), an item of \$2,900 omitted in a \$46,000 bid; *St. Nicholas Church v. Kropp*, 135 Minn. 115, 160 N.W. 500, L.R.A.1917D, 741 (1916), bidder's mistake in omitting one item from his estimate discovered before any change of position; *Neill v. Midland R. Co.*, 20 L.T.N.S. 864 (1869), mistake discovered after part performance; *Moffett, Hodgkins & Clarke Co. v. Rochester*, 178 U.S. 373, 20 S.Ct. 957, 44 L.Ed. 1108 (1900), mistake discovered before executing written contract.

In some of these cases the mistake was discovered before execution of the final documentary contract; but that contract was one that the bidder had bound himself either to execute or to give up a large deposit as liquidated damages. It is very material to know how soon the mistake was discovered and whether notice thereof was given before any important change of position by the other party.

In the case above, the defendant's unilateral mistake appears to have been used as a defense in a suit for damages for his refusal to perform. If the mistake is such that equity would have decreed cancellation, in any modern system of courts it should operate as a good equitable defense in any suit on the contract by the other party.

Bains v. Ensor, 39 A.2d 62 (1944, Mun.Ct.App.D.C.). The plaintiff offered to buy two lots of land belonging to defendant, \$300 for one and \$700 for the other. Two months later he asked defendant, by telephone, for his total price on the lots, including an amount for taxes paid in advance. The defendant replied \$1817.15. Being asked for a "breakdown"

of this, the defendant replied \$400 for lot D, \$700 for lot W, and \$317.15 for tax refund. The plaintiff noted these in writing, without adding them, and paid the sum of \$1817.15. On discovering the mistake in addition, the plaintiff suggested reconveyance and repayment of the whole amount; but the defendant refused. The court held that on these facts the plaintiff had a right to the repayment of \$400, a valid contract at \$1417.15 having been made.

Mistake as to Identity.—"Identity" is not as simple a concept as may appear. In bargaining face to face, it may be thought that neither one can be mistaken as to the physical person in front of him; yet mistake is possible as to age, weight, color, sex, features, and voice. There are factors in identity that may be more materially significant than these, as to which a party may be mistaken, whether bargaining face to face or at a distance. Such factors are name, family, social relations, business associations and position. The effect of a mistake as to one or more of these factors, with respect to the formation and the enforcement of a bargain, varies with the circumstances. Sometimes the mistake is wholly immaterial.

If A sends an offer by mail to B, but it is delivered to C who differs from B in practically all of the factors by which identity is determined, C gets no power of acceptance. If C attempts to accept in B's place, either by making the promise or by rendering the performance that A requested of B, no contract has been made. This result is not caused by any mistake of identity, by either A, B, or C. The postman may have made such a mistake or he may have read a street number incorrectly. In receiving and using goods shipped by C, A may make the mistake of believing them to have been shipped by B.

The complex problems that have arisen can not be dealt with in the present casebook. Cases often discussed are *Boulton v. Jones*, 2 H. & N. 564 (1857); *Cundy v. Lindsay*, 3 A.C. 459 (1878); *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am.Rep. 9 (1877); *Edmunds v. Merchants' Despatch Transp. Co.*, 135 Mass. 283 (1883).

Mistake as to the Terms of a Writing.—A voucher, railroad ticket, or other writing may be handed to and accepted by a person who does not take the trouble to read it. Under some circumstances he will be bound by contract in accordance with the printed terms. He may be unaware that a contract was being proposed; he may be consciously ignorant of the proposed terms, failing to read because of haste, laziness, or illiteracy; these statements may be applicable even in a case in which he executes a document by signature and delivery. One has often been held bound by terms, though he was ignorant or mistaken as to their existence, for the reason that his conduct led the other party to believe reasonably that he assented to them and to act in reliance on that belief. See *Restatement, Contracts*, § 70.

TYRA v. CHENEY.

Supreme Court of Minnesota, 1915. 129 Minn. 428, 152 N.W. 835.

Action by Joseph Tyra, etc., against Robert J. Cheney, etc. Verdict for plaintiff, and, from denial of alternative motion for judgment or new trial, defendant appeals. Affirmed.

HOLT, J. The defendant had the contract to add to and repair a school building in Minneapolis, Minn. Plaintiff did some work and furnished some material in the performance of the contract. This action was to recover the reasonable value thereof, less certain admitted payments. In defense an express contract was pleaded, and judgment tendered for \$27, the unpaid balance. Verdict for plaintiff, and defendant appeals from the order denying his motion in the alternative for judgment or a new trial.

Plaintiff's contention, in brief, was: About the last of July, 1912, he offered to bid on the roofing and sheet metal work required in defendant's contract. Lacking time to put the bid, or estimate, in formal shape, he, on July 27th, gave to defendant's estimator the figures for the various items, namely, \$963 for the new part of the building, \$2,410 for the old part, \$400 for registers, and \$251 for metal covered doors; the total bid being about \$4,025. On August 1st he was told the bid came too late, but, nevertheless, he could send it in in writing. Plaintiff undertook to do so on the 3d, but now claims the item of \$963 for the new part of the building was left out through oversight. A few days thereafter, upon inquiring about his chance of securing the work, he was told that his bid was too high. However, he persisted in the attempt to induce defendant to use, instead of the specified metal doors, metal doors of plaintiff's make. He succeeded, and late in August, was awarded a separate contract for the doors for \$295. Nothing further was heard from defendant until in September, when plaintiff was told to go ahead with the work. Defendant denies ever receiving any estimate, bid, or figures, except the written bid.

The court, in submitting the case, charged that the burden was upon plaintiff to show, by a fair preponderance of testimony, that when, in September, 1912, defendant gave plaintiff the direction to proceed with the work, it was done with knowledge of plaintiff's mistake of \$963 in the written bid and of his resting under the belief that it conformed to the oral bid of \$4,025, so that it might be truthfully found that defendant did not accept the written bid of \$3,062 in good faith, then plaintiff could recover the reasonable value, otherwise the verdict must be limited to the amount tendered in the answer. We believe this theory sound. If cognizant of the mistake in plaintiff's bid, and that the latter was unaware of its occurrence, defendant had no right to claim that, when he told plaintiff to go ahead with the work, their

minds met upon the price mistakenly stated in the bid. Nor should plaintiff be allowed to profit by his own mistake, so as to hold defendant to the oral bid. There was a failure to enter a binding contract. One cannot snap up an offer or bid knowing that it was made in mistake. Page on Contracts, § 86; Elliott on Contracts, § 107; *Harran v. Foley*, 62 Wis. 584, 22 N.W. 837; *Everson & Co. v. International Granite Co.*, 65 Vt. 658, 27 A. 320; *Singer v. Grand Rapids Match Co.*, 117 Ga. 86, 43 S.E. 755; *Rowland v. N. Y., etc., Ry. Co.*, 61 Conn. 103, 23 A. 755, 29 Am.St.Rep. 175; *Peerless Glass Co. v. Pacific Crockery & T. Co.*, 121 Cal. 641, 54 P. 101. This also disposes of alleged errors in admitting evidence of reasonable value. • • •

The order is affirmed.

CHAPTER 2

CONSIDERATION

INTRODUCTORY NOTE

In studying the cases dealing with consideration for a promise, it should always be remembered that the main problem before the court is to determine whether or not *a promise should be enforced*. The courts did not start in the beginning with any definite rule or series of rules by which to determine the question. Without doubt, the factors that induced the judicial enforcement of promises in early times were of various sorts, just as they are at present; but they were not the same factors. Not nearly so many promises were enforced in early times, mainly because business transactions that included a promise were very much less numerous.

"Consideration", as that term eventually came to be used, is a term that has included a number of different factors that have been thought to be good reasons for enforcing a promise. The courts certainly did not start with a full-fledged "doctrine of consideration" or with any definition indicating the factors of which a "consideration" may consist. The term itself appears not to have been in use before the sixteenth century. Legal historians have tried to trace the doctrine to its source and to discover the "original" or the "true" doctrine. There is not now and never has been one "true" doctrine; and the "doctrine", such as it is, has had a good many "origins" and is still having them. It has had a continuous and variable development as a part of the evolutionary process of determining what promises ought to be enforced by society and what ones should not.

Furthermore, the presence or absence of "consideration" is not the only test of enforceability. If the term "consideration" is closely and narrowly defined, then it will appear that many promises will be enforced without it. If it is more broadly and loosely defined, the enforceability of many more promises will appear to depend upon it.

The American Law Institute has chosen to adopt a definition of "consideration" that in some respects is narrow rather than broad. See sections 75-84 of the Restatement of Contracts. In section 75, the Institute declares that consideration is something that is a subject of conscious exchange. It is that which is "bargained for and given in exchange for the promise." In this the Institute is in substantial agree-

ment with Mr. Justice Holmes, as indicated in some of the cases that follow. But having thus limited the content of the term "consideration," the Institute at once proceeded to list a number of classes of cases in which an informal promise is enforceable without any consideration at all. See sections 85-94, under the topical heading, "Informal Contracts without Assent or Consideration."

In this casebook the definition and usage of the Institute will be followed; not on the ground that the Institute has stated (or Restated) the one true doctrine or the one correct definition, but because it is believed that its definition is a convenient one and its doctrine a good "working doctrine." It seems probable that the courts will tend to follow the lead of the Institute. For these reasons a separate chapter herein is headed "Informal Contracts without Mutual Assent or Consideration." Contracts that result from the bargaining process of offer and acceptance are included in Chapters I and II; the latter one, the present Chapter, contains cases dealing with the legal sufficiency of those matters that are bargained for and given in exchange for a promise.

Most of the transactions that lead to the judicial enforcement of a promise are business bargains. The factor that most commonly induces enforcement of a promise is the bargained-for consideration that was given in exchange for it. But not every such "consideration" is held to be a sufficient reason for enforcement. In Chapter I the problem was whether a bargain was made by the process of offer and acceptance and what was the agreed exchange for the promise to be enforced. In Chapter II the problem is as to the legal sufficiency of that exchange.

The rules of law by which that legal sufficiency is determined are merely "working rules", whether made by the Institute or by anybody else. The "Restatement" is not a closed book. New kinds of bargains will continue to be made, leading necessarily to new "law" as to the sufficiency of the exchange.

FORMS OF ACTION AT COMMON LAW

Before the so-called doctrine of consideration was born the Courts of Common Law were operating in England. They had a complex and important technical procedure. They had "forms of action." When suit was brought, a "writ" had to be served on the defendant, one of a number of stereotyped writs, expressed in Latin by some learned "clerk." Anyone who had a complaint based on facts that did not fit one of these existing writs was out of luck. Yet a writ, even in Latin, was capable of being stretched. This is not the place to give the history of Common Law Procedure and its "forms of action"; and yet that history is necessary to an understanding of the development of the

common law and its rules and doctrines. This is especially true of the doctrine of consideration.

In bringing suit against a defendant who had broken his promise, the question before the plaintiff's lawyer was not whether there was a "valid contract"; it was whether some one of the list of "writs", one of the then used forms of action would fit his case. By the time that the courts began to talk about "consideration", without defining it at all, the principal forms of action that would fit the broken-promise cases were known as Covenant, Debt, and Assumpsit.

The writ of Covenant was applicable only to promises made in a sealed writing. The writing and the seal had magic enough to make the promise legally enforceable without troubling about whether anything had been exchanged for the promise.

The writ of Debt was applicable when the defendant had received something from the plaintiff and owed a duty to return it, either specifically or its value in money. This "something received", often referred to as "quid pro quo", might be money, goods, or services; and the "debt", or duty of payment, arose not because the defendant had made a promise but because he was regarded as having something in his possession that "belonged" to the plaintiff. Nowadays most "debts" arise out of promises to pay a sum of money; but there are many non-promissory debts also.

The writ of Assumpsit was one that had its origin in the very early action of Trespass and its later form known as Trespass on the Special Case (or abbreviated to mere Case). Originally Trespass was an action for damages for harm done by violence by the defendant (trespass *vi et armis*). Such a form was not applicable to harms caused by the defendant's negligence, or otherwise than "with force and arms." When such wrongs began to cry out for remedy, instead of inventing a new writ (as the officers of the king could have done and as in earlier times they had often done) the courts permitted a mere variation in the writ of Trespass. The phrase *vi et armis* could be omitted, and a remedy was given for a *transgressio* that involved no force and arms. Of course, this was a making of new substantive law, although it was made to appear like a mere change in procedure.

As times and mores changed further, an insistent demand arose for a remedy for harm suffered by reason of the defendant's failure to make good his representations and to perform his promises—promises that were neither under seal nor such as to create a money debt. These included promises to render service, to erect a building, to deliver goods, to transfer title to land—the promises that now compose a very large part of those business transactions by which we live and thrive. Again it was easier to modify an old writ than to make a new one; and it satisfied the growing demand without appearing to make new law.

The already modified writ of Trespass, omitting the force and arms, was further altered, this time by an addition instead of an omission. In the Latin words of the writ it was further stated that the defendant had promised (*super se assumpsit*), that he had wrongfully deceived the plaintiff and caused him harm by inducing him to act in reliance on the promise. In issuing this writ the clerks had already been permitted to vary its exact wording so as to suit the special case of the plaintiff. The result was that the Common Law now offered a new writ and form of action described as Trespass on the Special Case in Assumpsit. Soon this came to be known by its single key word Assumpsit. It was thus that a very large and important amount of new "contract law" was created, by what appeared to be no more than shifts in procedure. No new "rules" or "doctrines" were enunciated; but the wiser judges certainly knew that granting an old remedy in a new kind of case was making new law, even though it has taken some more centuries to state (and to Restate) what it is. The effectiveness of a "rule of law" is directly dependent on the character of the "remedies" and the efficiency of the "procedure." Substantive law and Remedial law are but two aspects of our legal system.

A study of the reports of the ancient cases in which this history appears affords numerous clues toward clearing up what has been called the "Mystery of Consideration." But the clarification shows not the birth of a definitely worded doctrine, not an absolute and unchangeable rule, not a historically correct definition; it shows a continuous evolutionary process of determining, case by case, what promises should be enforced, what are the good and sufficient reasons for enforcement and what the insufficient, what are the factors that induce courts to give an enforcing remedy. An enforceable money debt was not created by a mere promise to pay; the promisor must have received something from the promisee—a *quid pro quo*. The action of Assumpsit was not maintainable unless the promisee had suffered harm by reason of the promise. Perhaps these are the sources of the idea, once very commonly stated (but not Restated by the Institute) that consideration must be either a Benefit to the promisor or a Detriment to the promisee. This statement was certainly an over-simplification. The Institute now states that consideration need be neither such a Benefit nor such a Detriment but that it must be bargained for and given in exchange for the promise to be enforced. The Institute restricts "consideration" to bargaining transactions; the courts in developing the doctrine made no such restriction.

The actions of Debt and Assumpsit were the accepted Common Law forms for the enforcement of informal promises for some centuries. These actions, most especially Assumpsit, expanded in their coverage, so that more and more promises became enforceable and more and more factors served as a sufficient "consideration." In determining

whether under our present legal procedure a promise is enforceable, it is useful to know whether or not it would have been so in Debt or Assumpsit; but this is far from a conclusive test of enforceability. In the continuing evolution of our law of contract many courts, especially the Court of Chancery, have played a part. We must know what could be done by a "bill in equity" as well as by the Common Law forms. Maitland, an eminent legal historian, said: "The forms of action we have buried; but they still rule us from their graves." There is some truth in this; a people can not escape from its own history. But it is far from the whole truth. At no time were these older forms wholly ruled by their own past; and in most jurisdictions they have been displaced by a more modern and much more flexible procedure. They have been swallowed up in the formless "civil action." This has a life of its own, with a broader range and outlook than any or all of its defunct predecessors of the Common Law, of Chancery, and of other courts.

The cases that follow, in this Chapter and the next succeeding one, include a few samples of the use of the Common Law actions of Debt and Assumpsit in the development of the "doctrine" of Consideration. But the history of those actions and of the doctrine itself must be sought in other works and in other courses of study. See especially Holmes, "The Common Law"; Ames, "History of Assumpsit" printed in his Lectures on Legal History; and Barbour, "History of Contract in Early English Equity" (1914). What has been said in this note is very inadequate as a "history" of the forms of action at common law. It is an "over-simplification" of that history. It is inserted here merely as a help toward understanding the reports of the cases that follow.

In conclusion, it seems desirable to give to the student at this point three bits of "advice":

1. Every definition and every doctrine are in continual process of evolutionary variation; so that it cannot be said that there is one *correct* definition or that a court decision that **is not** in accord with some doctrine is necessarily erroneous.

2. In spite of the changeability of law and language just noted, there is a high degree of uniformity in both the usage of terms and in the decision of cases, so that by careful comparative study it is possible to form definite opinions and pass confident judgments on the common affairs of life. In an institution that is well aware of the truth of proposition No. 1 above, greater emphasis on the truth of No. 2 is necessary.

3. One cannot learn either "the law" or doctrines from such preliminary notes as these; nor can he yet determine the truth of such propositions as 1 and 2. From such introductory notes one may, perhaps, get useful hints that will aid his own research; after studying the cases in the entire chapter, it will be well to recur to these notes (and

to articles, treatises, and Restatements) for critical appraisal and understanding.

American Law Institute, Restatement of the Law of Contracts.

§ 75. Definition of Consideration.

(1) Consideration for a promise is

(a) an act other than a promise, or

(b) a forbearance, or

(c) the creation, modification, or destruction of a legal relation, or

(d) a return promise,

bargained for and given in exchange for the promise.

(2) Consideration may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

SECTION 1.—EARLY DEVELOPMENT

(Debt and Assumpsit—Benefit to Promisor and Detriment to Promisee—Adequacy of Consideration in Value)

ANONYMOUS.

In the King's Bench, 1520. Y.B. 12 Hen. VIII, 11, 3.

In the King's Bench, the plaintiff brought an action on the case against two executors of one J. S. The count was that J. N. came to the house of the plaintiff to buy goods, and the said J. S., the testator, came with him, and when the said J. N. wished to have the goods, the plaintiff said to him that he was doubtful about giving him credit, and the said J. S., the testator, said to him, "If he does not pay you, I will pay you"; upon which promise the plaintiff delivered the goods to the said J. N. Later, J. N. died without paying the plaintiff, and J. S. also died. The plaintiff alleges that the latter left assets to his executors to pay all debts and legacies, and to satisfy them also. The question was whether or not this action lay against the executors. And it was adjudged by all the justices that he recover in this action, for two reasons: One, that he had no other remedy at common law than this action; the other, because the plaintiff had delivered the goods upon the promise of the testator and there is no reason that his soul should be in jeopardy and that he should suffer prejudice by his promise when there was sufficient with which to pay the plaintiff. And so judgment was given. And

FINEUX, C. J., said that this is not one of the cases where *Actio moritur cum persona*, for that is where the hurt or damage is corporeal; as where one beats me and then dies, my action is gone; or in case I die, my executors have no action, for the party cannot be punished when he is dead. But in this case the plaintiff can have that which he would have if the other party were alive, viz. the price of his goods, and so this action does not die, for each party can have his remedy; but it is not so in case of a battery, because the writ cannot say that the executors beat him and they are not held responsible in this action. Quære whether or not the testator could wage his law in this case, if he were alive and this action were brought against him.

NOTE

Fourteen years later the court again held in an exactly similar case that an action on the case would lie, although debt would not. Y.B. 27 Hen. VIII, 24, 3. See Barbour, 4 Oxford Studies in Social and Legal History, 41.

On the point that the action survived against the executors, this case was strongly disapproved by Fitzherbert fifteen years later. He declares that Fineux and Conesby so held without any authority to support them and "solely upon their own opinions." He adds, "Put this case out of your books, for without any doubt it is not law." Y.B. 27 Hen. VIII, 23, 21.

The action of Debt would not lie against a surety, such as was J.S. in the above case, for the reason that he had received nothing (no *quid pro quo*) belonging to the claimant. But the court thought that there were two good reasons for maintaining an "action on the case." Since in most cases an action on the case was not maintainable against a wrongdoer's executor, it is not surprising that Fitzherbert thought that Chief Justice Fineux was wrong.

WEBB'S CASE.

In the King's Bench, 1577. 4 Leon. 110.

In action upon the case, the plaintiff declared, that whereas Cobham was indebted to J. S. and J. S. to the defendant, the said defendant in consideration that the plaintiff would procure the said J. S. to make a letter of attorney to the defendant to sue the said Cobham, promised to pay and give to the plaintiff £10. It was objected, here was not any consideration for to induce the assumpsit; for the defendant by this letter of attorney gets nothing but his labour and travel. But the exception was not allowed of. For in this case not so much the profit which redounds to the defendant, as the labour of the plaintiff in procuring of the letter of attorney, is to be respected.

NOTE

The court thought that the plaintiff's trouble in reliance on the defendant's promise of £10 was a sufficient reason for enforcing that promise in an "action on the case," even though the "letter of attorney" might turn out to be in no way beneficial to the defendant. The word "consideration" has now appeared.

In *Williams v. Jensen*, 75 Mo. 681 (1882), a creditor promised to extend the time of payment on a note if the debtor would get his wife's signature as surety. The debtor obtained the signature. It was held that this was a sufficient consideration, even though the wife's signature as surety was absolutely void under the then existing law. Note, however, that the fact that the wife might feel a moral obligation to keep her promise, even though not legally bound, caused the obtaining of her signature to be a not inadequate exchange for the creditor's mere promise to extend time.

EX'R OF THO. SMITH v. JOHN SMITH.

In the King's Bench, 1584. 3 Leon. 88.

Lambert Smith, executor of Tho. Smith, brought an action upon the case against John Smith, that whereas the testator having divers children enfants, and lying sick of a mortal sickness, being careful to provide for his said children enfants; the defendant in consideration the testator would commit the education of his children, and the disposition of his goods after his death during the minority of his said children, for the education of the said children to him, promised to the testator, to procure the assurance of certain customary lands to one of the children of the said testator; and declared further, that the testator thereupon constituted the defendant overseer of his will, and ordained and appointed by his will, that his goods should be in the disposition of the defendant, and that the testator died, and that by reason of that will, the goods of the testator to such a value came to the defendant's hands to his great profit and advantage. And upon non assumpsit pleaded, it was found for the plaintiff: and upon exception to the declaration in arrest of judgment for want of sufficient consideration it was said by Wray, Chief Justice, that here is not any benefit to the defendant, that should be a consideration in law, to induce him to make this promise; for the consideration is no other, but to have the disposition of the goods of the testator pro educatione liberorum: for all the disposition is for the profit of the children; and notwithstanding, that such overseers commonly make gain of such disposition, yet the same is against the intendment of the law, which presumes every man to be true and faithful if the contrary be not shewed; and therefore the law shall intend, that the defendant hath not made any private gain to himself, but that he hath disposed of the goods of

the testator to the use and benefit of his children according to the trust reposed in him. Which Ayliffe, Justice, granted. Gawdy, Justice, was of the contrary opinion. And afterwards by award of the Court, it was, that the plaintiff nihil capiat per billam.

NOTE

Here the argument that was made for the defendant in Webb's case is sustained by two judges to one. They thought that a promise ought not to be enforceable unless the promisor got something beneficial as an inducement to make it. There was no pecuniary benefit in being made executor of the will and guardian of the children, for the court would not assume that the defendant was a grafter. An executor or guardian who is paid compensation for his services gets a pecuniary benefit.

Three years later, however, in *Manwood and Burston's Case*, 2 Leon. 203 (1587), it was said in argument: "There are three manner of considerations upon which an assumpsit may be grounded: 1. A debt precedent; 2. Where he to whom such a promise is made is damnified by doing any thing, or spends his labour at the instance of the promiser, although no benefit cometh to the promiser; as I agree with a surgeon to cure a poor man (who is a stranger unto me) of a sore, who doth it accordingly, he shall have an action; 3. Or there is a present consideration," etc. The second of these is directly contra to the decision in *Smith v. Smith*.

FOOLY AND PRESTON'S CASE.

In the Common Pleas, 1586. 1 Leon. 297.

In an action upon the case the plaintiff declared, that whereas John Gibbon was bound unto the plaintiff in quodam scripto obligatorio, sigillo suo sigillat. and coram, &c. recognito in forma statuti Stapul. The defendant in consideration that the plaintiff would deliver to him the said writing to read over, promised to deliver the same again to the plaintiff within six days after, or to pay to him £1000 in lieu thereof, upon which promise the plaintiff did deliver to the defendant the said writing; but the defendant had not, nor would not deliver it back to the plaintiff, to the great delay of the execution thereof, and the defendant did demur in law upon the declaration. It was objected, that here is no sufficient consideration appearing in the declaration upon which a promise might be grounded; but it was the opinion of the whole Court, that the consideration set forth in the declaration was good and sufficient; and by Anderson. It is usual and frequent in the King's Bench: if I deliver to you an obligation to rebail unto me, I shall have an action upon the case without an express assumpsit; and afterwards judgment was given for the plaintiff.

NOTE

It does not appear that the defendant was in any way benefited by the reading of John Gibbon's "certain writing obligatory, sealed with his seal and duly witnessed and acknowledged in the form of a statute Staple." Doubtless, the possession of such a formidable document, without which the plaintiff would presumably have been able to maintain no action against Gibbon, was regarded as of portentous import. Even if Gibbon were totally insolvent, he could have been held in jail for nonperformance.

Similar cases have appeared from time to time. In the great case of *Coggs v. Bernard*, 2 Ld. Raym. 920 (1703), the plaintiff turned over certain casks of wine to the defendant in reliance on the latter's gratuitous promise to haul them to a specified place for the plaintiff. The defendant drove carelessly and the casks were smashed. An action on the case was sustained. Query whether it would have been sustained if the defendant had merely left the casks at the wrong place so that the plaintiff had to haul them himself.

In *Bainbridge v. Firmstone*, 8 Adol. & El. 743 (1838), the plaintiff delivered certain boilers to the defendant for him to weigh, in reliance on the latter's promise to replace them. The promise was held enforceable.

SIR ANTHONY STURLYN v. ALBANY.

In the King's Bench, 1587. Cro.Eliz. 67.

Assumpsit. The case was, the plaintiff had make a lease to J. S. of land for life rendering rent. J. S. grants all his estate to the defendant; the rent was behind for divers years; the plaintiff demands the rent of the defendant, who assumed that if the plaintiff could shew to him a deed that the rent was due, that he would pay to him the rent and the arrearages; the plaintiff alledged that upon such a day of, &c. at Warwick, he shewed unto him the indenture of lease, by which the rent was due, and notwithstanding he had not paid him the rent and the arrearages due for four years. Upon non assumpsit pleaded it was found for the plaintiff; and damages assessed to so much as the rent and arrearages did amount unto.—And it was moved in arrest of judgment, that there was no consideration to ground an action, for it is but the shewing of the deed, which is no consideration.—2. The damages ought only to be assessed for the time the rent was behind, and not for the rent and the arrearages; for he hath other remedy for the rent; and a recovery in this action shall be no bar in another action. But it was adjudged for the plaintiff: for when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action; and here the shewing of the deed is a cause to avoid suit; and the rent and arrearages may be assessed all in dam-

ages: but they took order that the plaintiff should release to the defendant all the arrearages of rent before execution should be awarded.

• • •

NOTE

Merely exhibiting the "indenture of lease" to show the amount of the rent unpaid by J. S. was a sufficient reason for enforcing the defendant's promise. It was sufficient, "be it never so small." It may well be, however, that the landlord could have enforced payment of the back rent by "distrain" of the defendant's goods and chattels on the premises. This would be a good reason for requiring very slight "consideration" for the defendant's express promise. Without that promise, given for some "consideration", the plaintiff could not have maintained an action of Assumpsit.

The defendant feared that, if he paid the amount of the judgment rendered in the action of Assumpsit, the plaintiff might still be able to collect the rent by process of distrain as landlord. Possibly this would have been so in 1587 at common law. The court, for this reason, ordered that execution of the judgment should be stayed until the plaintiff filed in court a sealed release of the back rent.

KNIGHT v. RUSHWORTH.

In the Common Pleas, 1596. Cro.Eliz. 469.

Assumpsit. The case was, that one Mary Rushworth had entered into a bond of £200 to the plaintiff; and after gave all her goods to the defendant to pay her debts. The defendant pretending that this bond was read to the said Mary Rushworth as an obligation of £100 only and so void, assumed to the plaintiff, that if he and two witnesses would deponere before the Mayor of Lincoln, that the obligation was read to Mary Rushworth as an obligation of £200 that he would pay it. Whereupon the plaintiff, with two others, came before the Mayor of Lincoln, and there deposed upon a book accordingly; and hereupon brought this action. Whereto it was demurred.—Yelverton, for the defendant, moved, that this action lies not; for there is not any consideration besides this oath, which is unlawful, and therefore void.

HEARN. It is not material whether the consideration be for the plaintiff's [the promisor's] benefit; for if it be any charge or trouble to the defendant [the promisee], it sufficeth; as in Albanie's case; and he conceived the oath to be lawful enough. • • •

ANDERSON. The travail of coming before the mayor is a very good consideration; and truly the oath is not illegal, being taken before him; and the smallness of a consideration is not material, if there be any. • • •

WALMSLEY, accord. • • •

BEAUMOND and OWEN doubted herein at first; but afterwards they agreed with their companions, that the consideration was sufficient and lawful—Wherefore it was adjudged for the plaintiff.

NOTE

Another similar case is *Brooks v. Ball*, 18 Johns. (N.Y.) 337 (1820), decided the same way.

In the above case the “consideration” is not action by the plaintiff that the defendant bargained for as an object of his desire. Instead, that action is merely a “condition” of the defendant’s promissory duty to pay. Observe that although the “burden” on the plaintiff is not very great, it may well be a sufficient reason for enforcing the defendant’s promise in an action of *assumpsit*; for the defendant was already in possession of Mary Rushworth’s goods, held by him in trust for the payment of her debts including that due to the plaintiff.

THE LADY SHANDOIS v. SIMSON.

In the Queen’s Bench, 1601. Cro.Eliz. 880.

Error of a judgment in the Common Pleas, where the plaintiff declared in debt for £256 upon several retainers to embroider divers gowns.

The first error was, that the plaintiff’s declaration was not good, because he declares (*inter alia*) that the defendant retained him such a year, day, and place to embroider a satin gown for a maid-servant of her daughter’s, and to take for the same 40s.; and the embroidering of another’s gown is not a good consideration.—*Sed non allocatur*; for inasmuch as he did it upon her request, it is a sufficient consideration.

Secondly, it was alleged that debt lies not in this case, but an *assumpsit* only; for here is not any contract betwixt them, nor *quid pro quo*; and therefore *Nelson’s Case*, 28 Eliz. was cited, that where one retained Nelson to be attorney for another in such a suit, and agreed that he should have so much for his labour; he brought debt against him who retained him, and not against him for whom he was retained; and it was adjudged that it lay not, for it is not any contract between them; but an *assumpsit* lies only because he became at his request the other man’s attorney.—*Sed non allocatur*; for here the embroidering of the gown at her request is sufficient, and it is at his election to have debt or *assumpsit*; as 37 Hen. VI, pl. 8. 3 Edw. IV, pl. 21; 7 Edw. IV, pl. 26; *Dyer*, 347, and 337, *Wooton’s case*. * * *

NOTE

Here it was thought to be sufficient reason for maintaining an action of Debt that the plaintiff had rendered service at the defendant’s request at

a stated price. The defendant, was not a surety; neither the daughter nor her maid-servant had requested the service or was indebted therefor. Of course, the burdensome service, bargained for by the defendant, was a sufficient reason for enforcing her promise in an action of Assumpsit. Here, it was thought to be a sufficient *quid pro quo* to sustain an action of Debt, regarding the defendant as having received the service even though she did not own the gown.

CRISP v. GAMEL.

In the King's Bench, 1605. Cro.Jac. 128.

It was resolved that where, in an assumpsit, two considerations be alleged, the one good and sufficient and the other idle and vain, if that which is good be proved, it sufficeth; and although he fails in the proof of the other, it is not material, because it was in vain to allege it; and it is as if it had not been alleged.

NOTE

With respect to the rule here laid down, see Restatement, Contracts, § 84(b), and the Comment thereon.

One sufficient consideration will not support the return promise if the accompanying second consideration involves a performance that is illegal and forbidden. This is not for lack of consideration but rests on other grounds of public policy.

In *Ayoob v. Ayoob*, 74 Cal.App.2d 236, 168 P.2d 462 (1946), a man's promise to transfer property by will in consideration of marriage was enforced, even though it was accompanied by insufficient (but not illegal) considerations such as a promise to live with the promisor as his dutiful wife. The court said: "The fact that appellant, in the belief that they constituted further consideration, recited in addition certain promises given by her in the course of the making of the asserted ante-nuptial agreement, such as leaving her home and friends and accompanying decedent to America and caring for him and his home and family, is immaterial. These were vows which she might have put into words at the altar or before a justice of the peace or other functionary authorized to solemnize a marriage, and which were implicit in her engagement to marry. Surely she should not be penalized for expressing them elsewhere."

FREEMAN et ux. v. FREEMAN.

In the King's Bench, 1615. 2 Bulst. 269.

In an action upon the case for a promise, the case appeared to be this. Upon a motion in arrest of judgment, upon a non assumpsit, and a verdict for the plaintiffe. It was urged that the action here brought

did not lie, for that there was no good consideration set forth in the declaration, to ground the promise upon; and for this the case was, that the defendant, in consideration that the plaintiff's wife, when she was sole, would take the plaintiffe to her husband, he did promise to assure unto her such an estate in land, for her life, for a joynture, accordingly, she did take the plaintiffe to her husband, and for not performance of the promise, they did bring this action upon the case.

COKE, and the whole Court, this is a good consideration, to raise the promise; and so if one say to a chyrurgeon, cure such a one, and I will pay you for the cure, or deliver to such a merchant so many cloathes, for which, if he doth not pay you, I will; though the party promising hath no benefit by this, yet this is a good consideration, and the party liable to an action upon the case for the same.

COKE. If an act be to be done to another, at my request, of which I am to have no benefit, yet for this I shall be chargeable in an action upon the case; so if I do say to another, deliver so much to such a one and I will pay you for it, by this I am chargeable, and this is a good consideration to charge me with my promise, though no benefit at all by this redounds unto me, the Court cleer of opinion, that in this principal case the consideration was good, and so by the rule of the Court, judgment was given for the plaintiffe.

NOTE

Here, the notion of the two judges in *Smith v. Smith* appears to be wholly discredited. The defendant induced a young woman to marry the plaintiff (with whom she joins in this suit as "uxor") by promising her a marriage portion in the form of a life estate in land. This was a sufficient reason for enforcing the promise, even though there was no pecuniary benefit to the promisor. It seems to be immaterial, also, whether the marriage turned out to be beneficial or detrimental to the young woman who was the promisee.

WHEATLEY v. LOW.

In the King's Bench, 1623. Cro.Jac. 663.

Action on the case. Whereas he was obliged to J. S. in forty pounds for the payment of twenty pounds; and the bond being forfeited, he delivered ten pounds to the defendant, to the intent he should pay it to J. S. in part of payment sine ullâ morâ; that in consideratione inde the defendant assumed, &c. and assigns for breach, that he had not paid; whereupon the other had sued him for this debt, &c.

The defendant pleaded non assumpsit; and verdict for the plaintiff.

It was moved in arrest of judgment that this is not any consideration, because it is not alleged, that he delivered it to the defendant up-

on his request; and the acceptance of it to deliver to another sine morâ, cannot be any benefit to the defendant to charge him with this promise.

Sed non allocatur; for, being that he accepted this money to deliver, and promised to deliver it, it is a good consideration to charge him, Wherefore it was adjudged for the plaintiff.—A writ of error being brought, and this matter only assigned for error, the judgment was affirmed.

HAIGH et al. v. BROOKS.

In the Queen's Bench and the Exchequer Chamber, 1839 and 1840.
10 Adol. & El. 309.

The following written guarantee was in the possession of the plaintiffs:

“Manchester, February 4, 1837.

“Messrs. Haigh & Franceys:

“Gentlemen: In consideration of your being in advance to Messrs. John Lees & Sons in the sum of £10,000 for the purchase of cotton, I do hereby give you my guarantee for that amount (say, £10,000) on their behalf.
John Brooks.”

In assumpsit, the plaintiffs now allege that at the defendant's request they surrendered this document to the defendant in return for his promise that he would see paid at maturity three bills of exchange for some £9,666, payable three months after date, accepted and to be paid by John Lees and Sons; that the bills became due and have not been paid.

The defendant pleaded that the written guarantee surrendered to him was void and of no value for the reason that it was a promise to pay the debt of another to wit: John Lees and Sons, and so was within the provisions of the statute of frauds, and that the writing did not express the consideration for which the promise was made, as the said statute requires.

To this plea the plaintiff demurred, assigning for cause, “that it is admitted by the plea that the memorandum, the giving up of which was the consideration of the guarantee in the said declaration mentioned, was actually given up to the said defendant by the said plaintiffs, and the consideration was therefore executed by the said defendant [plaintiffs], and that, even if the original memorandum was not binding in point of law, the giving up was a sufficient consideration for the promise in the declaration mentioned.” Joinder.

The judgment of the Court of Queen's Bench was rendered by

LORD DENMAN, C. J. This action was brought upon an assumpsit to see certain acceptances paid, in consideration of the plaintiffs giv-

ing up a guarantee of £10,000, due from the acceptor to the plaintiffs. Plea, that the guarantee was for the debt of another, and that there was no writing wherein the consideration appeared, signed by the defendant, and so the giving it up was no good consideration for the promise. Demurrer, stating for cause that the plea is bad, because the consideration was executed, whether the guarantee were binding in law or not. The form of the guarantee was set out in the plea. "In consideration of your being in advance to Messrs. John Lees and Sons, in the sum of £10,000, for the purchase of cotton, I do hereby give you my guarantee for that amount (say £10,000), on their behalf. John Brooks."

It was argued for the defendant, that this guarantee is of no force, because the fact of the plaintiffs being already in advance to Lees could form no consideration for the defendant's promise to guarantee to the plaintiffs the payment of Lees' acceptances. In the first place, this is by no means clear. That "being in advance" must necessarily mean to assert that he was in advance of the time of giving the guarantee, is an assertion open to argument. It may, possibly, have been intended as prospective. If the phrase had been "in consideration of your becoming in advance," or, "on condition of your being in advance," such would have been the clear import. As it is, nobody can doubt that the defendant took a great interest in the affairs of Messrs. Lees, or believe that the plaintiffs had not come under the advance mentioned at the defendant's request. Here is then sufficient doubt to make it worth the defendant's while to possess himself of the guarantee; and, if that be so, we have no concern with the adequacy or inadequacy of the price paid or promised for it.

But we are by no means prepared to say that any circumstances short of the imputation of fraud in fact, could entitle us to hold that a party was not bound by a promise made upon any consideration which could be valuable; while of its being so the promise by which it was obtained from the holder of it must always afford some proof.

Here, whether or not the guarantee could have been available within the doctrine of *Wain v. Warlters*, 5 East, 10, the plaintiffs were induced by the defendant's promise to part with something which they might have kept, and the defendant obtained what he desired by means of that promise. Both being free and able to judge for themselves, how can the defendant be justified in breaking this promise, by discovering afterwards that the thing in consideration of which he gave it did not possess that value which he supposed to belong to it? It cannot be ascertained that that value was what he most regarded. He may have had other objects and motives; and of their weight he was the only judge. We therefore, think the plea bad: and the demurrer must prevail.

Judgment for the plaintiffs. • • •

From this judgment a writ of error was argued in the Exchequer Chamber before LORD ABINGER, C. B., BOSANQUET, COLTMAN, and MAULE, JJ., and ALDERSON and ROLFE, BB. Speaking for this court, LORD ABINGER said:

It is the opinion of all the Court that there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract, and therefore this was a sufficient consideration for the promise declared upon.

It is also the opinion of all the Court, with the exception of my BROTHER MAULE, who entertained some doubt on the question, that the words both of the declaration and the plea import that the paper on which the guarantee was written was given up, and that the actual surrender of the possession of the paper to the defendant was a sufficient consideration without reference to its contents.

Judgment affirmed.

NOTE

As to adequacy of consideration, see Restatement, Contracts, sec. 81. Does Lord Abinger really mean that the surrender of a blank piece of paper at the defendant's request would be a sufficient reason for enforcement of his promise as guarantor to pay £9,666?

As is carefully explained by the trial judge, Lord Denman, the document that was surrendered was far from blank. It is true that John Brooks's promise contained in it, to guarantee payment of £10,000, would not be legally enforceable if the advances to Lees & Sons had all been made before this promise was given. If such was the fact, it is surprising that the defendant's lawyers did not assert it definitely in their plea, instead of merely asserting that the document did not satisfy the requirements of the statute of frauds. There is no question today that the document would fully satisfy those requirements. Note that the new promise is made by the very man that had signed the surrendered document and felt bound by it.

In *Newman & S. State Bank v. Hunter*, 243 Mich. 331, 220 N.W. 665 (1928), a widow gave her personal note in consideration of the surrender to her of her deceased husband's note and certain corporate stock given by him as security. The husband's estate contained no available assets and the stock was in an insolvent company and valueless. The court held that there was no sufficient consideration for the widow's note. Some theorists would disapprove this decision.

THOMAS v. THOMAS.

In the Queen's Bench, 1842. 2 Q.B. 851.

Assumpsit. The declaration stated an agreement between plaintiff and defendant that the defendant should, when thereto required by the plaintiff, by all necessary deeds, conveyances, assignments, or

other assurances, grants, etc., or otherwise, assure a certain dwelling house and premises, in the county of Glamorgan, unto plaintiff for her life. • • •

At the trial, before Coltman, J., at the Glamorganshire Lent Assizes, 1841, it appeared that John Thomas, the deceased husband of the plaintiff, at the time of his death, in 1837, was possessed of a row of seven dwelling houses in Merthyr Tidvil, in one of which, being the dwelling house in question, he was himself residing; and that by his will he appointed his brother Samuel Thomas (since deceased) and the defendant executors thereof, to take possession of all his houses, etc., subject to certain payments in the will mentioned, among which were certain charges in money for the benefit of the plaintiff. In the evening before the day of his death he expressed orally a wish to make some further provision for his wife; and on the following morning he declared orally, in the presence of two witnesses, that it was his will that his wife should have either the house in which he lived and all that it contained, or an additional sum of £100 instead thereof.

This declaration being shortly afterward brought to the knowledge of Samuel Thomas and the defendant, the executors and residuary legatees, they consented to carry the intentions of the testator so expressed into effect; and, after the lapse of a few days, they and the plaintiff executed the agreement declared upon; which, after stating the parties, and briefly reciting the will, proceeded as follows:

“And, whereas the said testator, shortly before his death, declared in the presence of several witnesses, that he was desirous his said wife should have and enjoy during her life, or so long as she should continue his widow, all and singular the dwelling house,” etc., “or £100 out of his personal estate,” in addition to the respective legacies and bequests given her in and by his said will; “but such declaration and desire was not reduced to writing in the lifetime of the said John Thomas and read over to him; but the said Samuel Thomas and Benjamin Thomas are fully convinced and satisfied that such was the desire of the said testator, and are willing and desirous that such intention should be carried into full effect. Now these presents witness, and it is hereby agreed and declared by and between the parties, that, in consideration of such desire and of the premises,” the executors would convey the dwelling house, etc., to the plaintiff and her assigns during her life, or for so long a time as she should continue a widow and unmarried: “provided nevertheless, and it is hereby further agreed and declared, that the said Eleanor Thomas, or her assigns, shall and will, at all times during which she shall have possession of the said dwelling house, etc., pay to the said Samuel Thomas and Benjamin Thomas, their executors, etc., the sum of £1 yearly toward the ground rent payable in respect of the said dwelling house and other premises thereto adjoining, and shall and will keep the said

dwelling house and premises in good and tenantable repair"; with other provisions not affecting the questions in this case.

The plaintiff was left in possession of the dwelling house and premises for some time; but the defendant, after the death of his coexecutor, refused to execute a conveyance tendered to him for execution pursuant to the agreement, and, shortly before the trial, brought an ejectment, under which he turned the plaintiff out of possession. It was objected for the defendant that, a part of the consideration proved being omitted in the declaration, there was a fatal variance. The learned judge overruled the objection, reserving leave to move to enter a non-suit. Ultimately a verdict was found for the plaintiff on all the issues; and, in Easter Term last, a rule nisi was obtained pursuant to the leave reserved.

E. V. Williams, for the defendant, argued that this was "a mere gift cum onere," and that the only consideration was "the testator's expressed wish." "What is meant by the consideration for a promise, but the cause or inducement for making it? Plowden, commenting on *Sharington v. Strotton*, says (page 309), 'Note: That by the civil law nudum pactum is defined thus, *Nudum pactum est ubi nulla subest causa praeter conventionem; sed ubi subest causa, fit obligatio, et parit actionem.*' In *Chitty on Contracts* the following passage is cited from the Code Civil: '*L'obligation sans cause, ou sur une fausse cause, ou sur une cause illicite, ne peut avoir aucun effet.*' The rent and repairs cannot be said to have been the cause or motive which induced the executors to make this agreement. * * * The proviso merely causes the donee to take the gift charged with the burthen of paying the rent and keeping the premises in repair; and she cannot turn these conditions into a consideration."

LORD DENMAN, C. J. There is nothing in this case but a great deal of ingenuity, and a little wilful blindness to the actual terms of the instrument itself. There is nothing whatever to show that the ground rent was payable to a superior landlord; and the stipulation for the payment of it is not a mere proviso, but an express agreement. (His Lordship here read the proviso.) This is in terms an express agreement, and shows a sufficient legal consideration quite independent of the moral feeling which disposed the executors to enter into such a contract. Mr. Williams's definition of consideration is too large; the word *causa* in the passage referred to means one which confers what the law considers a benefit on the party. Then the obligation to repair is one which might impose charges heavier than the value of the life estate.

PATTESON, J. It would be giving to *causa* too large a construction if we were to adopt the view urged for the defendant; it would be confounding consideration with motive. Motive is not the same thing

with consideration. Consideration means something which is of some value in the eye of the law, moving from the plaintiff; it may be some benefit to the defendant, or some detriment to the plaintiff; but at all events it must be moving from the plaintiff. Now that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator; therefore, legally speaking, it forms no part of the consideration. Then it is said that, if that be so, there is no consideration at all, it is a mere voluntary gift; but when we look at the agreement we find that this is not a mere proviso that the donee shall take the gift with the burthens; but it is an express agreement to pay what seems to be a fresh apportionment of a ground rent, and which is made payable not to a superior landlord, but to the executors. So that this rent is clearly not something incident to the assignment of the house, for in that case, instead of being payable to the executors, it would have been payable to the landlord. Then as to the repairs, these houses may very possibly be held under a lease containing covenants to repair; but we know nothing about it, for anything that appears the liability to repair is first created by this instrument. The proviso certainly struck me at first as Mr. Williams put it, that the rent and repairs were merely attached to the gift by the donors; and, had the instrument been executed by the donors only, there might have been some ground for that construction; but the fact is not so. Then it is suggested that this would be held to be a mere voluntary conveyance as against a subsequent purchaser for value; possibly that might be so, but suppose it would, the plaintiff contracts to take it, and does take it, whatever it is, for better for worse; perhaps a bona fide purchase for a valuable consideration might override it, but that cannot be helped.

COLERIDGE, J. The concessions made in the course of the argument have, in fact, disposed of the case. It is conceded that mere motive need not be stated, and we are not obliged to look for the legal consideration in any particular part of the instrument, merely because the consideration is usually stated in some particular part; *ut res magis valeat*, we may look to any part. In this instrument, in the part where it is usual to state the consideration, nothing certainly is expressed but a wish to fulfil the intentions of the testator, but in another part we find an express agreement to pay an annual sum for a particular purpose, and also a distinct agreement to repair. If these had occurred in the first part of the instrument, it could hardly have been argued that the declaration was not well drawn and supported by the evidence. As to the suggestion of this being a voluntary conveyance, my impression is that this payment of £1 annually is more than a good consideration, it is a valuable consideration, it is clearly a thing newly created and not part of the old ground rent.

Rule discharged.

QUESTIONS:

1. Were the £1 ground rent and the repairs "bargained for and given in exchange for the promise" of the defendant?
2. Does the "provided" clause of the written agreement contain a promise by Eleanor Thomas, or does it merely make her payment of £1 yearly and her keeping the house in repair conditions of the defendant's duty?
3. Would the defendant's promise have been enforceable if it had been worded as follows and Eleanor had made no return promise: We promise to convey to Eleanor her deceased husband's interest in the dwelling house on condition that she shall pay the ground rent thereon to the superior landlord and keep the house in good repair?
4. Does the Restatement definition contradict the following assertions of Patteson, J.:
 - (a) "Motive is not the same thing with consideration"?
 - (b) "Consideration means something which is of value in the eye of the law, moving from the plaintiff"?
5. Was Eleanor Thomas herself a "bona fide purchaser for value"?

NOTE

Barrister E. V. Williams quotes from Roman and French law. Both of those systems require a sufficient "causa" in order that a promise shall be enforceable. "Causa" is similar to "consideration" in that it is a variable that is difficult to define and that has had an evolutionary development. See Lorenzen, "Causa and Consideration", 28 Yale L.J. 621 (1919). The two overlap to a considerable degree; but they have always been far from identical. The inducing "cause" of the making of a promise is not necessarily a sufficient cause for enforcement of the promise by the courts, in any system of law. A promise may be given at the point of a gun.

Very likely, the fact that John Thomas desired that his widow should have the life use of the dwelling house and that Samuel and Benjamin, who were his brothers and executors, desired that John's wish should be carried out, would be a sufficient "causa" for the enforcement of their express promise, in Roman and French law. It would not be so in the Anglo-American system. Nevertheless, it would exert a considerable pull in the direction of holding that a somewhat burdensome "condition" of their promise to be performed by the promisee was a sufficient reason for enforcing it.

The inducing "causes" for which a promise is made are often numerous and complex. No one asserts that a "consideration" is not legally sufficient unless the promisor's desire for it is the sole motivating cause or inducement of his making the promise. Restatement, Contracts, sec. 75, asserts only that "consideration" is something that is "bargained for" by the promisor and "given in exchange for the promise" by the promisee or by somebody else. It is evident that one who "bargains for" something has a desire for it; but from this it does not follow that this desire is the only, or even the principal, motivating factor.

SCHNELL v. NELL.

Supreme Court of Indiana, 1861. 17 Ind. 29, 79 Am. Dec. 453.

PERKINS, J. Action by J. B. Nell against Zacharias Schnell, upon the following instrument:

"This agreement, entered into this 13th day of February, 1856, between Zach. Schnell, of Indianapolis, Marion county, state of Indiana, as party of the first part, and J. B. Nell, of the same place, Wendelin Lorenz, of Stilesville, Hendricks county, state of Indiana, and Donata Lorenz, of Frickinger, Grand Duchy of Baden, Germany, as parties of the second part, witnesseth: The said Zacharias Schnell agrees as follows: Whereas his wife, Theresa Schnell, now deceased, has made a last will and testament in which, among other provisions, it was ordained that every one of the above-named second parties, should receive the sum of \$200; and whereas the said provisions of the will must remain a nullity, for the reason that no property, real or personal, was in the possession of the said Theresa Schnell, deceased, in her own name, at the time of her death, and all property held by Zacharias and Theresa Schnell jointly, therefore reverts to her husband; and whereas the said Theresa Schnell has also been a dutiful and loving wife to the said Zach. Schnell, and has materially aided him in the acquisition of all property, real and personal, now possessed by him; for, and in consideration of all this and the love and respect he bears to his wife; and, furthermore, in consideration of one cent, received by him of the second parties, he, the said Zach. Schnell, agrees to pay the above named sums of money to the parties of the second part, to wit: \$200 to the said J. B. Nell; \$200 to the said Wendelin Lorenz; and \$200 to the said Donata Lorenz, in the following installments, viz., \$200 in one year from the date of these presents; \$200 in two years; and \$200 in three years; to be divided between the parties in equal portions of $\$66\frac{2}{3}$ each year, or as they may agree, till each one has received his full sum of \$200. And the said parties of the second part, for, and in consideration of this, agree to pay the above-named sum of money (one cent), and to deliver up to said Schnell, and abstain from collecting any real or supposed claims upon him or his estate, arising from the said last will and testament of the said Theresa Schnell, deceased. In witness whereof, the said parties have, on this 13th day of February, 1856, set hereunto their hands and seals. Zacharias Schnell. J. B. Nell. Wen. Lorenz."

The complaint contained no averment of a consideration for the instrument, outside of those expressed in it; and did not aver that the one cent agreed to be paid, had been paid or tendered.

A demurrer to the complaint was overruled.

The defendant answered, that the instrument sued on was given for no consideration whatever.

He further answered, that it was given for no consideration, because his said wife, Theresa, at the time she made the will mentioned, and at the time of her death, owned, neither separately, nor jointly with her husband, or any one else (except so far as the law gave her an interest in her husband's property), any property, real or personal, etc.

The will is copied into the record, but need not be into this opinion.

The court sustained a demurrer to these answers, evidently on the ground that they were regarded as contradicting the instrument sued on, which particularly set out the considerations upon which it was executed. But the instrument is latently ambiguous on this point. See Ind.Dig. p. 110.

The case turned below, and must turn here, upon the question whether the instrument sued on does express a consideration sufficient to give it legal obligation, as against Zacharias Schnell. It specifies three distinct considerations for his promise to pay \$600:

- (1) A promise, on the part of the plaintiffs, to pay him one cent.
- (2) The love and affection he bore his deceased wife, and the fact that she had done her part, as his wife, in the acquisition of the property.
- (3) The fact that she had expressed her desire, in the form of an inoperative will, that the persons named therein should have the sums of money specified.

The consideration of one cent will not support the promise of Schnell. It is true, that as a general proposition, inadequacy of consideration will not vitiate an agreement. *Baker v. Roberts*, 14 Ind. 552. But this doctrine does not apply to a mere exchange of sums of money, of coin, whose value is exactly fixed, but to the exchange of something of, in itself, indeterminate value, for money, or, perhaps for other thing of indeterminate value. In this case had the one cent mentioned been some particular one cent, a family piece, or ancient, remarkable coin, possessing an indeterminate value, extrinsic from its simple money value, a different view might be taken. As it is, the mere promise to pay six hundred dollars for one cent, even had the portion of that cent due from the plaintiff been tendered, is an unconscionable contract, void, at first blush upon its face, if it be regarded as an earnest one. *Hardesty v. Smith*, 3 Ind. 39. The consideration of one cent is, plainly, in this case, merely nominal, and intended to be so. As the will and testament of Schnell's wife imposed no legal obligation upon him to discharge her bequests out of his property, and as she had none of her own, his promise to discharge them was not legally binding upon him, on that ground. A moral consideration, only, will not support a promise. Ind.Dig., p. 13. And for the same reason, a valid consideration for his promise cannot be found in the fact of a compromise of a disputed claim; for where such claim is legally groundless, a promise

upon a compromise of it, or of a suit upon it, is not legally binding. *Spahr v. Hollingshead*, 8 Blackf. 415. There was no mistake of law or fact in this case, as the agreement admits the will inoperative and void. The promise was simply one to make a gift. The past services of his wife, and the love and affection he had borne her, are objectionable as legal considerations for Schnell's promise, on two grounds: (1) They are past considerations. *Ind.Dig.*, p. 13. (2) The fact that Schnell loved his wife and that she had been industrious, constituted no consideration for his promise to pay J. B. Nell, and the Lorenzes, a sum of money. Whether, if his wife, in her lifetime, had made a bargain with Schnell, that, in consideration of his promising to pay, after her death, to the persons named, a sum of money, she would be industrious, and worthy of his affection, such a promise would have been valid and consistent with public policy, we need not decide. Nor is the fact that Schnell now venerates the memory of his deceased wife a legal consideration for a promise to pay any third person money.

The instrument sued on, interpreted in the light of the facts alleged in the second paragraph of the answer, will not support an action. The demurrer to the answer should have been overruled. See *Stevenson v. Druley*, 4 Ind. 519.

Judgment reversed.

NOTE

In accord, *Restatement, Contracts*, § 76(c); *Shepard v. Rhodes*, 7 R.I. 470 (1863); *Wolford v. Powers*, 85 Ind. 294 (1882). Distinguishable from the above case is a bargain for the exchange of one hundred dollars in gold for two hundred dollars in depreciated greenbacks. *Peabody v. Speyers*, 56 N.Y. 230 (1874).

In *re Greene*, 45 F.2d 428 (1930), in the United States District Court. The plaintiff filed a claim for \$375,700 against the estate of Greene, a bankrupt. For reasons that were not in themselves a sufficient consideration, the bankrupt had executed a written instrument promising to pay to the plaintiff \$1000 a month during their joint lives, to make her the beneficiary of a \$100,000 insurance policy on his life with all premiums paid by him, and to pay the rent on an apartment. This instrument recited as consideration the payment of One Dollar by the claimant to the bankrupt, "and other good and valuable considerations." *WOOLSEY*, District Judge, held that the bankrupt's promises were not enforceable for lack of a sufficient consideration. In the opinion the court said: "The \$1 consideration recited in the paper is nominal. It cannot seriously be urged that \$1, recited but not even shown to have been paid, will support an executory promise to pay hundreds of thousands of dollars.

"'Other good and valuable considerations' are generalities that sound plausible, but the words cannot serve as consideration where the facts show that nothing good or valuable was actually given at the time the contract was made."

One dollar, either paid or promised, is often said to be a sufficient consideration for a return promise of a performance other than the payment of a larger amount of money.

One dollar is certainly a sufficient consideration for an "option" to buy or to sell property at a specified price for a limited time; that is, for the other party's promise to sell or to buy, conditional on tender of the price or the property. Such an "option" contract is not a bargain for the exchange of the dollar for the property. In *Marsh v. Lott*, 8 Cal.App. 384, 97 P. 163 (1908), the amount paid for an "option" to buy property for \$100,000, good for four months, was 25 cents. Observe that the higher the exchange price for the property, relatively to the market, the lower is the market value of the option to buy at that price. Others might not be willing to give a "dime" for such an option.

If the court is convinced that the dollar was neither paid nor promised in fact and that the recital of consideration was made as a mere formality, it will not support a promise of the other party. There have been cases holding that an acknowledgment in a written contract of the receipt of a consideration can not be disproved for the purpose of invalidating the contract. See *Real Estate Co. of Pittsburgh v. Rudolph*, 301 Pa. 502, 153 A. 438 (1930). The general rule is contra to this and should be followed unless the writing is under seal or there is a statute declaring that an unsealed promise in writing shall be enforceable without any consideration.

EMBOLA v. TUPPELA.

Supreme Court of Washington, 1923. 127 Wash. 285, 220 P. 789.

PEMBERTON, J. John Tuppela joined the gold seekers' rush to Alaska, and after remaining there a number of years prospecting was adjudged insane, and committed to an asylum in Portland, Or. Upon his release, after a confinement of about four years, he found that his mining properties in Alaska had been sold by his guardian. In May of 1918 Tuppela, destitute and without work, met respondent at Astoria, Or. They had been close friends for a period of about 30 years. Respondent advanced money for his support, and in September brought him to Seattle to the home of Herman Lindstrom, a brother-in-law of respondent. Tuppela had requested a number of people to advance money for an undertaking to recover his mining property in Alaska, but found no one who was willing to do so. The estimated value of this mining property was about \$500,000. In the month of September Tuppela made the following statement to respondent:

"You have already let me have \$270. If you will give me \$50 more so I can go to Alaska and get my property back, I will pay you ten thousand dollars when I win my property."

Respondent accepted this offer, and immediately advanced the sum of \$50. In January, 1921, after extended litigation, Tuppela recovered

his property. Tuppela, remembering his agreement with respondent, requested Mr. Cobb, his trustee, to pay the full amount, and upon his refusal so to do this action was instituted to collect the same.

The answer of the appellant denies the contract, and alleges that, if it were made, it is unconscionable, not supported by adequate consideration, procured through fraud, and is usurious. The appellant also alleges that the amount advanced did not exceed \$100, and he has paid \$150 into the registry of the court for the benefit of respondent.

The court found in favor of the respondent, and from the judgment entered this appeal is taken.

It is contended by appellant that the amount advanced is a loan, and therefore usurious, and that the sum of \$300 is not an adequate consideration to support a promise to repay \$10,000. It is the contention of respondent that the money advanced was not a loan, but an investment; that the transaction was in the nature of a grubstake contract, which has been upheld by this court. *Raymond v. Johnson*, 17 Wash. 232, 49 P. 492, 61 Am.St.Rep. 908; *Ranahan v. Gibbons*, 23 Wash. 255, 62 P. 773; *Mack v. Mack*, 39 Wash. 190, 81 P. 707; *Mattocks v. Great Northern R. Co.*, 94 Wash. 44, 162 P. 19.

This is not a case wherein respondent advanced money to carry on prospecting. The money was advanced to enable appellant to recover his mining property. Appellant had already been advised by an attorney that he could not recover this property. The risk of losing the money advanced was as great in this case as if the same had been advanced under a grubstake contract. Where the principal sum advanced is to be repaid only on some contingency that may never take place, the sum so advanced is considered an investment, and not a loan, and the transaction is not usurious.

"To constitute usury it is essential that the principal sum loaned shall be repayable at all events and not put in hazard absolutely. If it is payable only on some contingency then the transaction is not usurious. * * *" 27 R.C.L. § 21, p. 220.

The fact that the money advanced was not to be returned until appellant won his property, a contingency at that time unlikely to occur, supports the finding that the consideration was not inadequate. To the contention that the contract was procured through fraud the testimony shows that appellant voluntarily offered to pay the \$10,000, and at the time was of sound and disposing mind, and considered that the contract was fair and to his advantage.

The trial court having found that there was no fraud, and that the contract was not unconscionable, we should uphold these findings unless the evidence preponderates against them. *Thompson v. Seattle Park Co.*, 94 Wash. 539, 162 P. 994; *Austin v. Union Lumber Co.*, 95 Wash. 608, 164 P. 245; *Mottinger v. Reagan*, 96 Wash. 49, 164 P. 595;

Hayes v. Hayes, 96 Wash. 125, 164 P. 740. We are satisfied that the evidence supports the findings.

The judgment is affirmed.

NOTE

The above case illustrates what is herein called an "aleatory" contract. In the case of an ordinary bargain, the consideration for a *promise* is also regarded as the equivalent of the *performance* that is promised. In an "aleatory" contract this is not so. The performance promised is conditional upon an uncertain event, and may never have to be rendered at all. For \$50 paid as "premium," an insurance company promises to pay \$10,000, if a house is destroyed by fire within a year. The consideration is legally sufficient; but whether or not it is "adequate" depends on the fire insurance rates that prevail in the insurance market. The "adequacy" of the premium exchanged for the aleatory promise is evidenced by the fact that insurance companies seldom go bankrupt; but such "adequacy" is not required for enforceability.

In Elliott v. Northern Trust Co., 178 Ill.App. 438 (1913), a wife gave \$500, out of her separate earnings, to her husband in order to enable him to go to Alaska, in return for his promise to give one half of all his property to her at his death. His property at death amounted to over \$2,000,000.

A bargain whereby one pays a large sum for a life annuity is not invalidated by the fact that the annuitant dies within a month. American State Bank v. National Life Ins. Co., 297 Ill.App. 137, 17 N.E.2d 256 (1938).

A worker joined a union in return for the union's promise to pay her regular wages in case of any subsequent unemployment. Kiser v. Amalgamated Clothing Workers, 169 Va. 574, 194 S.E. 727, 114 A.L.R. 1291 (1938).

One holding an auction advertised that a new automobile would be given to the person whose name should be drawn from a box containing the names of those who attended. The plaintiff saw the advertisement and attended, though she made no bids. Her name was drawn from the box. Maughs v. Porter, 157 Va. 415, 161 S.E. 242 (1931).

NOTE ON ADEQUACY OF CONSIDERATION

Restatement, Contracts, § 81 reads: "Except as this rule is qualified by §§ 76, 78-80, gain or advantage to the promisor or loss or disadvantage to the promisee, or the relative values of a promise and the consideration for it, do not affect the sufficiency of consideration."

If there are willing buyers and sellers, there is a market; and it is their willingness that determines value. When two parties agree upon an exchange of this for that, they constitute a part of the market. We have a free market under our law of contract, except as limited by price-fixing statutes, for the reason that the courts have left it free. They do not require that one person shall pay as much as others may be willing to pay, or that one person shall receive for what he sells as

little as others may be willing to receive for a like article. The contracting parties make their own contracts, agree upon their own exchanges, and fix their own values. Inadequacy of consideration may be so gross as to indicate that it was not in fact bargained for, or to be evidence of fraud or undue influence; in the absence of these factors, a promise will usually be enforced even though the consideration is not adequate in value.

Courts of equity refused to decree specific performance of contracts regarded as "unconscionable," and even prevented the enforcement by a common law action of bargains for unreasonable penalties and forfeitures. In all courts this is now the applicable law.

Consideration that is in fact bargained for is not required to be adequate in the sense of equality in market value. The rule thus stated would probably be regarded as a "safe" rule for counsellors in the process of making a contract sure to withstand litigation. See K. N. Llewellyn, "The Modern Approach to Counselling and Advocacy," 46 Col.L.Rev. 167 (1946). But he rightly says that it is an unsafe rule to say that "the adequacy of consideration will not be inquired into by the courts," or that "any bargained-for detriment" is a sufficient consideration. The decisions clearly indicate that bargains in which a good-faith equivalence exists are the better insurable risks. They indicate with equal clearness that if there are other persuasive reasons, wholly apart from value given in exchange, for the making of the promise and for its enforcement, there is no requirement of an "adequate" consideration and the value necessary to satisfy the law is reduced until it is no more than that of a "peppercorn."

The question of "adequacy" is involved in some of the cases in the succeeding sections.

Luing v. Peterson, 143 Minn. 4, 172 N.W. 692 (1919). B. S. wished to borrow \$200 to pay for hospital treatment, his mother, aged 88, being willing to give a mortgage on land as security. A collector who held bills amounting to \$1,400 against B. S. offered to make the \$200 loan if the mother would give her own notes and mortgage for a total of \$1,600, including the unpaid bills. She accepted and executed the notes and mortgage. Even though there was no proof that the old woman was "incompetent" or "imposed upon," the court set aside the notes and mortgage, except as to \$200, saying that the loan of \$200 was "not a sufficient consideration" for the mother's promise to pay her son's past debts. Two judges dissented.

PROMISES IN WRITING BUT WITHOUT A SEAL

It was held in *Pillans v. Van Mierop*, 3 Burr. 1663 (1765), that a promise was enforceable merely because it was in writing, no consideration being required. This was overruled by the House of Lords in *Rann v. Hughes*, 7 Term R. 350 (1778), declaring that only those contracts known as "specialties" are enforceable without any consideration. These are contracts under seal and recognizances; they are dealt with in Chapter 4 of this casebook. The court held that a promise in writing made by an administratrix to pay a debt of the estate out of her own pocket was not enforceable, no consideration having been given for it.

It is frequently provided by statute that in case of written contracts a consideration is presumed to exist, throwing the burden of proving absence of consideration upon the one who asserts it. Such statutes do not make a written promise enforceable if made without consideration. The Uniform Written Obligations Act does exactly this; but only two States have adopted it. See Chapter 4, hereafter.

SECTION 2.—FORBEARANCE AS CONSIDERATION

(Including Compromise Agreements)

INTRODUCTORY NOTE

We have already seen in Chapter I that there are Unilateral contracts as well as Bilateral ones, that one who makes a promise may bargain for an action or forbearance in exchange that is wholly non-promissory. This is further illustrated by some of the cases in the present section; but the purpose of including them here is quite different. Our problem now is to determine whether a forbearance to act is a sufficient consideration for a promise if it is in fact bargained for by the promisor; also whether a promise of such a forbearance is a sufficient consideration for a return promise. The distinction between Unilateral and Bilateral contracts is not here the primary issue; instead it is the distinction between action and forbearance to act, between promises to act and promises to forbear.

HAMER v. SIDWAY.

Court of Appeals of New York, 1891. 124 N.Y. 538, 27 N.E. 256.

In 1869, William E. Story promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of \$5,000. The nephew assented and fully performed as the uncle desired. On becoming 21 in 1875, the nephew informed his uncle that he was entitled to the money. The uncle replied renewing his promise, pointing out the danger of losing money easily acquired, and said that he would hold the money in trust for his nephew "on interest." In 1887, the uncle died having paid nothing. The plaintiff, to whom the nephew's claim was assigned, brought suit against the uncle's executor. [This is an abbreviated statement.]

PARKER, J. * * * The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber in 1875 defined "consideration" as follows: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." Courts "will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him." Anson, Cont. 63. "In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise." Pars.Cont. *444. "Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise." 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts (page 166), after citing the definition given by the Exchequer Chamber, already quoted, says: "The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first."

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him \$5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. * * *

Order appealed from reversed, and judgment of the special term affirmed.

QUESTIONS:

1. Did the plaintiff "waive a right" (that is, abandon and extinguish it)?
2. Did he forbear to enforce a right?
3. Did he extinguish any of his privileges (thus creating a duty)?
4. Did he forbear to act in some manner that continued to be within his privileges?
5. Did the promisor receive any "right, interest, profit, or benefit"?
6. Did the promisee suffer any "detriment"?

NOTE

Observe that if the nephew at the age of 15 made a return promise of forbearance to his uncle he was not bound by the promise.

In *Dunton v. Dunton*, 18 Vict.L.R. 114 (1892), the court enforced a promise to pay a divorced wife an annuity as long as she lived soberly, virtuously, and respectably.

See Restatement, Contracts, § 76.

ORR v. ORR.

Appellate Court of Illinois, 1913. 181 Ill.App. 148.

Mr. Justice PHILBRICK delivered the opinion of the court.

Mina M. Orr, appellee, was married to one Fred W. Orr, on June 5, 1909. Prior to the time of his marriage to appellee, Fred W. Orr held a benefit certificate in the Modern Woodmen of America in the sum

of \$2,000. One child, Carol W. Orr, was born of this marriage. Fred W. Orr died on August 17, 1910, intestate, at his father's house where he had been sick for several weeks, leaving surviving him appellee and his son, Carol W. Orr. Appellee and her child were dependent upon the father and husband for their support. The father, John W. Orr, was the beneficiary named in this policy at the time of the death of Fred W. Orr, and after his death, proper proofs having been made, the amount of the policy was paid to John W. Orr.

Appellee contends that prior to the death of her husband, it had been her desire that the beneficiary in the said benefit certificate be changed so that she would become the beneficiary. After Fred W. Orr was taken sick and while at his father's house, appellee insists that she and John W. Orr, the father, talked over and discussed the question of the change in the name of the beneficiary in this certificate from John W. Orr, the father, to appellee. That she made known to John W. Orr, her intention to go to her husband while he was sick at the home of John W. Orr and have him surrender the old certificate and to cause to be issued in lieu thereof another benefit certificate in which appellee should be named as beneficiary, so that upon the death of her husband appellee would receive this money. Appellee insists that when her intention of going to her husband for this purpose was made known to John W. Orr that he demurred to her going to his son with this request; fearing that a request of this kind at a time when Fred W. Orr was sick and not expected to recover would result fatally to him; the said John W. Orr promised and agreed with appellee herein that if she would refrain from going to Fred W. Orr who was then dangerously ill, and not worry or bother him concerning the change of beneficiaries that he would hold the policy for the benefit of her and the child, and that * * * she did refrain and forbear from going to her husband with a request that the beneficiary be changed.

John W. Orr collected the insurance and claims to own and hold the same for his own use and benefit. The suit was originally commenced by appellee as administratrix. Before final judgment, the child died, and thereupon appellee was granted leave and amended the cause of action so as to prosecute the cause in her own name. The trial below resulted in a verdict and judgment against appellant, from which he appeals.

Appellant contends this judgment is erroneous and should be reversed, insisting that the evidence does not sustain the allegations of the declaration regarding the promise alleged to have been made by appellant to appellee; also, that, conceding that the promise was made, there was no consideration therefor for the reason that she had no power even though she did request her husband to change this policy, to compel him to do so; further, that it was a mere speculation on her part whether or not he would make the change at her request; that

the court erred in permitting appellee to amend and prosecute the cause in her own name. * * *

We are satisfied from the testimony of the various witnesses that the contention of appellee that appellant made the promise alleged to have been made to her is fully sustained, and that the verdict of the jury is not contrary to the evidence and that it cannot be set aside on the ground that there is no evidence to support it.

Appellee had the right to request her husband to make the change of beneficiary in this policy before his death, and secure the benefit of the certificate for herself and child if it was possible for her to do so. The policy was taken out by the deceased before his marriage to appellee and the father then made beneficiary; after appellee and his only child became the natural objects of his bounty, it would only be natural that he should change the beneficiary during his last illness so that they would derive the benefit therefrom, unless some urgent reasons for his not so doing are shown. Appellee at least had the right to go to him and urge this, with such persuasion as she might bring to bear upon him for that purpose. * * *

It is well established that a promise or agreement carried out or completed which deprives the party of any substantial right, when done at the request of another, is a sufficient consideration to sustain the promise by the other party for the fulfillment and enforcement of the agreement then made by him, that one promise is a sufficient consideration for another, and the question of the adequacy of the consideration or the inequality of the consideration is wholly immaterial. And it is wholly immaterial on the question of the consideration for this promise whether or not appellee would have been able to have secured the change in the beneficiary which she desired, it was a valuable consideration, if by acceding to the demands or request of appellant she waived and abandoned a right she then had of endeavoring to persuade her husband to make the wife and child beneficiaries under the policy.

In determining whether there was a valuable consideration for the making of this promise by defendant it is not necessary that there should have been any pecuniary benefit to appellant, if there was a valuable consideration, however small it might have been, then it was sufficient. * * *

We are of the opinion that the agreement of appellee to refrain from going to her husband in his then condition with the request which she had the right to make and which she had the right to expect would be granted her, was sufficient consideration on her part to sustain the promise of appellant that in case the husband should not recover from that sickness appellant would collect the money and pay the same over to appellee for the benefit of herself and child.

There is no error in this record. The judgment is right and will be affirmed.

QUESTIONS:

1. The court assumes that the plaintiff promised that she would forbear to request her husband to change the insurance certificate. Does it make any difference in the decision of this case whether she made such a promise or merely forbore to make the request?
2. Did the plaintiff "waive and abandon a right"? Or a privilege? Can one forbear to exercise a privilege while still retaining it?

NOTE

Forbearance to make unwelcome visits and requests. *Sharon v. Sharon*, 68 Cal. 29, 8 P. 614 (1885); *Jamieson v. Renwick*, 17 Vict.L.R. 124 (1891). Cf. *White v. Bluett*, 23 L.J.Ex. 36 (1853), forbearance of son to make complaints to his father held no consideration; "by the argument a principle is pressed to an absurdity, as a bubble is blown until it bursts."

Query: Is forbearance to make reasonable requests and complaints a sufficient consideration if it is bargained for, while forbearance to be a chronic scold and martyr is not a sufficient consideration even if it is bargained for?

In *Linwitz v. Galeckis*, 110 Conn. 174, 147 A. 592 (1929), the plaintiff subjected the defendant to harassing demands that she pay a debt due from her husband. To get surcease from this sorrow she gave her promissory note for the amount of the debt. The note was held to be unenforceable. Forbearance to badger her further was not a sufficient consideration even though it was her object of desire. Forbearance to sue her husband was not sufficient, because she did not bargain for it.

FLINT v. GIGUIERE.

District Court of Appeal, California, 1920. 50 Cal.App. 314, 195 P. 85.

Action by S. W. Flint against Carl Giguere. Judgment for plaintiff, and defendant appeals. Affirmed.

BURNETT, J. The complaint in this action is brief and may be set out in full as follows:

"(1) That within two years last past the said plaintiff and D. B. Woods entered into a contract whereby the said D. B. Woods agreed to sell and deliver to the said plaintiff 365 head of cattle situated in Berryessa Valley, Cal.

"(2) That said plaintiff and defendant agreed that if plaintiff would permit said defendant to purchase said cattle so held under contract by plaintiff from the said Woods that the said defendant would pay plaintiff the sum of \$1 per head for each and every head purchased by him;

that, in consideration of said agreement on the part of said defendant to so pay him the sum of \$1 per head, the said plaintiff agreed that said Woods might sell said cattle to the said defendant, notwithstanding the contract between plaintiff and the said Woods.

"(3) That the said defendant thereupon purchased from the said Woods 365 head of said cattle.

"(4) That there is due, owing, and unpaid from the said defendant to the plaintiff the sum of \$365; that the same has not been paid and no part thereof has been paid." * * *

The theory of plaintiff, as we understand it, is that he had an option for the purchase of certain cattle from one Woods; that he agreed with defendant that he would not exercise said option if the defendant would pay him \$1 per head for all of said cattle that the defendant might purchase; that thereafter said defendant did purchase 328 thereof, and hence plaintiff became entitled to the payment of \$328.

Abstractly considered, such agreement does not appear to be legally objectionable. There is nothing to indicate that it is against public policy, and the declination of the plaintiff to exercise his option in order that the defendant might have the opportunity of purchasing the cattle for himself would constitute a sufficient consideration for the latter's promise to pay the former the said sum of money. Nor is there anything so uncertain or indefinite in its terms as to make such contract invalid or unenforceable.

But we do not understand appellant to claim that an agreement of that kind may not be enforced, but his contention is that no such contract was either pleaded in the complaint or shown by the evidence.

As to the complaint it is true that it is not expressly alleged that plaintiff agreed "to stand aside" or not to exercise his option, but that is necessarily implied in the averment "that said plaintiff agreed that said Woods might sell said cattle to the said defendant, notwithstanding the contract between plaintiff and said Woods." The inference is also strengthened by a consideration of the use of the expression "permit said defendant to purchase said cattle." In brief, the complaint shows the agreement to be that defendant would pay plaintiff \$1 per head for each of the cattle purchased by him, and in consideration of this promise the plaintiff agreed that Woods might sell said cattle to defendant, notwithstanding said option. If that is not equivalent to a promise on the part of plaintiff not to exercise his legal right to purchase said cattle, then the promise amounts to nothing. Of course, he could not permit defendant to buy the cattle or carry out his agreement that "Woods might sell said cattle to said defendant," if he exercised his option. Both conditions could not coexist. It hardly seems controvertible that plaintiff has substantially set forth in his complaint a contract in accordance with the theory for which he contends in his brief. * * *

Now for a more specific consideration of defendant's criticisms of the judgment: The first is that there was no consideration for the promise to pay said money to plaintiff. This is based upon the assumption that plaintiff did not confer any benefit or suffer any detriment, for the reason that his so-called option was without consideration. As to this, it is probably sufficient to say that the defendant presented no such defense in his answer. The option was embodied in a written instrument, and in such cases the burden of showing a want of consideration sufficient to support it lies with the party seeking to invalidate it. Civ.Code, § 1615.

The instrument being in writing, the presumption is that there was a sufficient consideration (section 1614, Civ.Code), and to overcome this presumption it was incumbent upon appellant to allege and prove the contrary (*Yellow Jacket, etc., Co. v. Holbrook*, 24 Cal.App. 687, 142 P. 128; *Pastene v. Pardini*, 135 Cal. 431, 67 P. 681).

Nor do we see anything in the form or terms of said option to render it invalid. It conferred upon plaintiff the legal right to purchase within a certain time said cattle at a certain price. Manifestly plaintiff was not required to promise to purchase the cattle in order to make it an enforceable instrument. If he had so promised, it would, of course, have made the instrument a contract of sale instead of an option. From the nature of this instrument it would follow that, a valuable consideration having presumably been paid therefor, the "option" was binding upon Woods and constituted property which was capable of ownership and of being transferred. But whether Woods could have withdrawn the privilege granted therein before it was acted upon is indeed immaterial, since there is no doubt that it was operative at the time of said agreement between plaintiff and defendant. This privilege or option being a property right, necessarily it would be a sufficient consideration to support an obligation. It is immaterial what its value was, although plaintiff and defendant placed its value at \$1 per head. At any rate, we must presume it was of value, and therefore the assignment of it—or what in effect is the same thing as far as the consideration is concerned—the voluntary declination of plaintiff to exercise said option, imposed upon him a burden and upon defendant a benefit; and hence there were reciprocal promises and obligations that constituted a valid contract between plaintiff and defendant. • • •

Judgment for plaintiff affirmed.

QUESTIONS:

1. Did the agreement between Flint and Giguere create in the latter a power of acceptance of Woods' offer to sell the cattle?
2. Did it extinguish Flint's power of acceptance of Woods' offer?
3. Did it create a duty in Flint not to send an acceptance to Woods?

4. Did the agreement create a bilateral contract?

5. Would Giguere's promise to pay \$1 per head be binding as a unilateral contract if he bargained for and received nothing other than Flint's actual forbearance to exercise his power as holder of the option?

NOTE

The court's language and analysis in the last paragraph are convincing evidence of the necessity of improving judicial terminology and methods of analysis. The opinion is not different in this respect from great numbers of other court opinions.

Woods gave to Flint a written "option" to buy cattle at a price. This was a promise by Woods, creating a power of acceptance in Flint during some period of time. If Flint gave a consideration for this option promise, it was a contract and created in Flint a right to a transfer of the cattle, conditional on his giving proper notice of acceptance and probably also on a tender of payment of the price. Flint's conditional right and irrevocable power would in such a case be assignable; but it does not appear that Flint actually made an assignment to Giguere. If there was such an assignment, it was certainly a sufficient consideration for Giguere's promise to pay \$1 per head to Flint; it would extinguish Flint's right and power against Woods and confer similar ones upon Giguere.

If Flint did not give a consideration to Woods for the "option", it was no more than an ordinary revocable offer. Woods' promise was not a contract; and Flint's power of acceptance would not be assignable.

The validity of the agreement between Flint and Giguere is not dependent on whether Flint gave a consideration for the option. In either case he had a power of acceptance. What he alleges in his complaint is that he made a bilateral contract with Giguere, Flint promising to forbear to buy the cattle (to forbear to send any notice of acceptance to Woods), in exchange for Giguere's promise to pay \$1 per head if he should succeed in buying the cattle. By this agreement Giguere got no right or power of any kind against Woods; but he bargained for and received Flint's promise not to block a purchase by Giguere and not to be a competitor.

Even if Flint made no promise to forbear to buy the cattle, his actual forbearance to do so (his actual forbearance to send a notice of acceptance to Woods) would be a sufficient consideration for Giguere's promise to pay \$1 per head, if Giguere bargained for such actual forbearance and asked for no promise.

The surrender of any legal power that one is privileged to exercise is a sufficient consideration, and so also is the forbearance to exercise such a power, even if it is not surrendered. *Schade v. Muller*, 75 Or. 225, 146 P. 144 (1915), power of filing mechanic's lien; *Skinner v. Fisher*, 120 Ark. 91, 178 S.W. 922 (1915); *Bickel v. Wessinger*, 58 Or. 98, 113 P. 34 (1911), forbearance to redeem property sold under mortgage foreclosure; *Strasser v. Bulkley*, 194 F. 355 (1912, C.C.A.), "surrender" of an option to buy land.

Forbearance to make an offer or bid, or the revocation of an offer already made, or the forbearance to accept an offer, is sufficient consideration. See *White v. McMath & Johnston*, 127 Tenn. 713, 156 S.W. 470 (1913); *Hopkins v. Ensign*, 122 N.Y. 144, 25 N.E. 306 (1890).

Forbearance to revoke an offer to a third person, or a promise of such forbearance. *Manary v. Runyon*, 43 Or. 495, 73 P. 1028 (1903).

STRONG v. SHEFFIELD.

Court of Appeals of New York, 1895. 144 N.Y. 392, 39 N.E. 330.

ANDREWS, C. J. The contract between a maker or endorser of a promissory note and the payee forms no exception to the general rule that a promise, not supported by a consideration, is nudum pactum. The law governing commercial paper which precludes an inquiry into the consideration as against bona fide holders for value before maturity, has no application where the suit is between the original parties to the instrument. It is undisputed that the demand note upon which the action was brought was made by the husband of the defendant and endorsed by her at his request and delivered to the plaintiff, the payee, as security for an antecedent debt owing by the husband to the plaintiff. The debt of the husband was past due at the time, and the only consideration for the wife's endorsement, which is or can be claimed, is that as part of the transaction there was an agreement by the plaintiff when the note was given to forbear the collection of the debt, or a request for forbearance, which was followed by forbearance for a period of about two years subsequent to the giving of the note. There is no doubt that an agreement by the creditor to forbear the collection of a debt presently due is a good consideration for an absolute or conditional promise of a third person to pay the debt, or for any obligation he may assume in respect thereto. Nor is it essential that the creditor should bind himself at the time to forbear collection or to give time. If he is requested by his debtor to extend the time, and a third person undertakes in consideration of forbearance being given to become liable as surety or otherwise, and the creditor does in fact forbear in reliance upon the undertaking, although he enters into no enforceable agreement to do so, his acquiescence in the request, and an actual forbearance in consequence thereof for a reasonable time, furnishes a good consideration for the collateral undertaking. In other words, a request followed by performance is sufficient, and mutual promises at the time are not essential, unless it was the understanding that the promisor was not to be bound, except on condition that the other party entered into an immediate and reciprocal obligation to do the thing requested. *Morton v. Burn*, 7 A. & E. 19; *Wilby v. Elgee*, L. R., 10 C. P. 497; *King v. Upton*, 4 Greenl. (Me.) 387, 16 Am. Dec. 266; *Leake*

on Con., p. 54; Am. Lead. Cas., Vol. II., p. 96 et seq. and cases cited. The general rule is clearly, and in the main accurately, stated in the note to *Forth v. Stanton* (1 Saund. 210, note b). The learned reporter says: "And in all cases of forbearance to sue, such forbearance must be either absolute or for a definite time, or for a reasonable time; forbearance for a little, or for some time, is not sufficient." The only qualification to be made is that in the absence of a specified time a reasonable time is held to be intended. *Oldershaw v. King*, 2 H. & N. 517; *Calkins v. Chandler*, 36 Mich. 320, 24 Am. Rep. 593. The note in question did not in law extend the payment of the debt. It was payable on demand, and although being payable with interest it was in form consistent with an intention that payment should not be immediately demanded, yet there was nothing on its face to prevent an immediate suit on the note against the maker or to recover the original debt. *Merritt v. Todd*, 23 N.Y. 28, 80 Am. Dec. 243; *Shutts v. Fingar*, 100 N.Y. 539, 3 N.E. 588, 53 Am. Rep. 231.

In the present case the agreement made is not left to inference, nor was it a case of request to forbear, followed by forbearance, in pursuance of the request, without any promise on the part of the creditor at the time. The plaintiff testified that there was an express agreement on his part to the effect that he would not pay the note away, nor put it in any bank for collection, but (using the words of the plaintiff) "I will hold it until such time as I want my money, I will make a demand on you for it." And again: "No, I will keep it until such time as I want it." Upon this alleged agreement the defendant endorsed the note. It would have been no violation of the plaintiff's promise if, immediately on receiving the note, he had commenced suit upon it. Such a suit would have been an assertion that he wanted the money and would have fulfilled the condition of forbearance. The debtor and the defendant, when they became parties to the note, may have had the hope or expectation that forbearance would follow, and there was forbearance in fact. But there was no agreement to forbear for a fixed time or for a reasonable time, but an agreement to forbear for such time as the plaintiff should elect. The consideration is to be tested by the agreement, and not by what was done under it. It was a case of mutual promises, and so intended. We think the evidence failed to disclose any consideration for the defendant's endorsement, and that the trial Court erred in refusing so to rule.

The order of the General Term reversing the judgment should be affirmed, and judgment absolute directed for the defendant on the stipulation with costs in all courts.

All concur, except GRAY and BARTLETT, JJ., not voting, and HAIGHT, J., not sitting.

Ordered accordingly.

QUESTIONS:

1. Did the plaintiff make merely an "illusory promise" in this case? See Restatement, Contracts, § 2.
2. Did the defendant get the consideration that she "bargained for"?
3. In *Hay v. Fortier*, post p. 319, was the consideration "tested by the agreement and not by what was done under it"?

J. H. QUEAL & CO. v. PETERSON.

Supreme Court of Iowa, 1908.

138 Iowa 514, 116 N.W. 593, 19 L.R.A., N.S., 842.

Action on a written instrument of guaranty. At the conclusion of the evidence there was a directed verdict for defendant, and from the judgment thereon plaintiff appeals. Affirmed.

McCLAIN, J. On April 8, 1896, one Nielson was indebted to plaintiff on a promissory note for \$120 then past due, and defendant executed to plaintiff his promise to pay the same in the following words: "In regard to the N. S. Nielson note of \$120 held by you and due September 1, 1895, if this note is not paid by said Nielson by October 1, 1896, I hereby agree to take it up October 1, 1896, for \$100."

Action being brought against defendant on this obligation, nonpayment by Nielson of his note being alleged, defendant denied his liability on the ground that his obligation was entered into without any consideration, and the evidence showed that, while defendant did voluntarily undertake to satisfy Nielson's obligation for \$120, with interest, by paying \$100 at a future date, provided Nielson's note then remained unpaid, there is no evidence that defendant requested plaintiffs to forbear suit on the Nielson note, or that plaintiffs agreed to forbear such suit, or that plaintiffs did forbear in reliance on defendant's guaranty. An agreement to forbear for a time the enforcement of a claim is a valid consideration for the promise of a third person to pay. *Burke v. Dillin*, 92 Iowa 557, 564, 61 N.W. 371; *Rix v. Adams*, 9 Vt. 233, 31 Am. Dec. 619. While it seems to have been thought at one time that the promise to forbear which would serve as consideration for a guaranty by a third person must be for a definite time, or for a reasonable time, nevertheless it has been held that, where there is an agreement to forbear, it will be presumed to be for a reasonable time in the absence of any stipulation as to a specified time. *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330; *Sidwell v. Evans*, 1 Pen. & W. (Pa.) 383, 21 Am. Dec. 387. If the creditor does in fact forbear from suing at the request of another, there is a good consideration for the guaranty of the indebtedness in connection with such request. *Crears v. Hunter*, 19 Q.B.D. 341. But the mere fact of forbearance is not sufficient evidence from

which a promise to forbear may be presumed, in the absence of any circumstances from which such agreement may be inferred. *Manter v. Churchill*, 127 Mass. 31.

As the defendant did not request plaintiffs to forbear suit on the Nielson note, and plaintiffs did not agree to do so, the fact of forbearance does not indicate that it was in pursuance of a promise to forbear, nor does the forbearance itself imply a request. Had plaintiffs brought suit against Nielson immediately after the execution of defendant's obligation, Nielson could not have defended on the ground that there was an agreement of extension. Therefore plaintiffs, having remained without interruption entitled to all the rights which they had against Nielson, suffered no detriment in consequence of the guaranty given by defendant, and, on the other hand, neither Nielson nor defendant received any benefit in consequence of defendant's promise. It is clear that under such circumstances defendant's promise to pay Nielson's debt was without consideration.

Judgment of the trial court is therefore affirmed.

QUESTIONS:

1. Was the defendant's promise offered in exchange for an extension of time to the debtor, either in the form of forbearance to press for payment until October 1, 1896, or for a promise of such forbearance?
2. Was the defendant merely promising to buy the Nielson note for \$100 on October 1?
3. What interpretation would the creditor be reasonable in giving to the written words?
4. If actual forbearance to press Nielson for payment of the already overdue note until October 1 was in fact induced by the defendant's promise, would it not be sufficient to make that promise binding even though it was not bargained for? This question looks forward to the cases in the succeeding Chapter.

NOTE

It has already appeared in Chapter I that in making a bargain the contract resulting may be either unilateral or bilateral. The promise of one party may be exchanged for action or forbearance or for a promise of such action or forbearance. But a party who offers his promise to the other party may not make it clear whether he is requesting in exchange an actual performance (action or forbearance) or a promise of such performance. The offeree may be quite reasonable in understanding that he has power to accept in either fashion. The court's first problem is the interpretation of the offeror's communicated expressions in order to determine of what the acceptance may, or must, consist.

One who makes a promise to pay the debt of another person may give that promise in exchange for the actual advancement of money or goods

or services by the creditor to the debtor. Such advancement is a sufficient consideration for the surety's promise as well as for the debtor's own promise to pay. In many cases, however, the surety's promise is given after the advancement has already been made; his promise is to pay an already existing debt of another person. For this promise, just as in any other case, the surety may bargain for any consideration that he may desire. He may exchange his promise for a commission or premium (as the corporate surety companies do), or for the creditor's forbearance to sue the debtor or otherwise press him for payment, or for the creditor's promise of such forbearance. If he asks the creditor to promise an "extension of time" to the debtor, the creditor must make that promise; he can not make the surety's promise enforceable by merely delaying action against the debtor. But the surety may ask no such return promise; he may ask merely that the creditor will forbear for a stated time, or will forbear without stating any period of time; in such case the requested forbearance (for the stated time or for a reasonable time) is a proper mode of acceptance and constitutes a sufficient consideration for the surety's promise.

Cases can be found in which the court says that actual forbearance to sue the debtor, there being no promise of such forbearance, is not a sufficient consideration for the surety's promise. Such a statement can be justified only in case the surety offered his promise in exchange for a promise of forbearance instead of an actual forbearance. In some of these cases the court merely failed to realize that a valid contract may be unilateral, being misled by the often repeated statement that "both parties must be bound or neither is bound." It is true that if the creditor has made no promise of forbearance he can properly maintain action against his debtor at any time; but forbearance to enforce a legal right is a sufficient consideration without actually surrendering or otherwise discharging it, and so is forbearance to exercise a legal privilege while at the same time continuing to possess it.

WADE v. SIMEON.

In the Common Pleas, 1846. 2 C.B. 548.

Assumpsit. The first count of the declaration stated that the plaintiff had brought a previous suit against the defendant in the court of Exchequer, to recover two sums amounting to £2,000; that issue was joined in said action, and trial set for December 7, 1844; that the defendant had notified the plaintiff that he would apply to the Chancery for an injunction; that thereupon, on the day before the day set for trial, in consideration that the plaintiff would forbear prosecuting and would stay all proceedings in the said action until December 14, 1844, the defendant promised the plaintiff that he would on that day pay the sum of £2,000 with interest and costs, and that the application for an injunction should be abandoned. The plaintiff averred that he had forborne to prosecute until December 14, and had stayed all proceed-

ings, but the defendant had failed and refused to pay as agreed and had prevented the plaintiff from getting any judgment in the action that had been brought. * * *

Fourth plea,—to the first count,—that the plaintiff never had any cause of action against the defendant in respect to the subject-matter of the action in the Court of Exchequer in that count mentioned; which he the plaintiff, at the time of the commencement of the action, and thence until and at the time of the making of the promise in the said first count mentioned, well knew—Verification. * * *

Special demurrer to the fourth plea, * * *

The defendant joined in demurrer.

TINDAL, C. J. The only question now remaining is upon the demurrer to the fourth plea. I am of opinion that the fourth plea is a good and valid plea, on general demurrer. The declaration alleges that the plaintiff had commenced an action against the defendant in the Exchequer, to recover two sums of £1,300 and £700, respectively, which action was about to be tried, and that, in consideration that the plaintiff would forbear proceeding in that action, until the 14th of December then next, the defendant promised the plaintiff that he would on that day pay the money, with interest, and costs; that the plaintiff, confiding in the defendant's promise, forbore prosecuting the action, and stayed the proceedings until the day named; but that defendant did not pay the money or the costs. The fourth plea states that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the action in the Court of Exchequer, which he, the plaintiff, at the time of the commencement of the said action, and thence until the time of the making the promise in the first count mentioned, well knew. By demurring to that plea, the plaintiff admits that he had no cause of action against the defendant in the action therein mentioned, and that he knew it. It appears to me, therefore, that he is estopped from saying that there was any valid consideration for the defendant's promise. It is almost *contra bonos mores*, and certainly contrary to all the principles of natural justice, that a man should institute proceedings against another, when he is conscious that he has no good cause of action. In order to constitute a binding promise, the plaintiff must show a good consideration, somewhat beneficial to the defendant, or detrimental to the plaintiff. Detrimental to the plaintiff it cannot be, if he has no cause of action; and beneficial to the defendant it cannot be; for, in contemplation of law, the defence upon such an admitted state of facts must be successful, and the defendant will recover costs, which must be assumed to be a full compensation for all the legal damage he may sustain. The consideration, therefore, altogether fails. On the part of the plaintiff it has been urged that the cases cited for the defendant

were not cases where actions had already been brought, but only cases of promises to forbear commencing proceedings. I must, however, confess that, if that were so, I do not see that it would make any substantial difference. * * *

Judgment for the defendant.

QUESTIONS:

1. Was not the forbearance to press the action until December 14 "beneficial" to the defendant, even though it was an ill-founded action?
2. Why should it be assumed "in contemplation of law" that the recovery of costs by a defendant is "full compensation" for the harm suffered in being forced to defend, when it is often contrary to the fact?
3. Should the bargained-for forbearance be held to be insufficient consideration for the defendant's promise on grounds of public policy?

COOK et al. v. WRIGHT.

In the Queen's Bench, 1861. 1 Best & S. 559.

Action on two promissory notes. The plaintiffs, as commissioners acting under the Whitechapel improvement act, had expended money in paving streets adjoining certain houses owned by one Mrs. Bennett, a nonresident. One of the houses was occupied by the defendant as tenant, and he acted as Mrs. Bennett's agent in collecting rents on the other houses and in paying taxes. The defendant informed the plaintiffs of these facts, and they nevertheless believed that the defendant was the person described in the improvement act as the owner against whom the charges for paving should be assessed. The defendant insisted that he was not bound to pay under the act; but when the plaintiffs threatened proceedings against him he induced the plaintiffs to reduce the amount of the charges and to give further time for payment, in return for his giving the notes now sued upon.

At the trial a verdict was entered for the defendant, with leave to move to enter a verdict for the plaintiff. In pursuance of such leave, a rule to show cause was obtained on the ground that there was a sufficient consideration shown by the evidence and that the plaintiff was entitled to a verdict.

BLACKBURN, J. In this case it appeared on the trial that the defendant was agent for Mrs. Bennett, who was nonresident owner of houses in a district subject to a local act. Works had been done in the adjoining street by the commissioners for executing the act, the expenses of which, under the provisions of their act, they charged on the owners of the adjoining houses. Notice had been given to the defend-

ant, as if he had himself been owner of the houses, calling on him to pay the proportion chargeable in respect of them. He attended at a board meeting of the commissioners, and objected both to the amount and nature of the charge, and also stated that he was not the owner of the houses, and that Mrs. Bennett was. He was told that, if he did not pay, he would be treated as one Goble had been. It appeared that Goble had refused to pay a sum charged against him as owner of some houses, and the commissioners had taken legal proceedings against him, and he had then submitted and paid, with costs. In the result it was agreed between the commissioners and the defendant that the amount charged upon him should be reduced, and that time should be given to pay it in three instalments. He gave three promissory notes for the three instalments. The first was duly honoured; the others were not, and were the subject of the present action. At the trial it appeared that the defendant was not in fact owner of the houses. As agent for the owner he was not personally liable under the act. In point of law, therefore, the commissioners were not entitled to claim the money from him; but no case of deceit was alleged against them. It must be taken that the commissioners honestly believed that the defendant was personally liable, and really intended to take legal proceedings against him, as they had done against Goble. The defendant, according to his own evidence, never believed that he was liable in law, but signed the notes in order to avoid being sued as Goble was. Under these circumstances the substantial question reserved (irrespective of the form of the plea) was whether there was any consideration for the notes. We are of opinion that there was.

There is no doubt that a bill or note given in consideration of what is supposed to be a debt is without consideration if it appears that there was a mistake in fact as to the existence of the debt (*Bell v. Gardiner*, 4 Man. & G. 11), and, according to the cases of *Southall v. Rigg* and *Forman v. Wright*, 11 C.B. 481, the law is the same if the bill or note is given in consequence of a mistake of law as to the existence of the debt. But here there was no mistake on the part of the defendant, either of law or fact. What he did was not merely the making an erroneous account stated, or promising to pay a debt for which he mistakenly believed himself liable. It appeared on the evidence that he believed himself not to be liable, but he knew that the plaintiffs thought him liable, and would sue him if he did not pay, and in order to avoid the expense and trouble of legal proceedings against himself he agreed to a compromise; and the question is, whether a person who has given a note as a compromise of a claim honestly made on him, and which but for that compromise would have been at once brought to a legal decision, can resist the payment of the note on the ground that the original claim thus compromised might have been successfully resisted.

If the suit had been actually commenced, the point would have been concluded by authority. In *Longridge v. Dorville*, 5 B. & Ald. 117, it was held that the compromise of a suit instituted to try a doubtful question of law was a sufficient consideration for a promise. In *Atlee v. Backhouse*, 3 M. & W. 633, where the plaintiff's goods had been seized by the excise, and he had afterward entered into an agreement with the Commissioners of Excise that all proceedings should be terminated, the goods delivered up to the plaintiff, and a sum of money paid by him to the commissioners, Parke, B., rests his judgment (page 650) on the ground that this agreement of compromise honestly made was for consideration and binding. In *Cooper v. Parker*, 15 Com.B. 822, the Court of Exchequer Chamber held that the withdrawal of an untrue defence of infancy in a suit, with payment of costs, was a sufficient consideration for a promise to accept a smaller sum in satisfaction of a larger.

In these cases, however, litigation had been actually commenced; and it was argued before us that this made a difference in point of law, and that though, where a plaintiff had actually issued a writ against a defendant, a compromise honestly made is binding, yet the same compromise, if made before the writ actually issues, though the litigation is impending is void. *Edwards v. Baugh*, 11 M. & W. 641, was relied upon as an authority for this proposition. But in that case Lord Abinger expressly bases his judgment (pages 645, 646) on the assumption that the declaration did not, either expressly or impliedly, show that a reasonable doubt existed between the parties. It may be doubtful whether the declaration in that case ought not to have been construed as disclosing a compromise of a real *bonâ fide* claim, but it does not appear to have been so construed by the Court. We agree that unless there was a reasonable claim on the one side, which it was *bonâ fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise. The position of the parties must necessarily be altered in every case of compromise, so that, if the question is afterward opened up, they cannot be replaced as they were before the compromise. The plaintiff may be in a less favorable position for renewing his litigation, he must be at an additional trouble and expense in again getting up his case, and he may no longer be able to produce the evidence which would have proved it originally. Besides, though he may not in point of law be bound to refrain from enforcing his rights against third persons during the continuance of the compromise, to which they are not parties, yet practically the effect of the compromise must be to prevent his doing so. For instance in the present case, there can be no doubt that the practical effect of the compromise must have been to induce the commissioners to refrain from taking proceed-

ings against Mrs. Bennett, the real owner of the houses, while the notes given by the defendant, her agent, were running; though the compromise might have afforded no ground of defence had such proceedings been resorted to. It is this detriment to the party consenting to a compromise arising from the necessary alteration in his position which, in our opinion, forms the real consideration for the promise, and not the technical and almost illusory consideration arising from the extra costs of litigation. The real consideration therefore depends, not on the actual commencement of a suit, but on the reality of the claim made and the *bonâ fides* of the compromise.

In the present case we think that there was sufficient consideration for the notes in the compromise made as it was.

The rule to enter a verdict for the plaintiff must be made absolute.
Rule absolute.

QUESTIONS:

1. Was the consideration for which the defendant gave his promissory notes a forbearance to sue Mrs. Bennett or forbearance to sue himself?
2. Was the reduction in the amount of the claim a sufficient consideration for the defendant's promises?
3. If we assume that the defendant, like the plaintiff, mistakenly believed that he was legally bound to pay the improvement charges, would that fact affect the sufficiency of the consideration for which the defendant bargained and which the plaintiff gave? Would it make the forbearance to bring suit and the reduction of the claim any less detrimental to the plaintiff?

BLOUNT v. WHEELER et al.

Supreme Judicial Court of Massachusetts, 1908.
199 Mass. 330, 85 N.E. 477, 17 L.R.A., N.S., 1036.

Suit by Edith Eliza Dillaway Blount against Frank Henry Dillaway and Frank A. Wheeler to compel specific performance of an agreement of compromise. Decree for plaintiff, and defendants appeal. Affirmed.

LORING, J. This is a bill brought by a sister against her brother and against the executor of the will of their mother. The plaintiff seeks to establish an agreement of compromise between her brother and herself as to the will and property of their mother, and to have the executor directed to pay to her one-third of the residue when his accounts are settled in the probate court and the time for distribution shall have come.

The mother died at 1:30 a. m. on Friday, July 28, 1905, at the City Hospital. There had been an estrangement between the plaintiff and her mother for some 10 years. The brother lived in New York. He reached Boston in the afternoon of the day of his mother's death, and went directly to the house of the plaintiff in Everett. The judge found that on the morning of the 29th the defendant Dillaway told the plaintiff there was a will leaving him everything and her nothing. This was the only knowledge she had of the contents of the will. They made the agreement of compromise on the evening of that day. By this agreement the plaintiff promised not to contest the will and the defendant promised that he would share with her, she taking one part and he two parts of the estate.

The mother was buried on Sunday. After the funeral the brother told his sister that he would not keep this agreement. The will was admitted to probate on September 27th, without opposition, and this bill was filed on November 14th.

The cause was heard on the merits, the evidence being taken by a commissioner. The judge made findings of the material facts and ordered a decree to be entered for the plaintiff. In pursuance of that order a decree was entered declaring that by virtue of the agreement of compromise the plaintiff was entitled to one-third of all moneys coming to the defendant in addition to one-third of the legacy of \$5 bequeathed to her, and directing the defendant Wheeler as executor to make said payments after the settlement of his final account in the probate court. It was further provided in said decree that the plaintiff should have the same standing in the probate proceedings that she would have had if the plaintiff and defendant had been residuary legatees.

The case is now before us on appeal by both defendants.

1. The first contention of the appellants is that the offer of the defendant was by its terms to ripen into a contract of compromise on the plaintiff's not contesting the probate of the will, that it was withdrawn before the time for such an acceptance came, and therefore no contract ever came into existence. But the plaintiff testified that when the defendant made the offer to her she told him that she would not contest the will. The judge in terms found that to be true. He found that "the plaintiff in good faith stated to the defendant, her brother, that she would contest the will on the ground of undue influence and want of sanity, and in consideration of his agreement to share the estate with her promised not to make any contest." After a careful examination of the whole evidence we see no reason to overturn that finding.

2. The second contention is that on the evidence there was as matter of law no valid consideration because it was not proved that the plaintiff had a fair chance of success in contesting the will. Their ar-

gument in support of this contention is that forbearance to prosecute an invalid claim is not a valid consideration for a promise unless "the promisee as a reasonable person believed that she had some fair chance of already succeeding in the contest." As we have already said, the judge found that the plaintiff "acted in good faith" in stating that she would contest the will and in agreeing not to contest it in consideration of his agreement to share with her. The judge further ruled "that she is not required to go further and prove that there was a doubtful question as to sanity or undue influence in order to establish a valid consideration. She had the right, acting in good faith, to go to court and make a contest and she promised not to exercise that right, and did not exercise it."

There are decisions in other jurisdictions for the position taken by the appellants. A collection of the decisions to that effect may be found in Wald's *Pollock on Contracts* (3d Am.Ed.) 214, note 23. But since the decision of this court in *Prout v. Pittsfield Fire District*, 154 Mass. 450, 28 N.E. 679, those cases are not law in this commonwealth, and the earlier case of *Palfrey v. Portland, Saco & Portsmouth Ry. Co.*, 4 Allen, 55, must be taken to be modified accordingly. This court in *Prout v. Pittsfield Fire District* adopted the rule finally established in England in *Miles v. New Zealand Alford Estate Co.*, 32 Ch.D. 266, in which *Cook v. Wright*, 1 B. & S. 559, *Callisher v. Bischoffsheim*, L. R. 5 Q.B. 449, *Ockford v. Barelli*, 20 W.R. 116, and the doubts thrown on those decisions by Lord Esher, M. R., in *Ex parte Banner*, 17 Ch.D. 480, 490, were considered at length. The rule there laid down was stated on page 291 with accuracy by Lord Bowen to be: "If an intending litigant bona fide forbears a right to litigate, he does give up something of value." He added, speaking of the case then before him: "I think therefore that the reality of the claim which is given up must be measured, not by the state of the law as it is ultimately discovered to be, but by the state of the knowledge of the person who at the time has to judge and make the concession." Again, on page 292, Lord Bowen says: "When the Master of the Rolls in *Ex parte Banner*, 17 Ch.D. 480, says he doubts, if there was really and obviously no cause of action, whether the belief of the parties that there was, would be sufficient ground for a compromise, I agree if by that he means there must be a real cause of action, that is to say, one that is bona fide and not frivolous or vexatious; but I do not agree if he means by a real cause of action some cause of action which commends itself to the ultimate reasoning of the tribunal which has to consider and determine the case." The case of *Prout v. Pittsfield Fire District*, 154 Mass. 450, 453, 28 N.E. 679, was affirmed in *Kennedy v. Welch*, 196 Mass. 592, 83 N.E. 11.

In the case at bar, having regard to the knowledge of the plaintiff, can it be said that her claim was a vexatious or frivolous one? Unless

a duly executed will had been made she was entitled as one of the two next of kin to a half of her mother's estate. She had just been told by the other next of kin, her brother, that their mother had left a will by which everything had been bequeathed to him. Even although she had been estranged from her mother for ten years, a determination to examine the will and the circumstances under which it had been made could not be said (having regard to the knowledge of the plaintiff) to be either vexatious or frivolous. We are of opinion that this finding and this ruling were right. The claim in *Palfrey v. Portland, Saco & Portsmouth Ry. Co.*, 4 Allen, 55, was a frivolous and vexatious one. * * *

Decree affirmed.

NOTE

Cases are very numerous in which a suit has been brought to enforce a compromise agreement. If the claim that was the subject of compromise was a valid one, there is no question that the claimant's forbearance to take action for its enforcement is a sufficient consideration for a promise given in return. Question arises only when the claim made was in fact invalid, either because the facts are not as the claimant asserted and believed or because the rules of law applicable to the facts are not as he asserted and believed. Compromises of disputed claims are favored by the law and are generally enforced; but there is some variation in the statement of the applicable rule by the courts. All agree that forbearance (or a promise of forbearance) to press a claim is not a sufficient consideration unless it was made in good faith. Many courts have said that in addition to good faith the claimant must have had some reasonable ground for belief in the validity of his claim—for his belief that the facts are as he asserts and that the law applicable to them sustains his claim. The American Law Institute supports this view, saying in *Restatement, Contracts* § 76(b) that "the surrender of, or forbearance to assert an invalid claim or defense by one who has not an honest and reasonable belief in its possible validity" is not a sufficient consideration. This is very far from requiring, however, that any man who is reasonable would have believed the claim to be valid. The Institute requires no more than a "reasonable" belief in the "possible" validity of the claim.

It is probable that the variation in the forms of stating the law does not lead to much inconsistency in actual decision. If there is no ground for reasonable belief in possible validity, a court or jury is unlikely to be convinced that the claim was made in good faith. If this is true, it is not worth while to spend time debating which form of statement is the better.

SECTION 3—MUTUAL PROMISES AS CONSIDERATION FOR EACH OTHER

(Conditional and Illusory Promises—Mutuality of Legal Duty
or Obligation)

INTRODUCTORY NOTE

In the early history of the Common Law the courts gave no recognition to a bilateral contract. A debt was a unilateral money-obligation arising out of a transaction in which the debtor received money or money's worth, a *quid pro quo*. The debtor may or may not have made a promise to pay his debt; but the *quid pro quo* given by the creditor was never merely a return promise to the debtor. Likewise, the action of Assumpsit was not maintainable by a plaintiff who had not acted to his injury in reliance on the defendant's promise. In its beginning, Assumpsit was one form of the action of Trespass on the Special Case and was not maintainable by one who had not been harmed. A plaintiff who had merely made an unperformed promise did not satisfy this requirement.

Learned scholars who believed that the origin of "consideration" was to be found in the history of Assumpsit and that it consisted in the harm suffered by the promisee came to the conclusion that consideration must always be some "detriment" to the promisee. These scholars had great difficulty in explaining how a plaintiff had suffered such a "detriment" when he had done no more than to make an executory promise in return for the defendant's promise. The American Law Institute has abandoned the effort to explain it; "consideration" as defined in the Restatement is something that is bargained for and given in exchange for a promise, but its sufficiency does not depend on its being either a detriment to the promisee or a benefit to the promisor.

In the sixteenth century, when the courts began to enforce bilateral contracts in the action of Assumpsit, they did not explain their innovation by saying that the making of a promise is a "detriment." They merely expanded the use of Assumpsit to include a bilateral contract and left the explanation to a later century. The fact is that business transactions steadily increased in number and kind, and that men began to bargain for promises as well as for the actual delivery of goods and the rendition of services. Two reciprocal promises having been thus exchanged, it came to be regarded as a sufficient reason for enforcing the defendant's promise that the plaintiff had made a return promise. Such was the "bargain"; and bargains should be performed as agreed. That the innovation involved the courts in many new difficulties, particularly when the plaintiff has committed a breach of the

promise that he gave in exchange for the defendant's promise, will appear in the subsequent chapter dealing with express and constructive conditions.

In the present Section we are concerned with the question whether all promises are a sufficient consideration for a return promise. There are different kinds of promises made by different kinds of people. Promises have been described as "implied" as well as express; a promise may be "aleatory" or otherwise "conditional"; some promises are voidable or unenforceable; other promises include an "option to cancel" and may be so flimsy as to be said to be "illusory." The sufficiency of all such promises has been before the courts and will be dealt with here.

It has been said by some courts and some writers that, if an actual performance would be sufficient consideration for a promise given in exchange for it, a promise to render that performance will likewise be a sufficient consideration; also, that if a performance would not be such a consideration neither will a promise to render it.¹ Without doubt, this is very generally true; but there are a few not very important exceptions. Problems arise, however, that are not solved by such a general statement; this is particularly true with respect to promises that are alternative, conditional, voidable, or unenforceable by legal process. See Restatement, Contracts, sections 77-80, and sec. 84 (e) and (f), where the general doctrine above is in substance laid down, with additional statements dealing with special problems. These sections should be studied with care, particularly after having fully covered the present chapter of cases and the succeeding one. As always, the student should be prepared to doubt, to criticize, and to reconstruct in the light of increasing case experience.²

¹In *Thorpe v. Thorpe*, 12 Mod. 455 (1701), Holt, C. J., said: "A is possessed of Black Acre, to which B has no manner of right, and A desires B to release him all his right to Black Acre, and promises him, in consideration thereof, to pay so much money, surely this is a good consideration and a good promise, for it puts B to the trouble of making a release. Then where the doing a thing will be a good consideration, a promise to do that thing will be so too." See, also 2 Street, *Foundations of Legal Liability*, 110 (1906); Williston, *Consideration in Bilateral Contracts*, 27 *Harv. L. Rev.* 518 (1914).

"So far as regards the matter of the consideration, as being executed or executory it may be observed that what-

ever matter, if executed, is sufficient to form a good executed consideration; if promised, is sufficient to form a good executory consideration; so that the distinction of executed and executory consideration has no bearing upon the question of the sufficiency of any particular matter to form a consideration." Leake, *Contracts* (1st Ed.) p. 314; *Id.* (2d Ed.) pp. 612, 613.

²A few of the discussions of this subject antecedent to the Restatement may be found in the following: 2 Street, *Foundations of Legal Liability*; Holdsworth in 11 *Mich.L.Rev.* 347; Corbin, "Does a Pre-existing Duty Defeat Consideration?" 27 *Yale L.Jour.* 362, 374 (1918); Ames, "Two Theories of Consideration," 12 *Harv.L.Rev.* 515; Wil-

WOOD v. LUCY, LADY DUFF-GORDON.

Court of Appeals of New York, 1917. 222 N.Y. 88, 118 N.E. 214.

CARDOZO, J. The defendant styles herself "a creator of fashions." Her favor helps a sale. Manufacturers of dresses, millinery, and like articles are glad to pay for a certificate of her approval. The things which she designs, fabrics, parasols, and what not, have a new value in the public mind when issued in her name. She employed the plaintiff to help her to turn this vogue into money. He was to have the exclusive right, subject always to her approval, to place her indorsements on the designs of others. He was also to have the exclusive right to place her own designs on sale, or to license others to market them. In return she was to have one-half of "all profits and revenues" derived from any contracts he might make. The exclusive right was to last at least one year from April 1, 1915, and thereafter from year to year unless terminated by notice of 90 days. The plaintiff says that he kept the contract on his part, and that the defendant broke it. She placed her indorsement on fabrics, dresses, and millinery without his knowledge, and withheld the profits. He sues her for the damages, and the case comes here on demurrer.

The agreement of employment is signed by both parties. It has a wealth of recitals. The defendant insists, however, that it lacks the elements of a contract. She says that the plaintiff does not bind himself to anything. It is true that he does not promise in so many words that he will use reasonable efforts to place the defendant's indorsements and market her designs. We think, however, that such a promise is fairly to be implied. The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view to-day. A promise may be lacking, and yet the whole writing may be "instinct with an obligation," imperfectly expressed (Scott, J., in *McCall Co. v. Wright*, 133 App.Div. 62, 117 N.Y.S. 775; *Moran v. Standard Oil Co.*, 211 N.Y. 187, 198, 105 N.E. 217). If that is so, there is a contract.

The implication of a promise here finds support in many circumstances. The defendant gave an exclusive privilege. She was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. The acceptance of the exclusive agency was an assumption of its duties. *Phoenix Hermetic Co. v. Filtrine Mfg. Co.*, 164 App.Div. 424, 150 N.Y.

liston, "Successive Promises of the Same Performance," 8 Harv.L.Rev. 27; Langdell, "Mutual Promises as a Consideration," 14 Harv.L.Rev. 496; Ballantine, "Mutuality and Consideration," 28

Harv.L.Rev. 121 (1914). These articles are republished in a volume entitled "Selected Readings in the Law of Contracts."

S. 193; *W. G. Taylor Co. v. Bannerman*, 120 Wis. 189, 97 N.W. 918; *Mueller v. Mineral Spring Co.*, 88 Mich. 390, 50 N.W. 319. We are not to suppose that one party was to be placed at the mercy of the other. *Hearn v. Stevens & Bro.*, 111 App.Div. 101, 106, 97 N.Y.S. 566; *Russell v. Allerton*, 108 N.Y. 288, 15 N.E. 391. Many other terms of the agreement point the same way. We are told at the outset by way of recital that:

"The said Otis F. Wood possesses a business organization adapted to the placing of such indorsements as the said Lucy, Lady Duff-Gordon, has approved."

The implication is that the plaintiff's business organization will be used for the purpose for which it is adapted. But the terms of the defendant's compensation are even more significant. Her sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything. Without an implied promise, the transaction cannot have such business "efficacy, as both parties must have intended that at all events it should have." *Bowen, L.J.*, in *The Moorcock*, 14 P.D. 64, 68. But the contract does not stop there. The plaintiff goes on to promise that he will account monthly for all moneys received by him, and that he will take out all such patents and copyrights and trade-marks as may in his judgment be necessary to protect the rights and articles affected by the agreement. It is true, of course, as the Appellate Division has said, that if he was under no duty to try to market designs or to place certificates of indorsement, his promise to account for profits or take out copyrights would be valueless. But in determining the intention of the parties the promise has a value. It helps to enforce the conclusion that the plaintiff had some duties. His promise to pay the defendant one-half of the profits and revenues resulting from the exclusive agency and to render accounts monthly was a promise to use reasonable efforts to bring profits and revenues into existence. For this conclusion the authorities are ample. *Wilson v. Mechanical OrguINETTE Co.*, 170 N.Y. 542, 63 N.E. 550; *Phoenix Hermetic Co. v. Filtrine Mfg. Co.*, supra; *Jacquin v. Boutard*, 89 Hun, 437, 35 N.Y.S. 496; *Id.*, 157 N.Y. 686, 51 N.E. 1091; *Moran v. Standard Oil Co.*, supra; *City of N. Y. v. Paoli*, 202 N.Y. 18, 94 N.E. 1077; *McIntyre v. Belcher*, 14 C.B.(N.S.) 654; *Devonald v. Rosser & Sons*, [1906] 2 K.B. 728; *W. G. Taylor Co. v. Bannerman*, supra; *Mueller v. Mineral Spring Co.*, supra; *Baker Transfer Co. v. Merchants' R. & I. Mfg. Co.*, 1 App.Div. 507, 37 N.Y.S. 276.

The judgment of the Appellate Division should be reversed, and the order of the Special Term affirmed, with costs in the Appellate Division and in this court.

CUDDEBACK, McLAUGHLIN, and ANDREWS, JJ., concur. HISCOCK, C. J., and CHASE and CRANE, JJ., dissent.

Judgment reversed, etc.

QUESTIONS:

1. Did the plaintiff obtain an "exclusive right" or an "exclusive privilege"?
2. Would not the defendant's promise be enforceable without implying any promise on the part of the plaintiff?
3. Would the implication of a promise by the plaintiff be made if Lucy were suing him for breach of contract to market her wares?

NOTE

Where an agent has been promised an exclusive agency it is more probable that the court will find "by implication" a return promise by the agent to make reasonable efforts to accomplish the purposes of the agency, than in cases where the agent is authorized to act and is promised a commission but is not protected against competition by the principal himself and by other agents.

Parties are continually being held by the courts to have made promises that they have not put into express promissory words. Such promises are described as "implied" promises, to be discovered by process of inference or "implication," from the conduct of the parties as well as from their language, the whole to be interpreted in the light of the surrounding circumstances. Sometimes it is the defendant who is found to have made a promise by implication, this promise being enforced on behalf of the plaintiff. In other instances, as in the above case, a promise by the plaintiff is found by implication for the purpose of establishing a sufficient consideration for the promise of the defendant that is being enforced. The process of interpretation, of either the words or the actions of men, is a perilous one; and no court can guarantee the accuracy of its inferences and implications or of the "meanings" that it holds the parties have in some form expressed. This will be dealt with in a subsequent chapter on Interpretation.

HOLT v. WARD CLARENCIEUX.

In the King's Bench, 1732. 2 Strange, 937.

The plaintiff declared, that it was mutually agreed between the plaintiff and defendant that they should marry at a future day, which is past, and that in consideration of each other's promises, each engaged to the other; notwithstanding which the defendant did not marry the plaintiff, but had married another, which she lays to her damage of £4,000.

The defendant with leave of the Court pleaded double (*viz.*) non assumpsit, and that the plaintiff at the time of the promise was an infant of fifteen years of age.

The plaintiff joins issue on the non assumpsit, and a verdict is found for her, with £2,000 damages. And as to the plea of infancy demurred.

This cause was several times argued at the Bar: 1. By Mr. Strange for the plaintiff, and Serjeant Chapple for the defendant. When the Court inclined strongly with the plaintiff, because though the defendant would not have the same remedy against her by action for damages, yet they thought he might have some remedy, *viz.* by suit in the Ecclesiastical Court, to compel a performance, the plaintiff being of the age of consent: and that would be a sufficient consideration. And therefore appointed an argument by civilians, to see what their law would determine in such a case.

Upon the arguments of the civilians, no instance could be shewn, wherein they had compelled the performance of a minor's contract. And they who argued for the defendant, strongly insisted, that in the case of a contract *per verba de futuro* (as this was), there was no remedy, even against a person of full age, in the Spiritual Court, but only an admonition. And the only reason why they hold jurisdiction in the case of a contract *per verba de præsenti* is, because that is looked upon amongst them to be *ipsum matrimonium*, and they only decree the formality of a solemnization in the face of the Church.

After their arguments it was spoke to a fourth time by Mr. Reeve and Serjeant Eyre. And now this term the Chief Justice delivered the resolution of the Court.

The objection in this case is, that the plaintiff not being bound equally with the defendant, this is *nudum pactum*, and the defendant cannot be charged in this action. Formerly it was made a doubt by my Lord Vaughan, whether any action could be maintained on mutual promises to marry; but that is now a point not to be disputed. And as to the present case, we should have had no difficulty in giving judgment for the plaintiff, if we could have been satisfied by the arguments of the civilians, that as the plaintiff was of the age of consent, any remedy, though not by way of action for damages, could be had against her. But since they seem to have had no precedent in the case, we must consider it upon the foot of the common law. And upon that the single question is, whether this contract as against the plaintiff, was absolutely void. And we are all of opinion, that this contract is not void, but only voidable at the election of the infant; and as to the person of full age it absolutely binds.

The contract of an infant is considered in law as different from the contracts of all other persons. In some cases his contract shall bind him; such is the contract of an infant for necessaries, and the law al-

lows him to make this contract as necessary for his preservation; and therefore in such case a single bill shall bind him, though a bond with a penalty shall not. 1 Lev. 87.

Where the contract may be for the benefit of the infant, or to his prejudice; the law so far protects him, as to give him an opportunity to consider it when he comes of age: and it is good or voidable at his election. Cro.Car. 502; 2 Roll. 24, 427; Hob. 69; 1 Brownl. 11; 1 Sid. 41; 1 Vent. 21; 1 Mod. 25; Sir W. Jones, 164. But though the infant has this privilege yet the party with whom he contracts has not; he is bound in all events. And as marriage is now looked upon to be an advantageous contract, and no distinction holds whether the party suing be man or woman, but the true distinction is whether it may be for the benefit of the infant, we think, that though no express case upon a marriage contract can be cited, yet it falls within the general reason of the law with regard to infants' contracts. And no dangerous consequence can follow from this determination, because our opinion protects the infant, even more than if we rule the contract to be absolutely void. And as to persons of full age, it leaves them where the law leaves them, which grants them no such protection against being drawn into inconvenient contracts.

For these reasons we are all of opinion that the plaintiff ought to have her judgment upon the demurrer.

NOTE

Under the generally existing law, an infant is not legally bound by his promises. Even when he makes a promise to buy and pay for "necessaries," there is no legal remedy for his refusal to receive them. For necessities that he actually receives and uses, the law requires him to pay their reasonable value, not what he may have promised to pay for them.

The present volume does not include cases on the capacity of parties to make contracts. There are many who are under partial or total disability—that is, who have only limited power or none at all to affect their legal relations by contract. The problem exists with respect to infants, lunatics, and corporations; and the common law doctrine, now practically defunct, once was that a married woman's promises were absolutely void. An infant's promise is not enforceable against him as a contract, generally being described as being "voidable" or "unenforceable." Nevertheless, such a promise is bargained for and given in exchange for a return promise by an adult; and the fact that it is "voidable" or "unenforceable" does not prevent it from being a sufficient consideration. This is true also of promises that are held to be voidable for "fraud" or certain kinds of "mistake", and of promises that are unenforceable because not in writing and signed as may be required by a statute (known as the statute of frauds.)

It is no explanation of the rule applied in the case above to say merely that an infant's promise is "voidable" but not "void;" although it is true that on becoming of age the infant acquires a power of ratification. A

better explanation must be looked for in custom and our prevailing opinions as to social policy.

In Restatement, Contracts, § 80, it is stated that "a promise which is neither binding nor capable of becoming binding by acceptance of its terms is insufficient consideration," except in the cases included within sec. 84(e) and certain cases of illegality dealt with in secs. 599-609. This rule is certainly in harmony with statements very commonly made in court opinions; but the present writer is unable to say that the rule of sec. 80 has any substantial application after a study of all the cases that are expressly excepted. The question is discussed in the following articles: Oliphant, "Mutuality of Obligation in Bilateral Contracts," 25 Col.L.Rev. 705 (1925), 28 Col.L.Rev. 997 (1928); Williston, "Effect of One Void Promise in a Bilateral Agreement," 25 Col.L.Rev. 857 (1925); Corbin, "Non-binding Promises as Consideration," 26 Col.L.Rev. 550 (1926). They are reprinted in Selected Readings in the Law of Contracts, pp. 353-401.

COOK v. SONGAT.

In the King's Bench, 1588. 1 Leon. 103, 4 Leon. 31.

The title to certain land being in dispute between the parties, they mutually agreed to submit the dispute to arbitration before J. S., a lawyer. The defendant promised that if J. S. decided against him he would at once surrender possession of the land to the plaintiff without suit; and the plaintiff promised that if J. S. decided for the defendant he would abandon all claim to the land. The decision of J. S. was against the defendant; but he refused to surrender possession. In an action for breach of the defendant's promise, judgment was given for the plaintiff. [Report condensed.]

COLEMAN v. EYRE.

Court of Appeals of New York, 1871. 45 N.Y. 38.

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done

or contributed any thing to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits, if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits, which the plaintiff might make out of the adventure, in case it should prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterwards, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that in consideration of the agreement by the plaintiff to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intendment is that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other. *Briggs v. Tillotson*, 8 Johns. 304. * * *

Order of general term reversed, and judgment for the plaintiff affirmed.

SEWARD & SCALES v. MITCHELL.

Supreme Court of Tennessee, 1860. 1 Cold. 87.

CARUTHERS, J. On the 16th Oct. 1856, Mitchell sold to Seward and Scales, for the consideration of \$8,596.50, a tract of land in the county of Gibson, described in a deed of that date, by metes and bounds, "containing 521 acres, being a part of a 5,000-acre tract granted to George Dougherty, and bounded as follows," &c.

The title is warranted with the usual covenants, but nothing more said about the grants than what is above recited.

Some time after the deed was made, the parties, differing as to the quantity of land embraced in the tract, made an agreement that it

should be surveyed by Gillespie, and if there were more than 521 acres, the vendee should pay for the excess at the rate of \$16.50 per acre, that being the price at which the sale was made, and if less, then the vendor should pay for the deficiency, at the same rate. It turned out that there was an excess of 57 acres, and the tract embraced in the deed was 578 acres, instead of 521, as estimated in the sale. For this excess, the present suit was brought, and recovery had, for \$1,079. * * *

There is more plausibility in the second objection, that there was no sufficient consideration for the promise. But this is also untenable. The argument is, that the deed embraced the whole tract, and passed a perfect title to the extent of the boundaries, and consequently there was nothing passing as a consideration for the new promise, that the party did not own before by a perfect legal right.

It is true, if the sale was by the tract and not by the acre, as appears from the deed, and no stipulations as to quantity, that the title was good for the whole and covered the excess. But if the sale was not in gross, but by the acre and the recitation in the deed would not be conclusive in a court of equity on that point if the fact could be shown to be otherwise, then there would be mutual remedies for an excess or deficiency in proper cases, as we held in *Miller v. Bentley*, 5 Sneed, 671, and a more recent case; but independent of that, and taking it to have been purely a sale in gross, and both parties desiring to act justly, and being of different opinions as to the quantity, mutually agreed to abide by an accurate survey to ascertain which was bound to pay, and recover from the other, and what amount, we see no good reason in law or morals why such an agreement should not be binding upon them. The case of *Howe v. O'Mally*, 5 N.C. 287, 3 Am.Dec. 693, is precisely in point. The court there held that a promise to refund in case of deficiency is a good consideration for a promise to pay for any excess over what is called for in the deed,—that such mutual promises are sufficient considerations for each other. * * *

Without further citation of authorities we are satisfied to hold that the promise in this case was binding upon the defendant, as his Honor charged, and therefore affirm the judgment.

NOTE

In each of the three cases next preceding, the promises of both parties are aleatory. Each was expressly conditional on an uncertain event. See the definition of "aleatory promise" in *Restatement, Contracts*, § 291. In many aleatory contracts it is only one of the parties whose promise is conditional on an uncertain event, as where A lends (or promises to lend) \$1,000 to B for use in maintaining a suit, and B promises in return that he will pay A \$10,000 if the suit is won, otherwise nothing. In the three cases preceding, however, both promises are aleatory; and it is certain in advance that one of them will not have to be performed, although it is

not certain which is the one. Ordinary betting agreements are of this sort. They are now generally illegal; but there are many aleatory agreements that are lawful.

The rule in Restatement, Contracts, § 84(f), is based upon such cases as these.

GREAT NORTHERN RY. CO. v. WITHAM.

In the Common Pleas, 1873. L.R. 9 C.P. 16.

The cause was tried before Brett, J., at the sittings at Westminster after the last term. The facts were as follows: In October, 1871, the plaintiffs advertised for tenders for the supply of goods (amongst other things iron) to be delivered at their station at Doncaster, according to a certain specification. The defendant sent in a tender, as follows:

"I, the undersigned, hereby undertake to supply the Great Northern Railway Company, for twelve months from November 1st, 1871, to October 31st, 1872, with such quantities of each or any of the several articles named in the attached specification as the company's store-keeper may order from time to time, at the price set opposite each article respectively, and agree to abide by the conditions stated on the other side. [Signed] Samuel Witham."

The company's officer wrote in reply, as follows:

"Mr. S. Witham:

"Sir: I am instructed to inform you that my directors have accepted your tender, dated, etc., to supply this company at Doncaster station any quantity they may order during the period ending October 31st, 1872, of the descriptions of iron mentioned on the enclosed list, at the prices specified therein. The terms of the contract must be strictly adhered to. Requesting an acknowledgment of the receipt of this letter, [Signed] S. Fitch, Assistant Secretary."

To this the defendant replied:

"I beg to own receipt of your favor of 20th instant, accepting my tender for bars, for which I am obliged. Your specifications shall receive my best attention. S. Witham."

Several orders for iron were given by the company, which were from time to time duly executed by the defendant; but ultimately the defendant refused to supply any more, whereupon this action was brought.

A verdict having been found for the plaintiffs,
Digby Seymour, Q.C., moved to enter a nonsuit.

KEATING, J. In this case Mr. Digby Seymour moved to enter a nonsuit. The circumstances were these: The Great Northern Railway Company advertised for tenders for the supply of stores. The defend-

ant made a tender in these words: "I hereby undertake to supply the Great Northern Railway Company, for twelve months, from etc. to etc., with such quantities of each or any of the several articles named in the attached specifications as the company's store-keeper may order from time to time, at the price set opposite each article respectively," etc. Some orders were given by the company, which were duly executed. But the order now in question was not executed; the defendant seeking to excuse himself from the performance of his agreement, because it was unilateral, the company not being bound to give the order. The ground upon which it was put by Mr. Seymour was, that there was no consideration for the defendant's promise to supply the goods; in other words, that, inasmuch as there was no obligation on the company to give an order, there was no consideration moving from the company, and therefore no obligation on the defendant to supply the goods. The case mainly relied on in support of that contention was *Burton v. Great Northern Railway Co.* [9 Ex. 507; 23 L.J. (Ex.) 184]. But that is not an authority in the defendant's favor. It was the converse case. The Court there held that no action would lie against the company for not giving an order. If before the order was given the defendant had given notice to the company that he would not perform the agreement, it might be that he would have been justified in so doing. But here the company had given the order, and had consequently done something which amounted to a consideration for the defendant's promise. I see no ground for doubting that the verdict for the plaintiffs ought to stand.

BRETT, J. The company advertised for tenders for the supply of stores, such as they might think fit to order, for one year. The defendant made a tender offering to supply them for that period at certain fixed prices; and the company accepted his tender. If there were no other objection, the contract between the parties would be found in the tender and the letter accepting it. This action is brought for the defendant's refusal to deliver goods ordered by the company; and the objection to the plaintiffs' right to recover is, that the contract is unilateral. I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint. If I say to another, "If you will go to York, I will give you £100," that is in a certain sense a unilateral contract. He has not promised to go to York. But if he goes, it cannot be doubted that he will be entitled to receive the £100. His going to York at my request is a sufficient consideration for my promise. So, if one says to another, "If you will give me an order for iron, or other goods, I will supply it at a given price;" if the order is given, there is a complete contract which the seller is bound to perform. There is in such a case ample consideration for the promise. So, here, the company having given the defendant an order at his request, his acceptance of the order would bind them. If any

authority could have been found to sustain Mr. Seymour's contention, I should have considered that a rule ought to be granted. But none has been cited. *Burton v. Great Northern Railway Co.* [9 Ex. 507; 23 L.J.(Ex.) 184] is not at all to the purpose. This is matter of every day's practice; and I think it would be wrong to countenance the notion that a man who tenders for the supply of goods in this way is not bound to deliver them when an order is given. I agree that this judgment does not decide the question whether the defendant might have absolved himself from the further performance of the contract by giving notice.

Rule refused.

QUESTIONS:

1. Did the letter signed "S. Fitch" have any legal operation?
2. Was the contract, as held to have been made, unilateral or bilateral?
3. Did Witham have a power of revocation after receiving Fitch's letter? After receiving an order for a specific amount of iron?

NOTE

See Restatement, Contracts, § 79; also § 2, Comment *b*, defining "illusory promise."

LIMA LOCOMOTIVE & MACHINE CO. v. NATIONAL STEEL CASTINGS CO.

Circuit Court of Appeals of United States, 1907.

155 F. 77, 83 C.C.A. 593, 11 L.R.A., N.S., 713.

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Action upon account for goods sold and delivered, and cross-action for damages for breach of contract. Jury waived. The trial judge made a finding of facts and a general finding for the plaintiff for the full amount of the account and against the defendant upon its cross-petition.

On April 10, 1902, the National Steel Castings Company made in writing the following proposition to the Lima Locomotive & Machine Company: "Gentlemen: We make the following proposition for furnishing all your requirements in steel castings for the remainder of the present year at the prices mentioned below, f. o. b. cars at Montpelier, the terms to be thirty days net. You agree to furnish us on or before the 15th of each month the tonnage that you wish to order during the following month. We agree to fill your orders as specified to the amount of this tonnage, and to make such deliveries as you

require." Then followed a schedule of steel castings and prices per pound. This was accepted in writing by indorsing thereon, at the foot of the proposition, "Accepted April 10, 1902," and duly signed by the Lima Company. This contract the defendant set out in its cross-petition and averred: First, that the castings for which the plaintiff had sued were ordered and supplied under this contract; second, that the plaintiff had failed and refused, though requested, to supply it with other castings necessary to meet the requirements of its business, and that defendant in consequence had been obliged to contract for same with other founders and had paid for the castings so procured \$5,498.24 over and above the contract price with plaintiff.

The defenses to the cross-petition were: First, that the contract was void for want of mutuality. * * *

LURTON, Circuit Judge, delivered the opinion of the court.

We find ourselves unable to agree with the learned circuit judge in respect to the nonmutuality of the contract by which the plaintiff agreed to supply all of the "requirements" of the defendant's business for the remainder of the year 1902. The defendant was engaged in an established manufacturing business which required a large amount of steel castings. This was well known to the plaintiff, and the proposition made and accepted was made with reference to the "requirements" of that well-established business. The plaintiffs were not proposing to make castings beyond the current requirements of that business, and would not have been obligated to supply castings not required in the usual course of that business. By the acceptance of the plaintiff's proposal, the defendant was obligated to take from the plaintiff all castings which their business should require. The contract, if capable of two equally reasonable interpretations, should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties. The second and third paragraphs must be read in the light of the first. Thus read, there is no ground for doubting that the words the "tonnage you wish to order," and "such deliveries as you may require," have reference to the established "requirements" of the business for the following "month," and the deliveries of the tonnage thus estimated. The contract falls under and is governed by the case of *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 F. 298, 58 C.C.A. 220, 61 L.R.A. 402, where the contract was to sell to a manufacturer of fertilizer "its entire consumption of phosphate rock" for a term of five years. In that case we held that the contract was mutual, and the buyer under obligation to take its entire requirement of phosphate rock from the seller. Concerning the definiteness of such a contract, we said:

"A contract to buy all that one shall require for one's own use in a particular manufacturing business is a very different thing from

a promise to buy all that one may desire, or all that one may order. The promise to take all that one can consume would be broken by buying from another, and it is this obligation to take the entire supply of an established business which saves the mutual character of the promise."

To the same effect and directly in point are the cases of *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.*, 114 F. 77, 52 C.C.A. 25, 57 L.R.A. 696; *Minnesota Lumber Co. v. Whitebreast Coal Co.*, 160 Ill. 85, 43 N.E. 774, 31 L.R.A. 529, and *Wells v. Alexandre*, 130 N.Y. 642, 29 N.E. 142, 15 L.R.A. 218. * * *

Judgment reversed.

QUESTIONS:

Consider the validity of the following agreements, assuming in each case that the promises are mutually exchanged between a seller and a buyer and that the price is agreed on:

1. { S. "I promise to fill all your orders for one year."
B. "I promise to buy of no one else."
2. { S. "I promise to sell all that you need."
B. "I promise to buy all that I need."
3. { S. "I promise to sell you my entire output."
B. "I promise to buy your entire output."

See *Imperial Refining Co. v. Kanotex Refining Co.* (C.C.A.) 29 F.2d 193 (1928).

4. { S. "I promise to fill all your orders for one year."
B. "I promise to buy a minimum of 100 tons."
5. { S. "I promise to fill all your orders for one year."
B. "I accept your offer."
6. { S. "I promise to sell you 100 tons of ice per day."
B. "I promise to buy of you all ice used by me up to 100 tons per day."

See *Nassau Supply Co. v. Ice Service Co.*, 252 N.Y. 277, 169 N.E. 383 (1929).

Observe that in the above six cases the two quoted promises do not represent an offer by S and an acceptance by B. By saying that the two promises are "mutually exchanged" is meant that each party has accepted the promise of the other as the consideration for his own promise. Is the consideration so accepted a "sufficient" one?

In re UNITED CIGAR STORES CO. OF
AMERICA.

District Court of the United States, S. D. New York, 1934.

8 F.Supp. 243.

In Bankruptcy. In the matter of the United Cigar Stores Company of America, a New Jersey corporation, bankrupt. On trustee's petition to review an order of the referee refusing to expunge a claim against the bankrupt's estate.

Order reversed.

PATTERSON, District Judge. The Consolidated Dairy Products Company filed a claim against the bankrupt estate. The trustee moved to expunge the claim, but the referee held the claim valid. The trustee brought the matter here on petition to review.

The claim is based on a "requirements" contract made by the bankrupt with a predecessor of the claimant which will be referred to as Consolidated. The bankrupt owned and operated a chain of retail stores. The contract is dated May 3, 1928. It is a long document and bears the marks of careful draftsmanship. Under it the bankrupt agreed for ten years to buy from the Consolidated all ice cream "required for its stores." The contract contains apt provisions relative to quality, price, and deliveries. By another clause the Consolidated agreed to sell 15,000 shares of its stock to the bankrupt at \$18.50 a share (the stock was then selling on the Stock Exchange at \$38 a share), and to give an interest in a certain option on stock of another corporation. The bankrupt was to cause certain subsidiaries similarly to agree to purchase their requirements of ice cream from the Consolidated.

The contract was performed by the bankrupt until August 29, 1932, when it filed a voluntary petition in bankruptcy because of insolvency. It was duly adjudicated bankrupt, and a receiver took possession of its stores and other property. Subsequently the trustee in bankruptcy notified the Consolidated that the contract was not adopted. As a result of the bankruptcy, the bankrupt ceased doing business and has not purchased any ice cream.

The trustee takes the position that the bankrupt lived up to the contract; that its only obligation was to purchase its requirements from the claimant and that it did so as long as it had requirements; that there was no undertaking by it that it would continue in business for ten years; that consequently the cessation of business on bankruptcy was not a breach. The claimant, on the other hand, insists that, although there is no express obligation on the bankrupt's part to stay in business and to have requirements for ten years, such an

obligation is to be implied, and that the abandonment of business on bankruptcy was a breach. The sole issue is whether there was an obligation on the bankrupt to have requirements for ten years.

Contracts whereby a buyer undertakes to buy his entire requirements of a commodity from a seller, and also contracts whereby a seller agrees to sell his entire output to a buyer, have been a frequent source of litigation. There is no difference in the legal principles applicable to the two types of contracts. At one time the view was taken in some quarters that such agreements were lacking in consideration. The promise was thought illusory because the buyer in a requirements contract might refrain from having requirements or the seller in an output contract might have no output. *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465); *Crane v. C. Crane & Co.*, 105 F. 869 (C.C.A. 7). Latterly it has been generally recognized that this view is erroneous. The buyer in a requirement contract surrenders his right to buy from any one he pleases. If he has requirements, he is bound to satisfy them through the seller alone. So, too, of the seller in an output contract; he has given up his right to sell at large. In both cases the obligation is a real and not an illusory one. 2 Williston on Sales, § 464; Restatement of Law of Contracts, § 32; *Ramey Lumber Co. v. John Schroeder Lumber Co.*, 237 F. 39 (C.C.A. 7); *Texas Co. v. Pensacola Maritime Corporation*, 279 F. 19 (C.C.A. 5). In the present case both sides concede the validity of the contract. The question is its interpretation.

On the effect of such agreements there are two lines of authorities. The view has been taken that, where the buyer engages to buy from the seller all his requirements of an article for a definite period, the seller agreeing to sell on agreed terms, the subject-matter of the contract is the buyer's actual requirements during the period. If his requirements taper off or altogether cease, either because of a change in his needs or because of a sale or discontinuance of his whole business, there is no default. He did not agree to buy any specific quantity, but only his requirements. No promise to continue to have requirements will be read into the contract. Subterfuges or evasions would doubtless not be tolerated, but the buyer's conduct in good faith determines his requirements. The same effect is given to output contracts; if the seller cuts down his manufacture or even closes up his plant in good faith, he has still performed his undertaking. The weight of authority supports this construction of the ordinary requirements contract and the ordinary output contract.

* * *

In other cases a stricter view of the buyer's undertaking in a requirements contract has been adopted. There has been read into such a contract an obligation on the part of the buyer to have requirements to substantially the same extent as were his requirements

when the contract was made. * * * In one or two instances courts have been prompted to take this interpretation by the older and now discarded notion that otherwise the agreement would be a mere option and lacking in mutuality. See *Loudenback Fertilizer Co. v. Tennessee Phosphate Co.*, 121 F. 298, 61 L.R.A. 402 (C.C.A. 6). On principle this view of the ordinary requirements contract and the ordinary output contract is difficult to justify. When a buyer agrees to buy his requirements from a seller, he means his requirements whatever they may be. If the parties had intended that the buyer should be bound to take goods according to his requirements in the past, they would have expressed that intention or would have inserted a specific quantity as the amount to be purchased. If they had intended that the buyer should be obligated to have future requirements, they presumably would have inserted a minimum quantity as is quite usual in contracts of this character (see *Wigand v. Bachmann-Bechtel Brewing Co.*, 222 N.Y. 272, 118 N.E. 618; *Louisville Soap Co. v. Taylor*, 279 F. 470 (C.C.A. 6), or in some other manner have indicated that the buyer must continue to buy throughout the term. There is another consideration. No case, so far as I know, has gone so far as to hold that the buyer is liable in case his requirements slump off in the course of the contract to one-half, one-third, or one-tenth of his former needs; and yet, if he is not liable in such a case, it is hard to see how he can be held liable where in good faith he ceases business altogether and thereafter has no requirements.

The moment we depart from the plain meaning of the words used and begin to imply conditions and covenants into the contract, we run into perplexing inconsistencies. * * * In none of the cases that take the minority view has it been held that the buyer in a requirements contract incurs liability on ceasing business altogether because of financial inability to keep going.

On principle and the weight of authority, therefore, it seems clear that, where the buyer makes a contract to purchase his requirements of a commodity for a term, he has not broken his contract when his requirements diminish or when he ceases to have any requirements by reason of retirement from business, voluntary or involuntary. A provision that he shall continue to have requirements is not ordinarily implied.

Other provisions of the requirements contract may be strong enough to indicate an agreement that the buyer was to remain in business and continue to have requirements.

The claimant insists that the provision requiring it to sell 15,000 shares of its stock to the bankrupt at a figure which was one-half the market price is such an indication. There is force in the argument. But the transfer of stock, giving the bankrupt an interest in the

claimant's business, is not the same as a cash payment. The transfer of stock to the bankrupt was doubtless intended to stimulate the purchase of ice cream by the bankrupt by giving it an interest in the claimant's business. This feature of the contract is not enough to warrant the court in importing into the contract a provision that is not there, that the bankrupt must continue in business for the ten year term. On familiar principles, the implication of such a covenant can be resorted to only in a case so plain that no doubt can exist, as to the real intention of the parties. The fact that this agreement was a deliberately prepared document, as is manifest from a reading of it, must not be lost sight of. In the Pfann Case, *supra*, the contract was one for the seller's output, and the buyer as part of the contract agreed to make a loan to the seller. This circumstance did not render the seller liable for selling his plant before the expiration of the contract and thus terminating his output.

It is not intimated that the bankruptcy was not in good faith, nor is it suggested that a desire to escape from obligations under the contract with the claimant prompted the filing of the petition in bankruptcy.

I am of opinion that the bankrupt performed its contract with the claimant, and that the latter has no claim for damages. The order of the referee will accordingly be reversed.

[The decision of the District Court was affirmed by the Circuit Court of Appeals. 72 F.2d 673.]

GURFEIN v. WERBELOVSKY.

Supreme Court of Errors of Connecticut, 1922. 97 Conn. 703, 118 A. 32.

Action by Nathan Gurfein against Abraham Werbelovsky, for damages for breach of a contract to sell and deliver goods, brought to and tried before the superior court on demurrer to complaint. Demurrer sustained and on plaintiff's refusal to plead further judgment entered for defendant. Plaintiff appeals. Error and cause remanded.

The complaint alleges that on October 20, 1919, the defendant made a contract with the plaintiff, doing business under the name of the Bridgeport Glass Company, in the form following:

"October 29, 1919.

"Bridgeport Glass Co., Bdgpt., Conn.—Gentlemen: We have this day accepted and entered your order for 5 cases of plate glass, the following: 1 case 60" wide; 1 case 70" wide; 2 cases 80" wide; 1 case 90"

wide—in the following brackets 25 to 50 square feet at 98 cents per sq. ft. and 50/100 at one dollar per sq. ft. f. o. b. N. Y. City.

“The above cases are to be shipped within 3 months from date. You have the option to cancel the above order before shipment.

“Yours truly,

J. H. Werbelovsky's Son,

“By Joseph Rosenblum.”

That the plaintiff frequently demanded delivery of the goods, but defendant has refused to ship the same, though more than three months has elapsed. Damages based on an increase in the market price over the contract price are demanded.

Defendant demurred to the complaint on the following grounds:

(1) Because it appears from said instrument Exhibit A that the same was of the nature of an option, and that said option was without consideration, and was therefore void and of no effect.

(2) Because it appears from said instrument Exhibit A that the same was of the nature of an option, but it does not appear that the same was ever properly exercised.

(3) Because it appears that said instrument by reason of the uncertainty of the terms and the lack of mutuality in the obligations it purports to create, is unenforceable as a contract, and is wholly invalid, void, and of no effect.

BEACH, J. (after stating the facts as above). The writing sued on is in the form of a letter from the defendant to the plaintiff accepting an antecedent proposal to buy five cases of glass on terms set forth in the acceptance. The final sentence of the letter is as follows: “You have the option to cancel the above order before shipment.” It is this phrase which gives rise to the claim that the contract is void for want of mutuality. The defendant's acceptance appears to be unconditional, and the objection is that the plaintiff in making his proposal reserved the right to cancel it at will. If that is so, the demurrer must be sustained.

“To agree to do something and reserve the right to cancel the agreement at will is no agreement at all.” *Ellis v. Dodge Bros.* (D.C.) 237 F. 860.

It might be said at the outset that the objection begs the entire question, for it is not clear that the “above order” as originally made contains any reservation at all, but as the case has been briefed and argued on the assumption that the buyer's privilege of cancellation at any time before shipment is one of the terms of the contract, we proceed to treat it as such, and to inquire whether on that understanding an enforceable contract, ever came into existence; that is whether the seller ever had any right, the exercise of which the buyer could not prevent or nullify, to compel the buyer to take the goods and pay for

them. If so, there was a promise for a promise and the contract is valid in law, for the question before us is not whether the contract is mutual in the sense in which that adjective is used to influence the discretion of a court of equity in decreeing specific performance, but whether the seller's promise to sell was with or without a consideration sufficient in law to support it. Of course, the right to enforce the buyer's promise to buy is such a consideration, and if that right existed even for the shortest space of time, it is enough to bring the contract into existence.

On the face of this contract the buyer must exercise his option "before shipment"; otherwise he is bound to take and pay for the goods. No time of shipment is specified otherwise than by the words "to be shipped within three months." Hence the seller had a right to ship at any time within the three months, and a shipment made before receiving notice of cancellation would put an end to the buyer's option. The seller's right of shipment accrued at the moment the contract was formed, and as he might have shipped at the same time that he accepted, there was one clear opportunity to enforce the entire contract, which the buyer could not have prevented or nullified by any attempted exercise of his option. This is all that is necessary to constitute a legal consideration and to bring the contract into existence. If the defendant voluntarily limited his absolute opportunity of enforcing the contract to the shortest possible time, the contract may have been improvident, but it was not void for want of consideration.

Whether it is so improvident that an equitable defense on that ground ought to prevail is a question of fact which cannot be raised by demurrer. It should, however, be said that, in addition to the one clear opportunity to enforce the contract already pointed out, the defendant has had a continuing right to enforce it during its entire term; for it appears from the complaint, not only that the plaintiff never attempted to exercise his option, but that he repeatedly demanded performance. In this connection it is important that the contract is framed on the theory that it remains enforceable by either party unless and until the plaintiff brings home notice of cancellation before shipment.

Referring to the authorities cited, it is of course undoubted that a contract for the sale of goods in which one party retains an unconditional option of cancellation is no contract at all, for the reason that no mutual obligation ever arises. *Rehm Zeiher Co. v. Walker*, 156 Ky. 6, 160 S.W. 777, 49 L.R.A.,N.S., 694, cited on the defendant's brief, and *American Agricultural Chemical Co. v. Kennedy*, 103 Va. 171, 48 S.E. 868, cited in the note to 13 C.J. 337, are cases of this kind.

In *Nicolls v. Wetmore*, 174 Iowa 132, 156 N.W. 319; *Velie Motor Co. v. Kopmeier Co.*, 194 F. 324, 114 C.C.A. 284, and *Ellis v. Dodge Bros. (D.C.)* 237 F. 860, the contracts in suit presented a double

aspect. Regarded as contracts for the purchase and sale of motor cars, they were held void for the want of any promise by the maker to sell, and, regarded as executory contracts of agency, they were held to be terminable at the option of either party. This was correct because the agency was not expressed to continue for a definite time or for the accomplishment of a stated purpose. *Willcox & Gibbs Co. v. Ewing*, 141 U.S. 627, 12 S.Ct. 94, 35 L.Ed. 882.

There is error, the judgment is set aside, and the cause remanded for further proceedings according to law.

All concur.

QUESTIONS:

1. Why did not the "option to cancel" prevent the existence of a contract?
2. Is the decision in conflict with Restatement, Contracts, § 79, and especially Illustration 1?
3. Suppose the following case: A and B both sign a written document reading: "We hereby agree to trade Blackacre (owned by A) for Whiteacre (owned by B), unless B notifies A in writing within 30 days of his desire to abandon the deal." Has a contract been made, either before or after the expiration of 30 days? See *Wheeler v. McStay*, 160 Iowa 745, 141 N.W. 404.

NOTE

See Comment in 32 Yale L.Jour. 496; also Corbin, "Effect of Options on Consideration," 34 Yale L.Jour. 571 (1925); Patterson, "Illusory Promises and Promisors' Options," 6 Iowa L.Bull. 129, 209. Both articles are reprinted, with revision, in *Selected Readings in the Law of Contracts*, pp. 401, 434.

AMERICAN AGRICULTURAL CHEMICAL CO. v. KENNEDY, 103 Va. 171, 48 S.E. 868 (1904). In the Supreme Court of Virginia. The parties signed a written agreement whereby the plaintiff promised to sell from 400 to 600 tons of fertilizer on stated terms and the defendant promised to take and pay for it. The plaintiff (the seller) reserved "the right to cancel this contract at any time we may deem proper, but in the event of such cancellation the provisions of this contract shall govern the closing of all business begun thereunder." The plaintiff manufactured fertilizer, put it in sacks, and offered to ship. The court held that no valid contract was made and that the plaintiff had no right to damages for the defendant's refusal to take and pay.

QUESTIONS:

1. If defendant had sent in a shipping order for 400 tons would the plaintiff have been bound to fill it?
 2. Would the sending of such an order have been "business begun thereunder?"
 3. Was the plaintiff's action in manufacturing fertilizer and offering to ship it "business begun thereunder?"
 4. Was this action by the plaintiff such action in reliance on the defendant's promise as to make Restatement, Contracts, sec. 90, applicable?
 5. Did plaintiff have power to cancel otherwise than by getting notice home to the defendant?
 6. Was plaintiff's promissory language no more than this, "I will sell you fertilizer if I wish to?"
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KOEHLER & HINRICHS MERCANTILE CO. v. ILLINOIS
GLASS CO.

Supreme Court of Minnesota, 1919. 143 Minn. 344, 173 N.W. 703.

Action by the Koehler & Hinrichs Mercantile Company against the Illinois Glass Company. Findings by the court for plaintiff, and from an order denying a new trial defendant appeals. Order affirmed.

LEES, C. This was an action to recover damages for breach of a contract of sale tried by the court without a jury. The findings were in plaintiff's favor, and defendant appeals from an order denying a new trial.

Plaintiff is a dealer at wholesale in glassware, bottles, flasks, and other merchandise. Its place of business is at St. Paul. Defendant is a manufacturer of glassware at Alton, Ill., and has an agency for the sale of its goods at St. Paul. On January 9, 1915, a contract in writing between defendant and the Koehler & Hinrichs Company was executed. By its terms the former agreed to sell and the latter agreed to buy, on or before December 31, 1916, 12 carloads of Ko-Hi flasks, at a stipulated price, shipments to be made upon specifications furnished by the buyer at least 30 days in advance of the shipping date, the final specifications to be furnished not later than October 1, 1916. Payments were to be made within 30 days after shipment, with certain discount privileges. It was provided that, if the financial responsibility of the buyer became impaired or unsatisfactory to the seller, cash in advance of shipment or satisfactory security might be demanded. There was a clause reading as follows:

"It is agreed that under this contract Koehler & Hinrichs Company may have the privilege of increasing quantity as much as they may desire at price shown herein during the period covered by this contract."

On June 6, 1916, the contract was assigned by Koehler & Hinrichs Company to Koehler & Hinrichs Mercantile Company, the plaintiff in this action. The latter was a corporation organized to succeed to the business of the former and became the owner of all its assets at that time. Prior thereto defendant had furnished and been paid for two carloads of Ko-Hi flasks. Defendant had notice of the transfer to plaintiff as early as July 1, 1916. Between that date and August 25th following, defendant furnished the plaintiff, at various times and upon its orders and specifications, 1 carload of flasks. They were furnished and paid for in accordance with the terms of the contract. Between August 25 and October 1, 1916, plaintiff furnished specifications and delivered orders to defendant for 13 carloads of flasks, and was able and offered to pay for them in cash at the contract price before they were shipped, but defendant refused to furnish any of them. The difference between the contract price of the flasks and their market price when defendant refused to deliver them was \$1,993.70. This amount, with interest from January 1, 1917, was awarded to plaintiff.

The questions we are called upon to decide are: (1) Whether the contract was void for want of mutuality either generally or as to the flasks ordered in excess of 12 carloads. (2) Whether the contract was assignable, and, if not, whether defendant is estopped from defending on that ground. [Part of the opinion, dealing with question (2), is omitted. The court held that the right to delivery of the glass was assignable, and was enforceable on tender of the cash.]

1. The contract contains an agreement by the glass company to sell, and an agreement by the Koehler & Hinrichs Company to buy a definite quantity of flasks at a stipulated price, payable on a day certain. It provides for delivery of the flasks upon specifications to be furnished by the buyer within a stated time, and it contains the clause we have quoted, giving to the buyer the privilege of increasing the quantity of flasks.

As to the 12 carloads, it is quite clear that the promises were not all on one side, for there is an express agreement on the one hand to sell and on the other to buy. Each party could hold the other to the performance of its agreement. The promises were mutual, were made at the same time, and are incorporated in a bilateral contract. Such promises so made are a sufficient consideration for each other. 1 Dun.Dig. § 1758; *Ellsworth v. S. M. Ry. Ex. Co.*, 31 Minn. 543-549, 18 N.W. 822; *Bayne v. Greiner's Estate*, 118 Minn. 350, 136 N.W. 1041; *Page on Contracts*, § 296.

Furthermore, the parties, by their acts after the contract was executed, treated it as one having mutuality of obligation. In March, 1916, the buyer sought to have it canceled. The seller offered to cancel it if paid \$500, and used this language in its letter in reply to the request for cancellation:

"This contract is certainly a liability of the Koehler & Hinrichs Company in case our factory sees fit to enforce it."

Later it wrote that it preferred to furnish the flasks specified in the contract at the contract price, and did not wish to cancel it or release the buyer. No further attempt was made to do away with the contract, but, on the contrary, it was acted upon by the delivery to plaintiff in small lots of another carload of flasks. The conduct of the parties amounted to a practical recognition of the binding effect of the contract in so far as the sale of 12 carloads of flasks was involved, and we decline to hold that it was void for want of mutuality.

The court found that 3 carloads of flasks were delivered, leaving 9 to be delivered if there had been no increase in the quantity definitely specified in the contract. Thirteen carloads more were ordered, but not delivered, and damages were awarded for the failure to make delivery of that quantity, the court giving effect to the option clause in the contract. It is confidently asserted in defendant's behalf that this portion of the contract is unilateral and not supported by any consideration. We have examined the authorities cited to sustain this contention, but think it is unnecessary to go beyond our own decisions in disposing of the question. It has been before the courts on many occasions. There is some diversity of opinion concerning the principles involved and more in their application to specific cases. This court is now definitely committed to the rule that if the party holding an option under a contract has bought his option for value paid or absolutely agreed to be paid, he may enforce it. *Staples v. O'Neal*, 64 Minn. 27, 65 N.W. 1083; *Gregory v. Shapiro*, 125 Minn. 81, 145 N.W. 791; *Murphy v. Anderson*, 128 Minn. 106, 150 N.W. 387; *First Nat. Bank v. Corp. Securities Co.*, 128 Minn. 341, 150 N.W. 1084; *Scott v. Stevenson Co.*, 130 Minn. 151, 153 N.W. 316. The rule has been approved by the United States Circuit Court of Appeals for this circuit. *Conley, etc., Co. v. Multiscope, etc., Co.*, 216 F. 892, 133 C.C.A. 96.

The rule applies to the option given to the buyer in the contract now under consideration. It was bound to take and pay for 12 carloads of flasks. This obligation furnished the consideration not only for the seller's promise to furnish them, but also for its promise to furnish a greater quantity if ordered by the buyer in accordance with the terms of its option. The fact that some of the flasks were to be shipped to Chicago, presumably for resale at a profit in a territory not theretofore covered by plaintiff, is of no importance. The option gave the buyer "the privilege of increasing quantity as much as they may desire * * * during the period covered by this contract." We find nothing in the language employed indicating that it was the purpose of the parties to limit the quantity the buyer might order to the reasonable necessities of its established trade at St. Paul. * * *

Affirmed.

QUESTIONS:

1. Was there an "option contract" in this case or only a revocable offer?
2. Did the K. & H. Company have power to assign to the K. & H. Mercantile Company its "privilege [power] of increasing quantity as much as *they* may desire"?

VICKREY et al. v. MAIER et al.

Supreme Court of California, 1913. 164 Cal. 384, 129 P. 273.

Action by O. A. Vickrey and another against Simon Maier and another. Judgment for defendants, and plaintiffs appeal. Reversed.

SHAW, J. Appeal from the judgment on the judgment roll alone.

The complaint is in three counts upon three contracts of similar form. The first is dated November 14, 1905, and is for the sale of 10 shares of the Maier Packing Company, a corporation, at \$5,000. The second and third are dated, respectively, August 20, and November 10, 1906; the second being for 20 shares of said stock at \$10,000, and the third for 30 shares at \$15,000. A consideration of the first contract will be determinative of all questions presented, except that of the statute of limitations.

On November 14, 1905, plaintiffs subscribed for the 10 shares of stock, and paid \$5,000 to said company therefor; that being the par value. The shares were issued to them on February 20, 1906, and they have ever since held and owned the same. Upon the date they subscribed the plaintiffs and defendants executed a written agreement as follows: "This agreement made and entered into this 14th day of November, 1905, by and between Simon Maier and John T. Jones, parties of the first part, and O. A. and B. L. Vickrey, party of the second part, witnesseth: That whereas said second party has subscribed for 10 shares of the capital stock of the Maier Packing Co., a corporation, the first parties are desirous of securing the first right to purchase said stock in the event second party may desire to sell the same: Now, therefore, said second party agrees that, before offering said stock for sale, he will first notify first parties and give them the first right to buy the same at the price offered by any bona fide intending purchaser. In consideration of which said first parties agree and obligate themselves to pay or cause to be paid to second party a dividend of six per cent per annum on said stock, payable quarterly, and that at any time after six months from date hereof, on ninety days' notice, they will purchase said stock at the price paid therefor and six per cent per annum from date of payment of last dividend, but the party of the second part shall not be obligated to sell said stock at the price paid therefor."

Dividends of 6 per cent per annum were regularly paid by said company on said stock down to and including the quarterly dividend due on July 3, 1909. In each of the last two counts the date "July 3, 1909," is, by what is obviously a clerical error, written July 3, 1910. We attach no importance to this misprision and disregard it entirely. No other dividends have been paid on the stock. On March 4, 1910, the plaintiffs gave to the defendants the following notice: "Messrs. Simon Maier and John T. Jones—Gentlemen: In accordance with the provisions contained in three certain agreements between yourselves upon the one part and the undersigned upon the other, of date of November 14, 1905, August 20, 1906, and November 10, 1906, respectively, at which times the undersigned purchased from the Maier Packing Company, a corporation, ten (10), twenty (20), and thirty (30) shares of its capital stock, respectively, making a total purchase of sixty (60) shares of the capital stock of the Maier Packing Company for the sum of thirty thousand (\$30,000) dollars, we request and demand that you carry out the provisions of said agreements and each thereof by paying or causing to be paid to the undersigned all dividends now in arrears upon said stock at the rate of six (6) per cent per annum, payable quarterly, and we further request and demand that you comply with the provisions of said agreements and each thereof by purchasing on or before ninety (90) days from date hereof said sixty (60) shares of stock and paying us therefor the price paid for the same, to wit, the sum of \$30,000, and in addition thereto all said sums now unpaid on account of dividends."

On September 12, 1910, plaintiffs tendered to defendants the said shares of stock, and demanded that the defendants should pay to plaintiffs the price paid by the plaintiffs therefor, to wit, \$5,000, and the further sum of \$355.67 as interest on the \$5,000, from the date of payment of said last paid dividend to the date of the demand. The defendants refused and still refuse to perform said agreement of November 14, 1905, and have not paid said sums or any part thereof. The prayer of the complaint is for judgment for \$32,134.01, being the aggregate amount demanded upon the three contracts, including purchase price and dividends unpaid. The action was begun on the day of the tender and immediately thereafter.

The only defenses alleged in the answer are that there was no consideration for the agreements sued on, and that the action is barred by the provisions of section 337 of the Code of Civil Procedure, prescribing four years as the period of limitation. No evidence was offered in support of either of the defenses, and the plaintiffs offered no evidence to prove a consideration. Upon the foregoing facts the court below gave judgment for the defendants.

The complaint states facts sufficient to constitute a cause of action. The agreement bound the defendants to perform two things: First,

to pay, or cause to be paid, quarterly, a dividend on the stock at the rate of 6 per cent per annum; second, to repurchase the stock at the price which the plaintiffs had paid therefor, with interest from the date of the payment of the last dividend. No dividend has been paid for the year beginning July 3, 1909. The dividends for that year on the 10 shares of stock covered by the first contract amounted to \$300. The defendants had agreed to pay this sum to plaintiffs, and had failed to do so, although it was past due. It was a direct undertaking for the payment of money, and upon a breach thereof they were immediately liable. The plaintiffs were therefore at least entitled to recover the amounts of the quarterly dividends on all the stock due and remaining unpaid at the time the action was begun.

There is no merit in the claim that the agreement was without consideration. Under the presumption in favor of written agreements, as provided by section 1614 of the Civil Code, in the absence of proof to the contrary, an adequate consideration must be presumed to have passed, and, if necessary, we must assume that it consisted of something of value not mentioned in the agreement itself, unless the terms of the agreement are such as to exclude or forbid such assumption. If the contract had not recited any consideration, the fact that it was in writing would therefore be sufficient evidence thereof. But the agreement, on its face, shows a consideration. It is a well-established rule of the law of contracts that a promise by one party may be a sufficient consideration for the promise of another; that where there are mutual or reciprocal promises in a written agreement each constitutes a consideration for the other, particularly where it is expressly so declared. *Gallagher v. Equitable, etc., Co.*, 141 Cal. 707, 75 P. 329; *Van Loben Sels v. Bunnell*, 120 Cal. 682, 53 P. 266; 1 *Parsons on Cont.* *p. 449; 1 *Page on Cont.* § 296; 1 *Beach on Cont.* § 178. Here the plaintiffs agreed that if they chose to sell the stock they would give the defendants a preferred right to buy it over all other purchasers. The defendants deemed this a valuable thing, and in consideration therefor they agreed to pay dividends on the stock, and also to buy the stock at plaintiff's option at any time after 6 months, on 90 days' notice, at a stated price. Under the authorities there was a sufficient consideration.

[The court then proceeded to discuss the application of the statute of limitations, and held that it would not begin to run from the end of the six months period next succeeding the making of the contract, but from the time when the defendant refused to perform his duty to pay after the end of the 90-day period and the tender of the stock. There would be no duty of immediate performance and no breach prior to the termination of the period of notice.]

Judgment reversed.

QUESTIONS:

1. Did Vickrey have an "option to sell"?
 2. Did Maier have an "option to buy"?
 3. Did the written agreement create in Maier a "first right to buy"?
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WOOD COUNTY GROCER CO. v. FRAZER, 284 F. 691 (1922). In the United States Circuit Court of Appeals. The Grocer Co. and the Nebraska-Iowa Mercantile Co. signed a detailed written agreement whereby the former promised to buy and the latter promised to sell 2,000 one hundred pound bags of refined beet sugar, the buyer then making an advance payment of \$10,000 as part of the price and promising to pay the balance when notified that the sugar was ready for delivery. The writing contained the following provisions as to price:

"It is understood and agreed that the price of said beet sugar shall not be less than \$16.12 f. o. b. Omaha, nor more than \$22.12 f. o. b. Omaha; party of the second part agreeing to accept said beet sugar in any event at the minimum price of \$16.12 and pay for same, but in case party of the first part should find it necessary to ask party of the second part to pay more than the minimum price herein shown, then said price shall be optional with party of the second part, and said party of the second part need not accept shipment of sugar.

"It is further understood that the party of the second part shall be notified of price to be charged by party of the first part on the first day of each two-week period approximately starting with October 15, 1920, and ending three (3) months thereafter, and should party of the second part elect not to accept said sugar, the advance payment of five dollars (\$5.00) per bag, acknowledged herein, will be returned to him less the necessary cost of resale as herein provided."

The sugar was duly tendered by the Mercantile Co. at the stated minimum price. At that time the market price of sugar had fallen to a point below that minimum. The Grocer Co. refused the sugar and refused payment. The Mercantile Co. became bankrupt, the defendant Frazer being appointed trustee in bankruptcy. The Grocer Co. claims repayment by Frazer of the \$10,000 paid in advance, asserting that there was never any valid contract. The court held that a valid contract was made, saying: "The contract could have been enforced by the Nebraska-Iowa Mercantile Company in any event at the minimum price. It could have been enforced by the Grocer Company in any event at the maximum price." The Grocer Co. was held not to have a right to the return of the advance payment.

QUESTIONS:

1. Should this decision be sustained?
2. Did the parties in this case do no more than make an agreed exchange of irrevocable offers, creating in each a binding option?
3. Was the tender of delivery of the sugar at the minimum price by the Mercantile Company the exercise of a power of acceptance of an offer made by the Grocer Company?

SECTION 4.—PERFORMANCE OF PRE-EXISTING LEGAL DUTY

(Including Promises of Such Performance)

INTRODUCTORY NOTE

Assuming that a promisor bargains for and receives a performance (or the promise of a performance) that it was already the legal duty of the promisee to render, is it a sufficient consideration for the promise so given? Being the actual consideration, is it a legally operative one? Cases involving this question may vary with respect to (1) the duty to be performed (to pay money, to render personal service, to erect a building, to transfer title to property); (2) the person to whom the duty is owed (to the promisor, to a third party, to the public); (3) the factors on the basis of which the duty was created (contract duties, official duties, duties the non-performance of which is a tort or a crime); (4) the circumstances that cause the nonperformance or threatened nonperformance of the duty and that induce the defendant to make his new promise; (5) the comparative effectiveness or ineffectiveness of the remedies that are available for enforcement of the duty.

REYNOLDS v. PINHOWE.

In the King's Bench, 1595. Cro.Eliz. 429.

Assumpsit. Whereas the defendant had recovered five pounds against the plaintiff; in consideration of four pounds given him by the plaintiff, that the defendant assumed to acknowledge satisfaction of that judgment before such a day; and that he had not done it. And it was thereupon demurred; for it was moved, that there was not any consideration; for it is no more than to give him part of the money which he owed him, which is not any consideration.—But all the

Court held it to be well enough; for it is a benefit unto him to have it without suit or charge; and it may be there was error in the record, so as the party might have avoided it. Wherefore it was adjudged for the plaintiff.

QUESTIONS:

1. Was the judgment for £5 discharged, or can the defendant still enforce it?
2. How much is the plaintiff entitled to as damages in the present action?
3. Is the decision in conflict with *Foakes v. Beer*, next following?

FOAKES v. BEER.

In the House of Lords, 1884. L.R. 9 App.Cas. 605.

Appeal from an order of the Court of Appeal.

On August 11th, 1875, the respondent recovered judgment against the appellant for £2,077 17s. 2d. for debt and £13 1s. 10d. for costs. On December 21st, 1876, a memorandum of agreement was made and signed by the appellant and respondent in the following terms:

"Whereas the said John Weston Foakes is indebted to the said Julia Beer, and she has obtained a judgment in her Majesty's High Court of Justice, Exchequer Division, for the sum of £2,090 19s. And whereas the said John Weston Foakes has requested the said Julia Beer to give him time in which to pay such judgment, which she has agreed to do on the following conditions. Now this agreement witnesseth that in consideration of the said John Weston Foakes paying to the said Julia Beer on the signing of this agreement the sum of £500, the receipt whereof she doth hereby acknowledge in part satisfaction of the said judgment debt of £2,090 19s., and on condition of his paying to her or her executors, administrators, assigns or nominee the sum of £150 on July 1st and January 1st or within one calendar month after each of the said days respectively in every year until the whole of the said sum of £2,090 19s. shall have been fully paid and satisfied, the first of such payments to be made on July 1st next, then she the said Julia Beer hereby undertakes and agrees that she, her executors, administrators or assigns, will not take any proceedings whatever on the said judgment."

The respondent having in June, 1882, taken out a summons for leave to proceed on the judgment, an issue was directed to be tried between the respondent as plaintiff and the appellant as defendant whether any and what amount was on July 1st, 1882, due upon the judgment.

At the trial of the issue before Cave, J., it was proved that the whole sum of £2,090 19s. had been paid by instalments, but the respondent claimed interest. The jury under his Lordship's direction found that the appellant had paid all the sums which by the agreement of December 21st, 1876, he undertook to pay and within the times therein specified. Cave, J., was of opinion that whether the judgment was satisfied or not, the respondent was, by reason of the agreement, not entitled to issue execution for any sum on the judgment.

The Queen's Bench Division (Watkin Williams and Mathew, JJ.) discharged an order for a new trial on the ground of misdirection.

The Court of Appeal (Brett, M. R., Lindley, and Fry, L. JJ.) reversed that decision and entered judgment for the respondent for the interest due, with costs. * * *

LORD BLACKBURN. My Lords, the first question raised is as to what was the true construction of the memorandum of agreement made on December 21st, 1876. What was it that the parties by that writing agreed to?

The appellants contend that they meant that on payment down of £500, and payment within a month after July 1st and January 1st in each ensuing year of £150, until the sum of £2,090 19s. was paid, the judgment for that sum and interest should be satisfied, for an agreement to take no proceedings on the judgment is equivalent to treating it as satisfied. This construction of the memorandum requires that after the tenth payment of £150 there should be a further payment of £90 19s. made within the next six months. This is the construction which all three Courts below have put upon the memorandum.

The respondent contends that the true construction of the memorandum was that time was to be given on those conditions for five years, the judgment being on default of any one payment enforceable for whatever was still unpaid, with interest from the date the judgment was signed, but that the interest was not intended to be forgiven at all. If this is the true construction of the agreement the judgment appealed against is right and should be affirmed, whether the reason on which the Court of Appeal founded its judgment was right or not. I am, however, of opinion that the Courts below, who on this point were unanimous, put the true construction on the memorandum. I do not think the question free from difficulty. It would have been easy to have expressed, in unmistakable words, that on payment down of £500, and punctual payment at the rate of £300 a year till £2,090 19s. was paid, the judgment should not be enforced either for principal or interest; or language might have been used which should equally clearly have expressed that, though time was to be given, interest was to be paid in addition to the instalments. The words actually used are such that I think it is quite possible that the two parties put a dif-

ferent construction on the words at the time; but I think the words "till the said sum of £2,090 19s. shall have been fully paid and satisfied" cannot be construed as meaning "till that sum, with interest from the day judgment was signed, shall have been fully paid and satisfied," nor can the promise "not to take any proceedings whatever on the judgment" be cut down to meaning any proceedings except those necessary to enforce payment of interest.

I think, therefore, that it is necessary to consider the ground on which the Court of Appeal did base their judgment, and to say whether the agreement can be enforced. I construe it as accepting and taking £500 in satisfaction of the whole £2,090 19s., subject to the condition that unless the balance of the principal debt was paid by the instalments, the whole might be enforced with interest. If, instead of £500 in money, it had been a horse valued at £500 or a promissory note for £500, the authorities are that it would have been a good satisfaction, but it is said to be otherwise as it was money.

This is a question, I think, of difficulty.

In *Coke, Littleton*, 212b, Lord Coke says: "Where the condition is for payment of £20, the obligor or feoffor cannot at the time appointed pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater. * * * If the obligor or feoffor pay a lesser sum either before the day or at another place than is limited by the condition, and the obligee or feoffee receiveth it, this is a good satisfaction." For this he cites *Pinnel's Case* [5 Rep. 117a]. That was an action on a bond for £16, conditioned for the payment of £8 10s. on November 11th, 1600. Plea that defendant, at plaintiff's request, before the said day, to wit, on October 1st, paid to the plaintiff £5 2s. 2d., which the plaintiff accepted in full satisfaction of the £8 10s. The plaintiff had judgment for the insufficient pleading. But though this was so, Lord Coke reports that it was resolved by the whole Court of Common Pleas "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction for the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, etc., in satisfaction is good, for it shall be intended that a horse, hawk, or robe, etc., might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff; but in the case at bar it was resolved that the payment and acceptance of parcel before the day in satisfaction of the whole would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material;

so if I am bound in £20 to pay you £10 at Westminster, and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction for the whole £10, it is a good satisfaction for the whole, for the expenses to pay it at York is sufficient satisfaction."

There are two things here resolved. First, that where a matter paid and accepted in satisfaction of a debt certain might by any possibility be more beneficial to the creditor than his debt, the Court will not inquire into the adequacy of the consideration. If the creditor, without any fraud, accepted it in satisfaction when it was not a sufficient satisfaction it was his own fault. And that payment before the day might be more beneficial, and consequently that the plea was in substance good, and this must have been decided in the case.

There is a second point stated to have been resolved—viz.: "That payment of a lesser sum on the day cannot be any satisfaction of the whole, because it appears to the judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." This was certainly not necessary for the decision of the case; but though the resolution of the Court of Common Pleas was only a dictum, it seems to me clear that Lord Coke deliberately adopted the dictum, and the great weight of his authority makes it necessary to be cautious before saying that what he deliberately adopted as law was a mistake.

* * *

For instance, in *Sibree v. Tripp* [15 M. & W. 33, 37], Parke, B., says: "It is clear if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder." And Alderson, B., in the same case says: "It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand which ought to be paid, is payment only in part, because it is not one bargain, but two—viz., payment of part, and an agreement without consideration to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties, but undoubtedly the law is so settled." After such strong expressions of opinion, I doubt much whether any judge sitting in a Court of the first instance would be justified in treating the question as open. But as this has very seldom, if at all, been the ground of the decision even in a Court of the first instance, and certainly never been the ground of a decision in the Court of Exchequer Chamber, still less in this House, I did think it open in your Lordships' House to reconsider this question. And, notwithstanding the very high authority of Lord Coke, I think it is not the fact that to accept prompt payment of a part only of a liquidated demand, can never be more beneficial than to insist on payment of the whole. And if it be not the fact, it cannot be apparent to the judges.

[LORD BLACKBURN here reviewed the cases since *Pinnel's Case*, finding that on the whole they supported Lord Coke's dictum.] And I think that their expressions justify Mr. John William Smith in laying it down as he does in his note to *Cumber v. Wane*, in the second edition of his *Leading Cases*, that "a liquidated and undisputed money demand, of which the day of payment is passed (not founded upon a bill of exchange or promissory note), cannot even with the consent of the creditor be discharged by mere payment by the debtor of a smaller amount in money in the same manner as he was bound to pay the whole." I am inclined to think that this was settled in a Court of the first instance. I think, however, that it was originally a mistake.

What principally weighs with me in thinking that Lord Coke made a mistake of fact is my conviction that all men of business, whether merchants or tradesmen, do every day recognize and act on the ground that prompt payment of a part of their demand may be more beneficial to them than it would be to insist on their rights and enforce payment of the whole. Even where the debtor is perfectly solvent, and sure to pay at last, this often is so. Where the credit of the debtor is doubtful it must be more so. I had persuaded myself that there was no such long-continued action on this dictum as to render it improper in this House to reconsider the question. I had written my reasons for so thinking; but as they were not satisfactory to the other noble and learned Lords who heard the case, I do not now repeat them nor persist in them.

I assent to the judgment proposed, though it is not that which I had originally thought proper.

Order appealed from affirmed, and appeal dismissed with costs.

* * *

QUESTIONS:

1. Is the consideration required for the extinguishment of a legal duty identical with that required for the creation of such a duty by a promise? See, further, the cases dealing with Accord and Satisfaction, post, chapter 8, section 6.
2. Was the judgment debt discharged upon payment of the £500? or upon payment of the full £2,090 19s?
3. Is Foakes the plaintiff in this case?
4. Can Foakes get judgment for damages for breach of Julia Beer's promise?
5. Did Beer make a gift to Foakes of the interest?

NOTE

The American cases in accord with *Foakes v. Beer* are very numerous, in spite of much criticism of the rule. At least eight States have enacted

statutes requiring decision to the contrary; and in three States a contrary result was reached by court decision. A leading case contra is *Frye v. Hubbell*, 74 N.H. 358, 68 A. 325 (1907). Restatement, Contracts, § 84(a) accepts the rule laid down in *Foakes v. Beer*. This is an example of the type of case in which the merest trifle (a pepper-corn, a tom-tit, or a canary) given by the debtor in addition to his part payment would be held to be a sufficient consideration for the creditor's promise. The creditor can discharge his debtor in various ways that operate as an executed gift, without any payment whatever. See the Chapter on Discharge.

A composition agreement between a debtor and two or more of his creditors, providing for a discharge upon payment of less than the full amount due, is universally supported. A consideration may be found in the mutual promises of the creditors or in the debtor's surrender of his privilege of preferring one creditor over another. Restatement, Contracts, § 84, Comment d.

In *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351, 11 L.R.A. 710 (1891), a debtor gave promissory notes for part, secured by a chattel mortgage, and the debt was held satisfied.

If the total amount owed by a debtor is disputed or otherwise unliquidated, a payment offered by him and accepted by the creditor is a sufficient consideration for the latter's promise to forego the balance claimed. See Restatement, Contracts, § 76. Also the cases on Accord and Satisfaction, Chapter 9, Discharge.

In paying any part of a liquidated debt, then admittedly due, the debtor is merely performing his legally enforceable duty. Men have always had varying attitudes toward what is called "duty"; but it can not be doubted that the prevailing mores have given it dynamic power. In any specific case, however, its compelling force depends upon the particular circumstances. It may be expected, therefore, that there will be some variation in decisions in determining whether the performance of legal duty is a sufficient consideration for a promise that is actually exchanged for it. Decision may depend on whether the performer is a consistent "dead beat," a debtor trying to capitalize on the nuisance value of litigation, an honest but inefficient borrower, an honest and successful man caught in a physical or financial earthquake.

It has been suggested that part payment of a debt may be a sufficient consideration for an executory promise, even though it can not operate as a discharge of the existing duty to pay the entire debt. This may have been Coke's idea, when he said that £10 can not equal £20. But if a part payment is sufficient to make binding a promise to accept it as a full settlement, under our existing law that binding promise would be a good defense in an action to enforce payment. The new transaction is a valid discharge if it is a valid contract.

MELROY et al. v. KEMMERER.

Supreme Court of Pennsylvania, 1907. 218 Pa. 381, 67 A. 609.

Action by Emma E. M. Melroy and Thomas B. Bachman against Charles R. Kemmerer. Judgment for plaintiffs, and defendant appeals. Reversed.

At the trial the defendant testified that on December 6, 1902, he had paid the plaintiff 30 per cent of the amount claimed, and that this was a good accord and satisfaction of the whole claim, because, at the time payment was made, plaintiffs had dissuaded him from going into bankruptcy. The court gave binding instructions for plaintiffs. Verdict and judgment for plaintiffs for \$2,217.32.

MITCHELL, C. J. It was said in *Ebert v. Johns*, 206 Pa. 395, 55 A. 1064, that the rule that the acceptance of a smaller sum for a debt presently due, though agreed and expressed to be payment in full, is not a good accord and satisfaction, was a deduction of scholastic logic, and was always regarded as more logical than just, and hence any circumstance of variation is sufficient to take a case out of the rule. As illustrations of such circumstances of variation, it has been held that payment a day, or even an hour, before the debt is due, or at a different place, or of a certainty in amount where the amount of the debt is uncertain, or payment of even a part by a third person, or additional security of any kind, such as the indorsement of a note by a third person, or payment in chattels or anything other than money, will be a good discharge of the whole by way of accord and satisfaction. Note to *Cumber v. Wane*, 1 Smith, Lead. Case. *357. And see a full collection of the more recent cases in the note to *Fuller v. Kemp* (138 N.Y. 231, 33 N.E. 1034) in 20 L.R.A. 785. The rule itself is founded on the want of consideration for the agreement. As a part can never be equal to the whole, payment of a part of a debt presently due gives the creditor nothing that he was not entitled to and deprives the debtor of nothing he was not bound to part with before, and therefore there is no consideration. The logic is unimpeachable, but it fails to take into consideration the practical importance of the difference between the right to a thing and the actual possession of it. As said in *Ebert v. Johns*, 206 Pa. 395, 55 A. 1064, "to a merchant with a note coming due \$5,000 before 3 o'clock to-day, which will save his commercial credit, may well be worth more than \$20,000 to-morrow, after his note has gone to protest." If the debt is not due till to-morrow, the payment of the lesser sum under all the cases will be a good accord and satisfaction; but if the debt was due yesterday, but the debtor can only pay part to-day, the benefit to the creditor of getting that part now, rather than the whole when it is too late, is just as great, and, whatever conclusion the scholastic logic and theoretical reasoning may lead to, the import-

ance of the practical result is a matter for the creditor to decide for himself, and, having so decided and got the benefit of it, justice and common honesty ought to hold him to his agreement. For this reason, the force of which is universally accepted, the courts, so far as they could without sacrifice of the maxim of *stare decisis*, have brought the law into closer accord with modern business principles.

In the present case the debtor, being in failing circumstances and contemplating bankruptcy, offered the plaintiffs 30 per cent of his debt as a settlement in full. The plaintiffs dissuaded him from going into bankruptcy, accepted his alternative offer, received the money, and closed the account. They have now brought this suit for the balance. In the absence of any express decision in this state on this point, the learned judge below did not feel at liberty to depart from the general rule. We have no such hesitation. The exact point is whether the debtor's relinquishment of his intention to seek a discharge in bankruptcy, and his payment of 30 per cent instead, constitute a sufficient consideration to bind the creditor to the agreement. On that point we have no doubt. A valuable consideration may consist in some right, interest, or benefit to one party, or some loss, detriment, or responsibility resulting actually or potentially to the other. *Bouvier's Law Dict.* "If there is any advantage to the creditor, the law will not weigh the adequacy of the consideration." *Fowler v. Smith*, 153 Pa. 639, 25 A. 744. The accord in this case was good on both branches. By it the creditors got a sum certain, instead of the chances of an uncertain dividend in bankruptcy. On the other hand, the debtor accepted the responsibility of paying a sum certain, whether his assets were sufficient or not, and gave up his right to a release of his future assets, and to a discharge from his whole debt, without regard to the sufficiency of his present assets. * * *

Judgment reversed.

NOTE

It seems doubtful whether the plaintiff bargained for the defendant's forbearance to seek a discharge in bankruptcy; but that forbearance may have been an expected result.

STILK v. MYRICK

In the Court of Common Pleas, 1810. 2 Camp. 317.

This was an action for seaman's wages, on a voyage from London to the Baltic and back.

By the ship's articles, executed before the commencement of the voyage, the plaintiff was to be paid at the rate of £5 a month; and the principal question in the cause was, whether he was entitled to a

higher rate of wages. In the course of the voyage two of the seamen deserted, and the captain, having in vain attempted to supply their places at Cronstadt, there entered into an agreement with the rest of the crew, that they should have the wages of the two who had deserted equally divided among them if he could not procure two other hands at Gottenburgh. This was found impossible, and the ship was worked back to London by the plaintiff and eight more of the original crew, with whom the agreement had been made at Cronstadt.

LORD ELLENBOROUGH. I think *Harris v. Watson* (Peak, 72) was rightly decided; but I doubt whether the ground of public policy, upon which Lord Kenyon is stated to have proceeded, be the true principle on which the decision is to be supported. Here, I say, the agreement is void for want of consideration. There was no consideration for the ulterior pay promised to the mariners who remained with the ship. Before they sailed from London they had undertaken to do all they could under all the emergencies of the voyage. They had sold all their services till the voyage should be completed. If they had been at liberty to quit the vessel at Cronstadt, the case would have been quite different; or if the captain had capriciously discharged the two men who were wanting, the others might not have been compelled to take the whole duty upon themselves, and their agreeing to do so might have been a sufficient consideration for the promise of an advance of wages. But the desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port. Therefore, without looking to the policy of this agreement, I think it is void for want of consideration, and that the plaintiff can only recover at the rate of £5 a month.

Verdict accordingly.

QUESTION:

Is there reason for believing that a case like this would be decided otherwise to-day?

DAVIS & CO. v. MORGAN.

Supreme Court of Georgia, 1903.

117 Ga. 504, 43 S.E. 732, 61 L.R.A. 148, 97 Am.St.Rep. 171.

Action by A. M. Morgan against C. H. Davis & Co. Judgment for plaintiff, and defendants bring error. Reversed.

LAMAR, J. Davis & Co. employed Morgan for one year at \$40 per month. After the contract had been in force for some time, Morgan

received an offer of \$65 per month from a company in Florida, and mentioned the fact to Davis, saying that of course he would not go without consent. Davis insists that he then said, if Morgan would stay out the balance of the term, and work satisfactorily, he would give him \$120 at the end of the year. Morgan says that Davis stated, "I will add \$10 a month from the time you began, and owe you \$120 when your time is up." Davis & Co. discharged Morgan two or three weeks before the end of the term, because the latter had gone to Florida for several days without their consent. Morgan insists that he told Davis that he was going, and the latter made no objection. He claimed that he was discharged without proper cause, and brought suit for the extra compensation promised. The jury found a verdict in his favor, and, the court having refused to grant a new trial, Davis & Co. excepted.

If the promise contemplated that Davis & Co. were to pay Morgan \$10 per month for that part of the year which had already passed, and as to which there had been a settlement, it was manifestly nudum pactum; for a past transaction, the obligation of which has been fully satisfied, will not sustain a new promise. *Gay v. Mott*, 43 Ga. 254. And the result is practically the same whether Morgan or Davis was correct in the statement of the conversation. Both proved a promise to give more than was due, and to pay extra for what one was already legally bound to perform. The employer, therefore, received no consideration for his promise to give the additional money at the end of the year. Morgan had agreed to work for 12 months at the price promised, and if during the term he had agreed to receive less, the employer would still have been liable to pay him the full \$40 per month. On the other hand, the employer could not be forced to pay more than the contract price. He got no more services than he had already contracted to receive, and according to an almost unbroken line of decisions the agreement to give more than was due was a nudum pactum, and void, as having no consideration to support the promise. The case is something like that of *Bush v. Rawlins*, 89 Ga. 117, 14 S.E. 886, where the landlord agreed to give the tenant certain property if he would pay his rent promptly; and it was held that such a promise was a gratuity, and void, as without consideration to support it. And see *Tatum v. Morgan*, 108 Ga. 336, 33 S.E. 940(2); Civ.Code 1895, § 3735. It is also within the principle of *Stilk v. Myrick*, 2 Campbell, 317, where Lord Ellenborough held that an agreement to pay seamen extra for what they were bound by their articles to do was void. And so in *Bartlett v. Wyman*, 14 Johns. 260, a similar ruling was made in a case where a master agreed to give more wages if the seamen would not abandon the ship. See, also, *Ayres v. C. R. I. Ry. Co.*, 52 Iowa 478, 3 N.W. 522. There are cases holding that a new promise is binding where one of the parties to a contract refuses to perform, and, to save

a loss, the innocent party agrees to pay more than the original contract price, if the actor will perform as originally agreed. *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284, 41 Am.Rep. 723. But even if that line of cases should not be disregarded as tending to encourage a breach of contract, they do not affect the rights of Morgan here, because he does not bring himself within their ruling. Had there been a rescission or formal cancellation (*Vanderbilt v. Schreyer*, 91 N.Y. 402) of the old contract by mutual consent, and if a new contract with new terms had been made; or if there had been any change in the hours, services, or character of work, or other consideration to support the promise to pay the increased wages it would have been enforceable. But, as it was, Morgan proved that Davis promised to pay more for the performance of the old contract than he had originally agreed. Such a promise was not binding. * * *

Judgment reversed.

QUESTIONS:

1. According to the mores of today, is the fact that an employee is offered a better job at higher pay a justifying reason for his quitting his job before the end of the agreed period?
2. Should the answer vary if the employee is a day laborer, a high salaried engineer, a poor college professor?
3. Should the answer vary with the cost of bread and meat?
4. If the employee continues in service in reliance on his employer's promise of an increase in wages, should that promise be enforced irrespective of whether he had been offered a better job?

NOTE

The factors on which the answers to these questions depend may be of more importance in advising a client than are the stated rules of "law" that are found in print. Do not infer from this that those printed rules may safely be disregarded or that you will soon be able to construct better ones.

Restatement, Contracts, § 76(a) is in accord with the decision in the above case, where the consideration given is one that the promisee was already under a legal duty to the promisor to render. The rule is commonly so stated in court opinions and in treatises. It is highly necessary, however, to study cases that do not apply the rule and to see why they do not.

If the previously existing duty of the promisee is a contractual duty owed by him to some third person instead of to the promisor, the fact that the duty existed does not make the consideration insufficient to support the promise, according to Restatement, Contracts, § 84(d). The rule commonly stated in court opinions and in treatises has been directly contra to this. Again, it is necessary to study the cases that managed to

avoid applying the formerly stated rule. Without doubt this rule of the Restatement will be made use of by the courts in the cases where they are convinced that the new promise should be enforced.

It is very likely that as case follows case, a new and better generalization can be constructed, taking into account other factors than the mere existence of "legal duty" or the person to whom the promisee owes it. The student must determine what these factors are. They, too, must be weighed in the light of case experience and not by process of intuition based on no experience.

SCHWARTZREICH v. BAUMAN-BASCH, Inc.

Court of Appeals of New York, 1921. 231 N.Y. 196, 131 N.E. 887.

Action by Louis Schwartzreich against Bauman-Basch, Incorporated. After judgment for plaintiff entered upon verdict of a jury, the trial court on motion set aside the verdict and judgment and dismissed the complaint, and upon appeal to the Appellate Term this action was reversed and verdict and judgment in plaintiff's favor reinstated; leave being granted to take the case to the Appellate Division. The Appellate Division (188 App.Div. 960, 176 N.Y.S. 921) affirmed the judgment of the Appellate Term, one of the judges dissenting, and certified by its order that a question of law was involved to be reviewed by the Court of Appeals. Judgments of Appellate Division and Appellate Term affirmed.

CRANE, J. On the 31st day of August, 1917, the plaintiff entered into the following employment agreement with the defendant:

"Bauman-Basch, Inc.

"Coats & Wraps

"31-33 East 32d Street

"New York

"Agreement entered into this 31st day of August, 1917, by and between Bauman-Basch, Inc., a domestic corporation, party of the first part, and Louis Schwartzreich, of the borough of Bronx, city of New York, party of the second part, witnesseth:

"The party of the first part does hereby employ the party of the second part, and the party of the second part agrees to enter the services of the party of the first part as a designer of coats and wraps.

"The employment herein shall commence on the 22d day of November, 1917, and shall continue for twelve months thereafter. The party of the second part shall receive a salary of ninety (\$90.00) per week, payable weekly.

"The party of the second part shall devote his entire time and attention to the business of the party of the first part, and shall use his best energies and endeavors in the furtherance of its business.

"In witness whereof, the party of the first part has caused its seal to be affixed hereto and these presents to be signed, and the party of the second part has hereunto set his hand and seal the day and year first above written.

"Bauman-Basch, Inc.,

"S. Bauman.

"Louis Schwartzreich.

"In the presence of."

In October the plaintiff was offered more money by another concern. Mr. Bauman, an officer of the Bauman-Basch, Inc., says that in that month he heard that the plaintiff was going to leave and thereupon had with him the following conversation:

"A. I called him in the office, and I asked him, 'Is that true that you want to leave us?' and he said 'Yes,' and I said, 'Mr. Schwartzreich, how can you do that; you are under contract with us?' He said, 'Somebody offered me more money.' * * * I said, 'How much do they offer you?' He said, 'They offered him \$115 a week.' * * * I said, 'I cannot get a designer now, and, in view of the fact that I have to send my sample line out on the road, I will give you a hundred dollars a week rather than to let you go.' He said, 'If you will give me \$100, I will stay.' "

Thereupon Mr. Bauman dictated to his stenographer a new contract, dated October 17, 1917, in the exact words of the first contract and running for the same period, the salary being \$100 a week, which contract was duly executed by the parties and witnessed. Duplicate originals were kept by the plaintiff and defendant.

Simultaneously with the signing of this new contract the plaintiff's copy of the old contract was either given to or left with Mr. Bauman. He testifies that the plaintiff gave him the paper but that he did not take it from him. The signatures to the old contract plaintiff tore off at the time according to Mr. Bauman.

The plaintiff's version as to the execution of the new contract is as follows:

"A. I told Mr. Bauman that I have an offer from Scheer & Mayer of \$110 a week, and I said to him: 'Do you advise me as a friendly matter—will you advise me as a friendly matter what to do; you see I have a contract with you, and I should not accept the offer of \$110 a week, and I ask you, as a matter of friendship, do you advise me to take it or not.' At the minute he did not say anything, but the day afterwards he came to me in and he said, 'I will give you \$100 a week, and I want you to stay with me.' I said: 'All right, I will accept it; it is very nice of you that you do that, and I appreciate it very much.' "

The plaintiff says that on the 17th of October, when the new contract was signed, he gave his copy of the old contract back to Mr. Bau-

man, who said: "You do not want this contract any more because the new one takes its place."

The plaintiff remained in the defendant's employ until the following December, when he was discharged. He brought this action under the contract of October 17th for his damages.

The defense, insisted upon through all the courts, is that there was no consideration for the new contract as the plaintiff was already bound under his agreement of August 31, 1917, to do the same work for the same period at \$90 a week.

The trial justice submitted to the jury the question whether there was a cancellation of the old contract and charged as follows:

"If you find that the \$90 contract was prior to or at the time of the execution of the \$100 contract canceled and revoked by the parties by their mutual consent, then it is your duty to find that there was a consideration for the making of the contract in suit, viz., the \$100 contract, and, in that event, the plaintiff would be entitled to your verdict for such damages as you may find resulted proximately, naturally, and necessarily in consequence of the plaintiff's discharge prior to the termination of the contract period of which I shall speak later on."

Defendant's counsel thereupon excepted to the portion of the charge in which the court permitted the jury to find that the prior contract may have been canceled simultaneously with the execution of the other agreement. Again the court said:

"The test question is whether by word or by act, either prior to or at the time of the signing of the \$100 contract, these parties mutually agreed that the old contract from that instant should be null and void."

The jury having rendered a verdict for the plaintiff, the trial justice set it aside and dismissed the complaint on the ground that there was not sufficient evidence that the first contract was canceled to warrant the jury's findings.

The above quotations from the record show that a question of fact was presented and that the evidence most favorable for the plaintiff would sustain a finding that the first contract was destroyed, canceled, or abrogated by the consent of both parties.

The Appellate Term was right in reversing this ruling. Instead of granting a new trial, however, it reinstated the verdict of the jury and the judgment for the plaintiff. The question remains, therefore, whether the charge of the court, as above given, was a correct statement of the law or whether on all the evidence in the plaintiff's favor a cause of action was made out.

Can a contract of employment be set aside or terminated by the parties to it and a new one made or substituted in its place? If so, is it competent to end the one and make the other at the same time?

It has been repeatedly held that a promise made to induce a party to do that which he is already bound by contract to perform is without consideration. But the cases in this state, while enforcing this rule, also recognize that a contract may be canceled by mutual consent and a new one made. Thus *Vanderbilt v. Schreyer*, 91 N.Y. 392, 402, held that it was no consideration for a guaranty that a party promise to do only that which he was before legally bound to perform. This court stated, however:

"It would doubtless be competent for parties to cancel an existing contract and make a new one to complete the same work at a different rate of compensation, but it seems that it would be essential to its validity that there should be a valid cancellation of the original contract. Such was the case of *Lattimore v. Harsen*, 14 Johns. 330."

In *Cosgray v. New England Piano Co.*, 10 App.Div. 351, 353, 41 N.Y.S. 886, 888, it was decided that where the plaintiff had bound himself to work for a year at \$30 a week, there was no consideration for a promise thereafter made by the defendant that he should, notwithstanding, receive \$1,800 a year. Here it will be noticed there was no termination of the first agreement which gave occasion for *Bartlett, J.*, to say in the opinion:

"The case might be different if the parties had, by word of mouth, agreed wholly to abrogate and do away with a pre-existing written contract in regard to service and compensation, and had substituted for it another agreement."

Any change in an existing contract, such as a modification of the rate of compensation, or a supplemental agreement, must have a new consideration to support it. In such a case the contract is continued, not ended. Where, however, an existing contract is terminated by consent of both parties and a new one executed in its place and stead, we have a different situation and the mutual promises are again a consideration. Very little difference may appear in a mere change of compensation in an existing and continuing contract and a termination of one contract and the making of a new one for the same time and work, but at an increased compensation. There is, however, a marked difference in principle. Where the new contract gives any new privilege or advantage to the promisee, a consideration has been recognized, though in the main it is the same contract.¹ *Triangle Waist Co., Inc., v. Todd*, 223 N.Y. 27, 119 N.E. 85.

¹ The use of the word "promisee" in this sentence may be a mere slip of the pen by the court; it is easy to interchange the terms promisor and promisee by mistake. But it may be due to confusion of mind. Such an interchange of terms must be avoided

in discussing consideration for a promise. A promisor never gives consideration for his own promise. No promise is ever made binding by a "new privilege or advantage to the promisee." A Bargain is an *exchange* of equivalents.

If this which we are now holding were not the rule, parties having once made a contract would be prevented from changing it no matter how willing and desirous they might be to do so, unless the terms conferred an additional benefit to the promisee.

All concede that an agreement may be rescinded by mutual consent and a new agreement made thereafter on any terms to which the parties may assent. Prof. Williston, in his work on Contracts, says (volume 1, § 130a):

"A rescission followed shortly afterwards by a new agreement in regard to the same subject-matter would create the legal obligations provided in the subsequent agreement."

The same effect follows in our judgment from a new contract entered into at the same time the old one is destroyed and rescinded by mutual consent. The determining factor is the rescission by consent. Provided this is the expressed and acted upon intention, the time of the rescission, whether a moment before or at the same time as the making of the new contract, is unimportant. * * *

There is no reason that we can see why the parties to a contract may not come together and agree to cancel and rescind an existing contract, making a new one in its place. We are also of the opinion that reason and authority support the conclusion that both transactions can take place at the same time.

For the reasons here stated, the charge of the trial court was correct, and the judgments of the Appellate Division and the Appellate Term should be affirmed, with costs.

CHASE, J., dissents.

Judgments affirmed.

NOTE ON OPINIONS IN THE LOWER COURT

The trial court (City Court of New York City) had held that the new promise was not enforceable. On appeal therefrom, the next higher court (Appellate Term of the Supreme Court) reversed the decision on the ground that the jury's verdict in favor of the plaintiff ought to be supported because there was evidence that the original contract was rescinded before the new agreement was made. BLJUR, J., for the majority said:

"It seems to me, therefore, that if after the second agreement had actually been signed the parties had canceled the earlier one, and the circumstances indicated the intent to redeliver or make effective the second agreement, there is no reason why that result might not validly be achieved. This nice question, however, need not be decided in the instant case, for, as I read the record, there was evidence upon which

the jury might properly have based its finding that it was the intention of the parties to and that they actually did cancel the first contract before the execution of the second agreement."

In a dissenting opinion, it was said by MULLAN, J.:

"Of course it goes without saying that the parties could have canceled the old contract and subsequently have made a new one. It is equally plain that they observed the formalities usual in making a contract, that is to say, they performed all the necessary gestures and gave promise for promise, and made what would have been, except for the rule of law under discussion, the clearest example of a good contract. But were the parties capable, at the time, of making that particular contract? The answer to that question depends upon the answer to the primary question, whether, when the second contract was made, the first contract was at an end.

"A true cancellation of a contract leaves the parties to it in *statu quo ante*; that is, it leaves them in the same situation in respect of the subject-matter of the canceled contract as if they had never seen or heard of each other. An agreement to cancel a contract is itself just as truly a contract as the contract it terminates, and its effect is to put an end to the contract not merely that the contractors may thereby be enabled to enter into a new contract with each other, but to leave them in perfect freedom to refuse to enter into any further contractual relationship with each other. Now, it may be theoretically possible for parties to a contract genuinely to terminate it by agreement, thereby intending to be free to refuse to deal with each other again, and then immediately and genuinely to change their minds and remake the contract that was canceled, with a change of terms in favor of one party only. It is more reasonable, however, to assume that at least some few moments must elapse between the time when two given minds shall agree to cancel an existing contract and the time when those same two minds shall decide to reinstate it or again make one very like it. In the world of the realities lightning fast changes of the kind that must have taken place to make the second contract good do not occur, and I feel quite safe in saying dogmatically that no such sudden revulsion occurred here; nor indeed do I understand that such an absurdity is claimed. Can it be seriously urged that the defendant was willing that the plaintiff should have any moment of freedom from the old contract—such freedom I mean as to give the plaintiff the right to seek employment from some one other than the defendant? I think it is very clear that the parties never intended to be free from each other, and that the new contract was a mere substitution for the old one, and that is precisely what the rule that refuses validity to a promise to pay more for what the promisee has already obligated to do was intended to prevent.

"There is nothing in this case that distinguishes it from the many cases in the books in which the ancient rule of law referred to was ap-

plied. The tearing up of one writing and the delivery of another writing in its stead are unimportant evidentiary details. Whenever the question of the rule's applicability has arisen one contract has been in legal effect destroyed and another contract, valid but for the rule, has been substituted for it. Quite obviously, the physical tearing of a piece of paper accomplishes nothing more than does an oral agreement to cancel; and I see no importance in the particular chronological order in which the various physical gestures occurred. Indeed, it seems to me that the entire argument of the appellant amounts to nothing more than a mere magnification of the value of immaterial details and misses the real meaning and purpose of the doctrine we are dealing with."

NOTE

Where the facts of a case are such that the court feels that the new promise of increased compensation for a service that is in no way changed should be enforced, the court is very likely to make use of the circular argument that the new agreement is valid for the reason that it operates as a "rescission" of the former contract. See *Sasso v. K. G. & G. Realty & Const. Co.*, 98 Conn. 571, 120 A. 153 (1923), and Comment in 33 *Yale L.J.* 78. In a later case, however, the same court disapproved of this argument ("we cannot now hold that theory to be sound"), and indicated that the promise of increased pay was really supported by a new consideration in the form of a change in the performance rendered by the promisee. This later case is *Blakeslee v. Board of Water Com'rs of City of Hartford*, 106 Conn. 642, 139 A. 106, 55 A.L.R. 1319 (1927), enforcing a new promise to pay increased compensation for work required by a previous contract. The outbreak of the war, after the first contract was made, had vastly increased costs so that it no longer seemed fair to hold the builder to his agreement. On this ground alone the court seemed to be willing to enforce the new promise to pay the actual cost of construction, discussing the problem intelligently and at some length. Nevertheless, it rested its decision on the fact that the builder bound himself by the new agreement to give up his right to the old contract price and to accept the actual cost of the work as full compensation. He thus gave up his opportunity to make any profit; and this was thought to be a sufficient consideration, even though the chance that such a profit could have been made was practically negligible. With respect to this the court said: "In the ninth paragraph the allegation is that a new contract was entered into whereby the compensation to be paid the plaintiffs was to be the actual cost of the work, labor, and material to be furnished by them. * * * If they succeed in proving a new contract such as they allege in the ninth paragraph of the complaint, we would have a situation where there could be no doubt of its validity, for, as there alleged, the plaintiffs clearly surrendered any rights they might have to recover the contract price and agreed to accept the actual cost of the work, labor, and materials to be furnished. Of course, they were abundantly satisfied that that cost would exceed the contract price, but if through some unforeseen circumstances the actual cost had fallen below the contract price, under this al-

legation of their complaint, they would have been bound to accept the lesser sum. There would, in such a situation, be a clear surrender of rights on the part of the plaintiffs which would amply meet the requirements of a good consideration."

MUNROE v. PERKINS.

Supreme Judicial Court of Massachusetts, 1830. 9 Pick, 298, 20 Am. Dec. 475.

Indebitatus assumpsit for work done, materials found, money paid, &c. brought against the defendant jointly with William Payne, who died after the action was commenced.

At the trial before the chief justice it appeared, that in 1821 the plaintiff was employed by Perkins and Payne to build a hotel at Nahant, which was begun in that year and finished in 1823.

The general defence was that, there was a special contract, and that the work had been paid for according to the terms of that contract.

For the purposes of this case it was admitted, that the amount of expenditures made and incurred by the plaintiff in and about the work, exceeded the amount of the payments made to him.

It appeared that in 1821, a number of persons associated themselves for the purpose of erecting a hotel at Nahant, and subscribed certain sums of money therefor; that Perkins and Payne were subscribers and were the agents of the association, which was to be incorporated as soon as possible, and which was incorporated accordingly in February, 1822.

The defendant offered in evidence an agreement under seal, dated October 24, 1821, wherein the plaintiff engages to build the hotel according to a certain drawing and description, and the defendant and Payne, in behalf of their associates, agree to pay the plaintiff therefor \$14,500 as the work advances.

T. W. Sumner, a witness called by the defendant, testified that the work was executed upon the basis of the drawing and description referred to in the sealed contract; that there were some deviations, consisting of additional work; that this was considered as extra work, not included in the contract, and was paid for separately according to its full cost and value.

To prove a waiver of the special contract, the plaintiff introduced several witnesses. J. Alley testified, that in 1825 he said to the defendant, it was a pity Munroe had undertaken to build the hotel; to which the defendant replied, that Munroe would not lose anything by it, and that they had agreed to pay him for every minute's work and for all he had purchased. J. Mudge testified, that in the spring of 1823 the plaintiff was indebted to the Lynn bank on a note for \$1,100, which he

wished to have renewed, but that the directors were not satisfied of his solvency; that in April of that year, the plaintiff came to the bank with Payne, who said he was the agent who attended to the business of the Nahant hotel in the absence of Perkins, who had gone to Europe; that he wanted to get from the bank some indulgence towards the plaintiff; that the corporation would leave the plaintiff as good as they found him; they would pay Munroe for all he should lay out; that Munroe should not stop for want of funds; that he (Payne) knew Perkins's mind upon the subject; that the bills would be paid, and the plaintiff should not suffer. W. Johnson testified, that on the strength of this representation of Payne, the bank renewed the plaintiff's paper. W. Babb testified, that in May 1822, the defendant asked the plaintiff how he got on; that the plaintiff said poorly enough; that the defendant told him he must persevere; the plaintiff said he could not without means; and the defendant repeated, you must persevere, and added you shall not suffer, we shall leave you as we found you.

The defendant objected to this evidence, that it was insufficient in law to set aside the special contract; that it did not amount to a waiver of the original contract, but so far as it proved anything, it was evidence of a new express promise, which was without consideration and from which no implied assumpsit could be raised. * * *

A verdict was taken by consent, subject to the opinion of the court, for plaintiff.

PER CURIAM. The verdict of the jury has established the fact, if the evidence was legally sufficient, that the defendant, together with Payne, made the promise declared on. The defence set up was, that the work was done and the materials were furnished on a special contract under seal, made by the defendant and Payne on behalf of themselves and other subscribers to the hotel; and such a contract was produced in evidence. The main question is, whether, there being this contract under seal, for a stipulated sum, an action lies on a general assumpsit for the amount which the building actually cost; which is more than the sum specified in the contract. It is said on the part of the plaintiff, that having made a losing bargain and being unwilling and unable to go on with the work, Perkins and Payne assured him that he should not suffer; and that the work was carried on and finished upon their engagement and promise that he should have a reasonable compensation without regard to the special contract. This engagement is to be considered as proved, if by law it was admissible to show a waiver of a special contract.

It is objected, that as the evidence was parol, it is insufficient in law to defeat or avoid the special contract; and many authorities have been cited, to show that a sealed contract cannot be avoided or waived but by an instrument of a like nature; or generally, that a contract

under seal cannot be avoided or altered or explained by parol evidence. That this is the general doctrine of the law cannot be disputed. It seems to have emanated from the common maxim, "*Unumquodque dissolvitur eo ligamine quo ligatur.*" But like other maxims, this has received qualifications, and indeed was never true to the letter, for at all times, a bond, covenant or other sealed instrument might be defeated by parol evidence of payment, accord and satisfaction, &c. * * *

The parol promise, it is contended, was without consideration. This depends entirely on the question, whether the first contract was waived. The plaintiff having refused to perform that contract, as he might do, subjecting himself to such damages as the other parties might show they were entitled to recover, he afterward went on upon the faith of the new promise and finished the work. This was a sufficient consideration. If Payne and Perkins were willing to accept his relinquishment of the old contract and proceed on a new agreement, the law, we think, would not prevent it.

Motion for new trial overruled.

NOTE

As the court was aware, at the time this case was decided the legal duty of a contractor created by a written contract under seal could not be discharged by mere informal agreement of the parties, whether written or oral. The early imagination had endowed a sealed writing with a mystic quality that made its legal operation immune from being affected by anything of a less high nature. See the subsequent chapter on Contracts Under Seal. The first departure from this notion was to hold that the legal duty created by a sealed writing could be discharged by a parol agreement that had been fully performed. From this it appears that the "first contract" in the above case could not be "waived" by the new parol agreement. The question remains, therefore, whether the plaintiff as he proceeded with performance in construction of the house was not merely performing what his still existing duty to the defendant required and whether such performance was a sufficient consideration for the latter's new promise.

A second question involved in this case is whether the plaintiff could terminate his legal duty to build by declaring his inability and unwillingness to proceed with performance. It was once suggested by Justice Holmes that a promisor's duty is in the alternative—to perform as promised or to pay damages for not performing. This theory has received no general support. But one who is legally bound to render either of two performances at his own option gives a sufficient consideration for a promise if at the promisor's request he forbears to exercise his option and renders that one of the alternative performances that the promisor desires.

Observe that in this case the plaintiff was not a repudiator or one about to commit a wilful breach; also that the bank (a third party) gave further credit to the plaintiff in reliance on Payne's new promise to Munroe thereby enabling the latter to complete the building.

LINGENFELDER v. THE WAINWRIGHT BREWING
COMPANY.

Supreme Court of Missouri, 1890. 103 Mo. 578, 15 S.W. 844.

GANTT, P. J. * * * The referee found that Jungenfeld, the plaintiffs' testator, was not entitled to the commission of five per cent on the cost of the refrigerator plant. He found that Jungenfeld's employment as architect was to design plans and make drawings and specifications for certain brewery buildings for the Wainwright Brewery Company and superintend their construction to completion for a commission of five per cent on the cost of the buildings. He found further that Jungenfeld's contract did not include the refrigerator plant that was to be constructed in these buildings. He further found, and the evidence does not seem to admit of a doubt as to the propriety of his finding, that this refrigerator plant was ordered not only without Mr. Jungenfeld's assistance, but against his wishes. He was in no way connected with its erection.

"Mr. Jungenfeld was president of the Empire Refrigerating Company and largely interested therein. * * * The De La Vergne Ice Machine Company was a competitor in business. * * * Against Mr. Jungenfeld's wishes Mr. Wainwright awarded the contract for the refrigerating plant to the De La Vergne Company. * * * The brewery was at that time in process of erection and most of the plans were made. When Mr. Jungenfeld heard that the contract was awarded he took his plans, called off his superintendent on the ground, and notified Mr. Wainwright that he would have nothing more to do with the brewery. The defendant was in great haste to have its new brewery completed for divers reasons. It would be hard to find an architect in Mr. Jungenfeld's place and the making of new plans and arrangements when another architect was found would involve much loss of time. Under these circumstances Mr. Wainwright promised to give Jungenfeld five per cent on the cost of the De La Vergne ice machine if he would resume work. Jungenfeld accepted and fulfilled the duties of superintending architect till the completion of the brewery.

"As I understand the facts and as I accordingly formally find, defendant promised Jungenfeld a bonus to resume work and complete the original contract under the original terms.

"I accordingly submit that in my view defendant's promise to pay Jungenfeld five per cent on the cost of the refrigerating plant was without consideration, and recommend that the claim be not allowed."

The referee also finds "that Mr. Jungenfeld never claimed that defendant had broken the contract or intended to do so, or that any of his legal rights had been violated."

The learned circuit judge, upon this state of facts, held that the defendant was liable on this promise of Wainwright to pay the additional five per cent on the refrigerator plant. The point was duly saved, and from the decision this appeal is taken.

Was there any consideration for the promise of Wainwright to pay Jungenfeld five per cent on the refrigerator plant? If there was not, plaintiff cannot recover the \$3,449.75, the amount of that commission. The report of the referee, and the evidence upon which it is based, alike show that Jungenfeld's claim to this extra compensation is based upon Wainwright's promise to pay him this sum to induce him, Jungenfeld, to complete his original contract under its original terms.

It is urged upon us by respondents that this was a new contract. New in what? Jungenfeld was bound by his contract to design and supervise this building. Under the new promise he was not to do anything more or anything different. What benefit was to accrue to Wainwright? He was to receive the same service from Jungenfeld under the new that Jungenfeld was bound to tender under the original contract. What loss, trouble, or inconvenience could result to Jungenfeld that he had not already assumed? No amount of metaphysical reasoning can change the plain fact that Jungenfeld took advantage of Wainwright's necessities, and extorted the promise of five per cent on the refrigerator plant, as the condition of his complying with his contract already entered into. Nor had he even the flimsy pretext that Wainwright had violated any of the conditions of the contract on his part.

Jungenfeld himself put it upon the simple proposition that, "if he, as an architect, put up the brewery, and another company put up the refrigerating machinery, it would be a detriment to the Empire Refrigerating Company" of which Jungenfeld was president. To permit plaintiff to recover under such circumstances would be to offer a premium upon bad faith, and invite men to violate their most sacred contracts that they may profit by their own wrong.

"That a promise to pay a man for doing that which he is already under contract to do is without consideration," is conceded by respondents. The rule has been so long imbedded in the common law and decisions of the highest courts of the various States that nothing but the most cogent reasons ought to shake it. * * *

[The court refused to approve the argument that the promise was enforceable because the defendant voluntarily chose to make the new

promise in order to get the promised performance instead of bringing a suit for money damages.]

What we hold is that, when a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor, and, although by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum*, and will not lend its process to aid in the wrong.

Judgment of the court below was reversed.

NOTE

Suppose the following case: One of several bidders resolves to get the contract at all costs. He submits a bid so low that he knows there can be no profit. His bid is accepted, a written contract executed, and work begun. He then goes to the other party, shows clearly that the agreed price is much below cost, and says that he may not be able to complete the work. The other party then promises to pay after completion as much as the amount of the bid that was next higher than the price agreed upon, this being \$5,000 more than the contract price.

LINZ v. SCHUCK.

Court of Appeals of Maryland, 1907.

106 Md. 220, 67 A. 286, 11 L.R.A.,N.S., 789, 124 Am.St.Rep. 481, 14 Ann.Cas. 490.

Action by Albinus Schuck against John Linz. From a judgment for plaintiff, defendant appeals. Affirmed.

BOYD, J. The appellee sued the appellant on the common counts for a balance claimed to be due for work done and materials provided, etc., under the following circumstances: The appellant owned a house known as "No. 3038 Elliott street," at the corner of Canton street in Baltimore City, which was built without a cellar, was not plastered or partitioned off on the second story, and the rear was arranged for a stable. The appellee entered into a contract in writing with the appellant which states: "Cellar to be dug under the entire store to the partition wall between kitchen and store to a depth of 7 feet, and walls to be underpinned with good hard brick laid in cement, * * * cellar to be connected with sewer and cemented" and provides for work to be done in the kitchen, the second story of the house, and a number of other things not necessary to mention. It concludes, "I will do the work and furnish material for the sum of fifteen hundred dollars (\$1,500)." The paper was drawn in the shape of an estimate or bid, but was accepted by the appellant, and the appellee identified it as his contract.

The appellee began the work in April, 1903. He gave the contract to build the cellar to a subcontractor who started to excavate. The ap-

pellee thus described the conditions of the ground: "The house stood on a hard crust about three feet thick, and the foundation of that house didn't extend through that hard crust. It was built on that crust, and the more we got through that the more we got into a swamp like—the bottom of an old creek, black muddy stuff and soft and they tried to dig and dig and it all ran into this place and finally a big lump would cave off and fall in every now and then, and they continued on that way to get a trench dug to connect the cellar with the sewer so we thought we could drain the place a little." His foreman notified him that the house was cracking, and he then got lumber and drove "lagging" in to hold the ground. He testified that he notified Mr. Preston, the building inspector of the city, who went there with one of his assistants, that they "took sticks and shoved them down in the ground about 14 feet deep, and that Mr. Linz was present upon this occasion." He also said that Mr. Preston told him no cellar could be made, and he should fill in what he had taken out, and he stopped the work. He further testified that the appellant called on him "off and on," and wanted to see "whether we couldn't make a cellar there; wouldn't it be possible in some way to overcome it even if a small cellar." They finally thought they "could make a little cellar to get some cellar there," and he said: "Let the thing lay, and we will drain the ground into the sewer, and maybe we can overcome it, provided you pay the additional cost and stand the consequences." He demanded a writing from the appellant, and he said "his word was as good as mine, and if I put a cellar there he would see I got pay for it; that he would pay for the additional work I was compelled to do to make a cellar." In another place he stated: "He says if I was able to get a cellar under there he would reimburse or pay me the additional cost, whatever it was to get a cellar there; that the house was no good to him without a cellar." In October we went to work again, dug out eight feet, then drove poles down eight feet long, used "concrete and cement in there to form our footing," and went to great expense and trouble to make the cellar, under the new arrangement.

The appellant introduced evidence which tended to show that some of the trouble about the cellar was owing to the negligent way in which the appellee's men did the work, and that the bad condition of the soil did not extend as deep as the appellee said it was, but there can be no doubt that the conditions were altogether different from what appeared upon the surface or what was anticipated. The appellee also testified that before he made the offer he "wanted to know how the ground was, and defendant took plaintiff in the cellar of his building" (which was on the opposite side of the street), "and he showed me he had a cellar dug there and it went all right, and the soil was nice and sound there on the other corner, and when I started I wouldn't have any trouble, and I made my figures on his say so." After the work

was begun the owner of the adjoining property sued the appellant and the appellee for damages to her house sustained by reason of the excavation, and the suit was compromised by the appellant buying the house, and the appellee agreeing to put it in proper condition. That was No. 3036 Elliott street.

The principal question in the case is whether the plaintiff was entitled to recover for the additional costs and expenses incurred, by reason of those conditions, on the promise of the appellant to pay him for them. The precise question for our consideration is presented by the plaintiff's fifth prayer, which was granted. After referring to the written contract made in April or May, 1903, and the refusal of the plaintiff in June, 1903, to perform and complete said contract the prayer further submitted to the jury to find whether "said refusal on the part of the plaintiff was induced by substantial and unforeseen difficulties in the performance, which would cast upon the plaintiff additional burden not anticipated by the parties when the contract was made, and if they further find that after said refusal by the plaintiff the defendant, to induce the plaintiff to resume the work thus abandoned, promised him to see him through and to stand the consequences, and that, relying upon said promise, the plaintiff completed the work then their verdict may be for the plaintiff," etc. That prayer seems to have followed quite closely the language used in *King v. Duluth, M. & N. Ry. Co.*, 61 Minn. 487, 63 N.W. 1105, which case, notwithstanding unfavorable criticisms by some writers, in our opinion, announces a principle which is not only just and equitable, but is easily reconcilable with the general rule that a promise to do, or actually doing, that which a party to a contract is already under legal obligation to do, is not a valid consideration to support the promise of the other party to the contract to pay additional compensation for such performance. In *King v. Duluth*, after stating that general rule, it is added: "In other words, a promise by one party to a subsisting contract to the opposite party to prevent a breach of the contract on his part is without consideration." The court then cited *Ayers v. Railroad Co.*, 52 Iowa 478, 3 N.W. 522, *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844, *Vanderbilt v. Schreyer*, 91 N.Y. 392, and other cases, most of which are among those relied on by the appellant as sustaining and illustrating the general rule which the Supreme Court of Minnesota unhesitatingly and emphatically approved of. Indeed the court said that the doctrine of *Munroe v. Perkins*, 9 Pick. (Mass.) 305; *Goebel v. Linn*, 47 Mich. 489, 11 N.W. 284, 41 Am.Rep. 723; *Rogers v. Rogers*, 139 Mass. 440, 1 N.E. 122; *Bryant v. Lord*, 19 Minn. 396 (Gil. 342), and *Moore v. Locomotive Works*, 14 Mich. 266, as it is frequently applied, did not commend itself to their judgment or sense of justice.

Those are some of a number of cases which have sustained actions for additional compensation on various theories—some on the ground

of waiver, others on the ground that the party for whom the work was done had the election of suing the other party for damages for breach of contract or to make a new contract, and others that it was a modification of the original contract, etc. Chief Justice Start of the Minnesota court, in the course of the opinion, said: "It is entirely competent for the parties to a contract to modify or waive their rights under it and ingraft new terms upon it, and in such a case the promise of one party is the consideration for that of the other; but, where the promise to the one is simply a repetition of a subsisting legal promise, there can be no consideration for the promise of the other party, and there is no warrant for inferring that the parties have voluntarily rescinded or modified their contract. But, where the party refusing to complete his contract does so by reason of some unforeseen and substantial difficulties in the performance of the contract, which were not known or anticipated by the parties when the contract was entered into, and which cast upon him an additional burden not contemplated by the parties, and the opposite party promises him extra pay or benefits if he will complete his contract, and he so promises, the promise to pay is supported by a valid consideration. In such a case the natural inference arising from the transaction, if unmodified by any equitable considerations, is rebutted, and the presumption arises that by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them. Cases of this character form an exception to the general rule," etc. The opinion then goes on to say that on the other hand, when there are no unforeseen additional burdens which make the refusal to perform, unless promised further pay, equitable, and such refusal and promise of extra pay are one transaction the promise is without consideration and the case is within the general rule. It then holds that what unforeseen difficulties and burdens will make the refusal to perform equitable, so as to bring it within the exception to the general rule, must depend upon the facts of each particular case.

We have thus referred to, and quoted from, that case at unusual length, because the principles therein announced seem to us to be, not only well and clearly stated, but just, and founded on reasons that any court of justice should hesitate to reject, unless they conflict with some binding authority or established rule of law, which, in our judgment, they do not. When two parties make a contract, based on supposed facts which they afterwards ascertain to be incorrect, and which would not have been entered into by the one party if he had known the actual conditions which the contract required him to meet, not only courts of justice but all right thinking people must believe the fair course for the other party to the contract to pursue is either to relieve the contractor of going on with his contract or to pay him additional compen-

sation. If the difficulties be unforeseen, and such as neither party contemplated, or could have from the appearance of the thing to be dealt with anticipated, it would be an extremely harsh rule of law to hold that there was no legal way of binding the owner of property to fulfill a promise made by him to pay the contractor such additional sum as such unforeseen difficulties cost him. But we do not understand the authorities to sustain such a rule. On the contrary they hold that the parties can rescind the original contract, and then enter into a new one, by which a larger consideration for the same work and materials that were to be done and furnished under the first contract can be validly agreed upon. * * *

We are, however, of the opinion that this prayer can be sustained on the ground stated in *King v. Duluth, etc., Ry. Co.*, supra, and other cases, which is, as expressed in that case, that "by the voluntary and mutual promises of the parties their respective rights and obligations under the original contract are waived, and those of the new or modified contract substituted for them." When there is such a strong moral obligation as there was in this case to give the appellee relief, it would be making an exceedingly technical distinction to hold that the promise would have been binding if the original contract would have been expressly rescinded, but that it is not binding because there was no express or actual rescission, although the facts show that it was undoubtedly intended by the parties that neither should be held to the terms of the original contract. Of course it will be borne in mind that the court in *King v. Duluth, etc., Ry. Co.*, only applied the principle announced to cases where the refusal to perform was equitable and fair, and the difficulties were substantial, unforeseen, and not within the contemplation of the parties when the original contract was made. The opinion also excluded from the application of the principle mere "inadequacy of the contract price which is the result of an error of judgment, and not of some excusable mistake of fact." * * *

Judgment affirmed.

NOTE

A contractor is not excused from his duty of performance by the fact that he encounters unexpected difficulty and expense. "Impossibility" of performance caused by supervening events is now held to operate as a discharge; and in some cases this concept has been liberally expanded so as to include cases in which the increased cost is so great as to amount to "commercial impracticability." The fact that a contractor actually completes the agreed performance, under the stimulation of a promise of increased compensation, is evidence that "impossibility" does not exist.

Where there is unexpected difficulty or expense, due to the conduct of the defendant, or where the work done by the plaintiff was changed in its character, location, or amount by the defendant, there is ample consideration for the new promise to pay increased compensation. *United Steel Co. v. Casey* (C.C.A.) 262 F. 889 (1920). There the court further

said: "Where a contract must be performed under burdensome conditions not anticipated, and not within the contemplation of the parties at the time the contract was made, and the promisee measures up to the right standard of honesty and fair dealing, and [the promisor] agrees, in view of the changed conditions, to pay what is then reasonable, just, and fair, such new contract is not without consideration within the meaning of that term, either in law or in equity."

In *UNITED STATES, USE OF WILKINSON v. LANGE*, 35 F.Supp. 17 (1940), the United States District Court for Maryland followed the decision in *Linz v. Schuck*. Lange had contracted with the United States Government to construct a laundry building at Annapolis. A sub-contract for the installation of a clothes chute was made with Wilkinson, who agreed to do the work in accordance with the Government specifications for \$325. Wilkinson had not carefully read those specifications; and he later discovered that the chute was required to be built of stainless steel. After much correspondence, Lange and Wilkinson made a second contract for the same work, the agreed compensation now being \$1,106, Lange having found that other builders would ask an even greater amount. No reference of any kind was made to the first contract. The construction work required by the two contracts was identical; but the second one required Wilkinson to submit a new set of drawings. The court held that Lange was bound to pay the larger sum, in spite of the fact that Wilkinson had been negligent in his reading of the Government specifications. The decision was rested on the slight change in the performance required of Wilkinson and also on the fact that Lange recognized the injustice of the compensation fixed in the first contract. Lange promised the larger amount, not as an agreed equivalent of the slight change in Wilkinson's performance, but "because of the fact that the cost of doing the work was found, after the first contract was made, to be much higher." The court adds: "Finally, it may be said that resistance to the present suit consummates an attempt on the part of Lange inequitably to deprive the plaintiff of just compensation for work satisfactorily done."

If Wilkinson could have got equitable relief from the obligation of the first contract on the ground of "mistake," his rendition of the agreed performance without applying for such relief, would be sufficient consideration for Lange's new promise. However, it did not appear that his "mistake" was such as to justify such relief; nor was the new agreement made as a compromise of the matter as a doubtful or disputed question.

MCDEVITT v. STOKES.

Court of Appeals of Kentucky, 1917.
174 Ky. 515, 192 S.W. 681, L.R.A.1917D, 1100.

Action by Mike McDevitt against W. E. D. Stokes. Defendant's demurrer to complaint was sustained, and plaintiff appeals. Affirmed.

SETTLE, C. J. In this action instituted by the appellant Mike McDevitt, in the court below he sought to recover of the appellee, W. E. D. Stokes, the sum of \$800 alleged to be the balance due him of a \$1,000 claim which appellee agreed to pay him in the event he won with a mare called "Grace," to be driven by him, the celebrated Kentucky Futurity race of the Kentucky Trotting Horse Breeders' Association at Lexington in October, 1910. In the opinion of the circuit court the facts alleged in the petition did not show a sufficient consideration to support the agreement on the part of appellee to pay the \$1,000, for which reason the general demurrer filed by the latter to the petition was sustained. The appellant declining to plead further, the petition was dismissed, and from the judgment entered in conformity to these rulings he prosecutes this appeal.

The facts constituting appellant's cause of action, fully set forth in the petition, are substantially as follows: At the trotting meeting of the Kentucky Trotting Horse Breeders' Association, held at the city of Lexington in October, 1910, the mare Grace, owned by one Shaw, was entered in the Kentucky Futurity race to be driven by the appellant, McDevitt, a driver of great skill and experience, who was then in Shaw's employ. The Kentucky Futurity race is one of the most noted races among trotting horsemen in the United States, and the winning of it greatly increases the value of the winning horse and also the value of the sire, dam, and brothers and sisters of the winner. The purse offered in the race in question was \$14,000, to be divided as follows: To the winner \$10,000; to the second horse \$2,000; to the third horse \$1,000; to the fourth horse \$500; to the owner of the dam of the winner \$300; to the owner of the dam of the second horse \$100; to the owner of the dam of the third horse \$75; to the owner of the dam of the fourth horse \$25. At the time this race occurred, and for some years prior thereto, the appellee, Stokes, controlled and managed a large stock farm near Lexington, together with a number of valuable race horses, bred and reared thereon, and had formed for operating the business a corporation known as the "Patchen Wilkes Stock Farm," of which he owns practically all the stock and is the president and manager. Among the horses then owned by this corporation was Peter the Great, the sire of the mare Grace, Orianna, her dam, Vladimir, a yearling, and Kilpatrick, a colt, her full-brothers. As appellee named the mare Orianna as the dam of Grace, entered to win the Ken-

tucky Futurity race, he, or the corporation of which he is president, was entitled, in the event of the latter's winning it, to receive \$300 out of the purse of \$14,000, going to the winner. In addition, the value of each of the four horses, Peter the Great, Orianna, Vladimir and Kilpatrick, owned by the corporation of which he is president, would be greatly increased by Grace winning the race. It is alleged in the petition that, influenced by the foregoing considerations, appellee agreed to pay appellant the sum of \$1,000 if he would drive and win the Kentucky Futurity with the mare Grace, to which the latter agreed; drove the mare and won the race; that by reason thereof appellee, or the corporation of which he is president, received, of the \$14,000 purse won, \$300, as owner of Orianna, the dam of Grace, and the value of Peter the Great, the sire of Grace, was increased \$10,000, that of Orianna, her dam, \$5,000, and that of Vladimir and Kilpatrick, her brothers, \$5,000 each.

It is insisted for appellant that the above-enumerated benefits received by appellee from the winning of the trotting race by the mare Grace, which resulted in large measure from his skill in driving her, constitutes a sufficient consideration for the promise and undertaking of appellee to pay him the \$1,000. This contention ignores consideration of another element of the alleged contract between the parties which, in our minds, is conclusive of its invalidity, viz. that appellant, because of his employment by Shaw, the owner of the mare Grace, was already both morally and legally bound to perform the service required of him by the alleged contract he made with appellee; hence its performance, as legally required by his contract with Shaw, would inevitably have resulted in the benefits received by appellee, in the absence of the alleged contract made by the latter to pay therefor. To hold that appellant would not have won the race with Grace but for the agreement of appellee to pay him the \$1,000 if he would do so would be to say that he would have been recreant to the obligation arising out of his employment by Shaw, an inference not justified by anything appearing in the petition.

We find no fault with the argument of appellant's counsel that a consideration which is either of benefit to the promisor or detriment to the promisee will be regarded sufficient to uphold the contract between the parties; nor are we inclined to depart from any principle announced in the cases of *Talbott v. Stemmons*, 10 Ky.Law Rep. 33, *Ryan v. Tribble*, 60 S.W. 633, 22 Ky.Law Rep. 1447, *Moayon v. Moayon*, 114 Ky. 864, 72 S.W. 33, 24 Ky.Law Rep. 1641, 60 L.R.A. 415, 102 Am.St.Rep. 303, *Van Winkle v. King*, 145 Ky. 693, 141 S.W. 46, *First State Bank, etc., v. Morton*, 146 Ky. 293, 142 S.W. 694, and *Shadwick v. Smith*, 147 Ky. 160, 143 S.W. 1027, relied on in the brief of counsel. The contracts discussed and passed on in those cases rest upon no such

facts as are presented by the contract in the instant case, nor do they, or any of them, conflict with the conclusions at which we have arrived.

It will be found from an examination of those cases that the benefit resulting to the promisor, constituting the consideration of the contract, was some legal right acquired of the promisee to which he would not otherwise have been entitled, or that the detriment resulting to the promisee, constituting the consideration of the contract, was the waiver or loss of some legal right in return for the promise he would otherwise have availed himself of. Our meaning will be better explained by the following excerpt from Page on Contracts, vol. 1, § 274, in which the author, in discussing the meaning of the words "valuable consideration," says:

"The use of 'benefit' and 'detriment' in this connection needs explanation. While correct if properly understood, it is liable to misconstruction. 'Benefit' does not refer to any pecuniary gain arising out of the transaction, nor 'detriment' to any pecuniary loss. It is not possible to wait until the transaction is concluded and the books balanced to see whether the consideration existed originally. 'Benefit' as used in this rule means that the promisor has, in return for a promise, acquired some legal right to which he would not otherwise have been entitled; 'detriment' means that the promisee has, in return for the promise, forborne some legal right which he would otherwise have been entitled to exercise." * * *

In 9 Cyc. at page 347, it is said:

"A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal. This legal obligation may arise from (1) the law independent of contract, or it may arise from (2) a subsisting contract. * * * Where a party is under duty created or imposed by law to do what he does, or promises to do, his act or promise is clearly of no value and is not a sufficient consideration for a promise given in return."

Obviously the rule stated must also obtain where the promise is made by a third party to induce the promisee to carry out an existing contract which he has with another. Indeed, this was declared to be the law by this court as far back as 1822 in *Ford v. Crenshaw*, 1 Litt. 68, doubtless the first case involving the question decided in this jurisdiction. Instead of reciting the voluminous facts or commenting upon the opinion, we here give the conclusions reached by the court, which are correctly and with admirable clearness expressed in the first paragraph of the syllabus, as follows:

"Where a man has, by his own contract, become morally and legally bound to do an act, he cannot maintain an action on the promise of a third person, afterwards made, to pay him for doing it." * * *

It is apparent from the facts alleged in the petition and the application to them of the principle announced by the authorities, *supra*, that the petition fails to state a cause of action against appellee. The latter was, it is true, benefited by the winning of the Kentucky Futurity purse by the mare Grace, driven by appellant, but the benefit was purely incidental and one to which he was entitled regardless of appellant's undertaking with him to win the race or of his, appellee's, promise to pay him the \$1,000 if he would do so. As appellant under his contract with his employer, Shaw, was in duty bound to do what he claims appellee agreed to pay him to perform, it is evident that he neither assumed any added responsibility nor sustained any loss by reason of his undertaking with appellee that he would cause the mare Grace to win the race; and no liability was legally imposed upon appellee by his promise to pay him for the service rendered.

This conclusion makes it unnecessary for us to decide whether the contract was contrary to public policy; hence that question is not passed on. It follows from what has been said that the action of the circuit court in sustaining the demurrer was not error. Wherefore the judgment is affirmed.

QUESTIONS:

1. Did Stokes bargain for something when he promised \$1,000 to Mike? If yes, did he get it?
 2. Did Mike drive better than he would have driven had Stokes made no promise? Better than he was already bound to drive for Shaw?
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DE CICCIO v. SCHWEIZER et al.

Court of Appeals of New York, 1917.

221 N.Y. 431, 117 N.E. 807, L.R.A.1918E, 1004, Ann.Cas.1918C, 818.

Action by Attilio De Cicco against Joseph Schweizer and others. From a judgment of the Appellate Division, First Department (166 App.Div. 919, 152 N.Y.S. 1106), modifying and affirming a judgment of the trial term in favor of plaintiff, the defendant named appeals. Affirmed.

CARDOZO, J. On January 16, 1902, "articles of agreement" were executed by the defendant Joseph Schweizer, his wife, Ernestine, and Count Oberto Gulinelli. The agreement is in Italian. We quote from a translation the part essential to the decision of this controversy:

"Whereas, Miss Blanche Josephine Schweizer, daughter of said Mr. Joseph Schweizer and of said Mrs. Ernestine Teresa Schweizer, is now affianced to and is to be married to the above said Count Oberto Giacomo Giovanni Francesco Maria Gulinelli: Now in consideration of all

that is herein set forth the said Mr. Joseph Schweizer promises and expressly agrees by the present contract to pay annually to his said daughter Blanche, during his own life and to send her, during her lifetime, the sum of two thousand five hundred dollars, or the equivalent of said sum in francs, the first payment of said amount to be made on the 20th day of January, 1902."

Later articles provided that "for the same reason heretofore set forth," Mr. Schweizer will not change the provision made in his will for the benefit of his daughter and her issue, if any. The yearly payments in the event of his death are to be continued by his wife.

On January 20, 1902, the marriage occurred. On the same day, the defendant made the first payment to his daughter. He continued the payments annually till 1912. This action is brought to recover the installment of that year. The plaintiff holds an assignment executed by the daughter, in which her husband joined. The question is whether there is any consideration for the promised annuity. That marriage may be a sufficient consideration is not disputed. The argument for the defendant is, however, that Count Gulinelli was already affianced to Miss Schweizer, and that the marriage was merely the fulfillment of an existing legal duty. For this reason, it is insisted, consideration was lacking. The argument leads us to the discussion of a vexed problem of the law which has been debated by courts and writers with much subtlety of reasoning and little harmony of results. There is general acceptance of the proposition that where A. is under a contract with B., a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C., a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C. in return for a new promise by A., and a promise by C. in return for performance by A. Some jurists hold that there is consideration in both classes of cases. Ames, *Two Theories of Consideration*, 12 Harv.L.Rev. 515; 13 Harv.L.Rev. 29, 35; Langdell, *Mutual Promises as a Consideration*, 14 Harv.L.Rev. 496; Leake, *Contracts*, p. 622. Others hold that there is consideration where the promise is made for a new promise, but not where it is made for performance. Beale, *Notes on Consideration*, 17 Harv.L.Rev. 71; 2 Street, *Foundations of Legal Liability*, pp. 114, 116; Pollock, *Contracts* (8th Ed.) 199; Pollock, *Afterthoughts on Consideration*, 17 *Law Quarterly Review*, 415; 7 Halsbury, *Laws of England, Contracts*, p. 385; *Abbott v. Doane*, 163 Mass. 433, 40 N.E. 197, 34 L.R.A. 33, 47 Am.St.Rep. 465. Others hold that there is no consideration in either class of cases. Williston, *Successive Promises of the Same Performance*, 8 Harv.L.Rev. 27, 34; *Consideration in Bilateral Contracts*, 27 Harv.L.Rev. 503, 521; Anson on *Contracts* (11th Ed.) p. 92.

The storm center about which this controversy has raged is the case of *Shadwell v. Shadwell*, 9 C.B.(N.S.) 159; 99 E.C.L. 158, which arose

out of a situation similar in many features to the one before us. Nearly everything that has been written on the subject has been a commentary on that decision. There an uncle promised to pay his nephew after marriage an annuity of £150. At the time of the promise the nephew was already engaged. The case was heard before Erle, Ch. J., and Keating and Byles, JJ. The first two judges held the promise to be enforceable. Byles, J., dissented. His view was that the nephew, being already affianced, had incurred no detriment upon the faith of the promise, and hence that consideration was lacking. Neither of the two opinions in *Shadwell v. Shadwell* can rule the case at bar. There are elements of difference in the two cases which raise new problems. But the earlier case, with the literature which it has engendered, gives us a point of departure and a method of approach.

The courts of this state are committed to the view that a promise by A. to B. to induce him not to break his contract with C. is void. *Arend v. Smith*, 151 N.Y. 502, 45 N.E. 872; *Vanderbilt v. Schreyer*, 91 N.Y. 392; *Seybolt v. N. Y., L. E. & W. R. R. Co.*, 95 N.Y. 562, 47 Am.Rep. 75; *Robinson v. Jewett*, 116 N.Y. 40, 22 N.E. 224. If that is the true nature of this promise, there was no consideration. We have never held, however, that a like infirmity attaches to a promise by A., not merely to B., but to B. and C. jointly, to induce them not to rescind or modify a contract which they are free to abandon. To determine whether that is in substance the promise before us, there is need of closer analysis.

The defendant's contract, if it be one, is not bilateral. It is unilateral. *Miller v. McKenzie*, 95 N.Y. 575, 47 Am.Rep. 85. The consideration exacted is not a promise, but an act. The count did not promise anything. In effect the defendant said to him: If you and my daughter marry, I will pay her an annuity for life. Until marriage occurred, the defendant was not bound. It would not have been enough that the count remained willing to marry. The plain import of the contract is that his bride also should be willing, and that marriage should follow. The promise was intended to affect the conduct, not of one only, but of both. This becomes the more evident when we recall that though the promise ran to the count, it was intended for the benefit of the daughter. *Durnherr v. Rau*, 135 N.Y. 219, 32 N.E. 49. When it came to her knowledge, she had the right to adopt and enforce it. *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756, 6 L.R.A. 610, 15 Am. St.Rep. 508; *Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724, 44 L.R.A. 170, 70 Am.St.Rep. 454; *Lawrence v. Fox*, 20 N.Y. 268. In doing so, she made herself a party to the contract. *Gifford v. Corrigan*, *supra*. If the contract had been bilateral, her position might have been different. Since, however, it was unilateral, the consideration being performance (*Miller v. McKenzie*, *supra*), action on the faith of it put her in the same position as if she had been in form the promisee. That she

learned of the promise before the marriage is a legitimate inference from the relation of the parties and from other attendant circumstances. The writing was signed by her parents; it was delivered to her intended husband; it was made four days before the marriage; it called for a payment on the day of the marriage; and on that day payment was made, and made to her. From all these circumstances, we may infer that at the time of the marriage the promise was known to the bride as well as the husband, and that both acted upon the faith of it.

The situation, therefore, is the same in substance as if the promise had run to husband and wife alike, and had been intended to induce performance by both. They were free by common consent to terminate their engagement or to postpone the marriage. If they forbore from exercising that right and assumed the responsibilities of marriage in reliance on the defendant's promise, he may not now retract it. The distinction between a promise by A. to B. to induce him not to break his contract with C., and a like promise to induce him not to join with C. in a voluntary rescission, is not a new one. It has been suggested in cases where the new promise ran to B. solely, and not to B. and C. jointly. Pollock, *Contracts* (8th Ed.) p. 199; Williston, 8 *Harv.L.Rev.* 36. The criticism has been made that in such circumstances there ought to be some evidence that C. was ready to withdraw. Williston, *supra*, pp. 36, 37. Whether that is true of contracts to marry is not certain. Many elements foreign to the ordinary business contract enter into such engagements. It does not seem a far-fetched assumption in such cases that one will release where the other has repented. We shall assume, however, that the criticism is valid where the promise is intended as an inducement to only one of the two parties to the contract. It may then be sheer speculation to say that the other party could have been persuaded to rescind. But where the promise is held out as an inducement to both parties alike, there are new and different implications. One does not commonly apply pressure to coerce the will and action of those who are anxious to proceed. The attempt to sway their conduct by new inducements is an implied admission that both may waver; that one equally with the other must be strengthened and persuaded; and that rescission or at least delay is something to be averted, and something, therefore, within the range of not unreasonable expectation. If pressure, applied to both, and holding both to their course, is not the purpose of the promise, it is at least the natural tendency and the probable result.

The defendant knew that a man and a woman were assuming the responsibilities of wedlock in the belief that adequate provision had been made for the woman and for future offspring. He offered this inducement to both while they were free to retract or to delay. That they neither retracted nor delayed is certain. It is not to be expected that

they should lay bare all the motives and promptings, some avowed and conscious, others perhaps half-conscious and inarticulate, which swayed their conduct. It is enough that the natural consequence of the defendant's promise was to induce them to put the thought of rescission or delay aside. From that moment, there was no longer a real alternative. There was no longer what philosophers call a "living" option. This in itself permits the inference of detriment. *Smith v. Chadwick*, 9 App.Cas. 187, 196; *Smith v. Land & House Corp.*, 28 Ch. D. 7, 16; *Voorhis v. Olmstead*, 66 N.Y. 113, 118; *Fottler v. Moseley*, 179 Mass. 295, 60 N.E. 788. "If it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into the contract, it is a fair inference of fact that he was induced to do so by the statement." *Blackburn, L.J.*, in *Smith v. Chadwick*, *supra*. The same inference follows, not so inevitably, but still legitimately, where the statement is made to induce the preservation of a contract. It will not do to divert the minds of others from a given line of conduct, and then to urge that because of the diversion the opportunity has gone by to say how their minds would otherwise have acted. If the tendency of the promise is to induce them to persevere, reliance and detriment may be inferred from the mere fact of performance. The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.

One other line of argument must be considered. The suggestion is made that the defendant's promise was not made *animo contrahendi*. It was not designed, we are told, to sway the conduct of any one; it was merely the offer of a gift which found its motive in the engagement of the daughter to the count. Undoubtedly, the prospective marriage is not to be deemed a consideration for the promise "unless the parties have dealt with it on that footing." *Holmes, Common Law*, p. 292; *Fire Ins. Ass'n v. Wickham*, 141 U.S. 564, 579, 12 S.Ct. 84 (35 L. Ed. 860). "Nothing is consideration that is not regarded as such by both parties." *Philpot v. Gruninger*, 14 Wall. 570, 577 (20 L.Ed. 743); *Fire Ins. Ass'n v. Wickham*, *supra*. But here the very formality of the agreement suggests a purpose to affect the legal relations of the signers. One does not commonly pledge one's self to generosity in the language of a covenant. That the parties believed there was a consideration is certain. The document recites the engagement and the coming marriage. It states that these are the "consideration" for the promise. The failure to marry would have made the promise ineffective. In these circumstances we cannot say that the promise was not intended to control the conduct of those whom it was designed to benefit. Certainly we cannot draw that inference as one of law. Both sides moved for the direction of a verdict, and the trial judge became

by consent the trier of the facts. If conflicting inferences were possible, he chose those favorable to the plaintiff.

The conclusion to which we are thus led is reinforced by those considerations of public policy which cluster about contracts that touch the marriage relation. The law favors marriage settlements, and seeks to uphold them. It puts them for many purposes in a class by themselves. *Phalen v. U. S. Trust Co.*, 186 N.Y. 178, 181, 78 N.E. 943, 7 L.R.A.,N.S., 734, 9 Ann.Cas. 595. It has enforced them at times where consideration, if present at all, has been dependent upon doubtful inference. *McNutt v. McNutt*, 116 Ind. 545, 19 N.E. 115, 2 L.R.A. 372; *Appleby v. Appleby*, 100 Minn. 408, 111 N.W. 305, 10 L.R.A.,N.S., 590, 117 Am.St.Rep. 709, 10 Ann.Cas. 563. It strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honorable fulfillment of engagements designed to influence in their deepest relations the lives of others.

The judgment should be affirmed with costs.

QUESTIONS.

1. Was Blanche Schweizer a promisee?
2. When the Count married Blanche, was he doing more than his already existing duty?
3. Were the Count and Blanche any more "free by common consent to terminate their engagement" than were Shaw and Mike McDevitt in the case of *McDevitt v. Stokes*?
4. Was their forbearance to rescind the engagement the bargained-for exchange for the defendant's promise, or was it a mere "natural consequence"?
5. Why was not this a mere promise of a "gift cum onere", a gift conditional on marriage as was argued by Williams in *Thomas v. Thomas ante*?
6. If a promisee performs some action that is an express condition of the promisor's duty, does he always thereby give a "consideration" for the promise?

GRAY v. MARTINO.

Supreme Court of New Jersey, 1918. 91 N.J.L. 462, 103 A. 24.

Action by Stephen Gray against Theresa D. Martino. Judgment for plaintiff on trial without a jury, and defendant appeals. Reversed.

MINTURN, J. The plaintiff occupied the position of a special police officer in Atlantic City, and incidentally was identified with the work of the prosecutor of the pleas of the county. He possessed knowledge concerning the theft of certain diamonds and jewelry from the pos-

session of the defendant, who had advertised a reward for the recovery of the property. In this situation he claims to have entered into a verbal contract with defendant whereby she agreed to pay him \$500 if he could procure for her the names and addresses of the thieves. As a result of his mediation with the police authorities the diamonds and jewelry were recovered, and plaintiff brought this suit to recover the promised reward. The district court, sitting without a jury, awarded plaintiff a judgment for the amount of the reward, and hence this appeal.

Various points are discussed in the briefs, but to us the dominant and conspicuous inquiry in the case is, Was the plaintiff during the period of this transaction a public officer, charged with the enforcement of the law? The testimony makes it manifest that he was a special police officer to some extent identified with the work of the prosecutor's office, and that position upon well-settled grounds of public policy required him to assist at least, in the prosecution of offenders against the law.

The services he rendered in this instance must be presumed to have been rendered in pursuance of that public duty, and for its performance he was not entitled to receive a special quid pro quo.

The cases on the subject are collected in a footnote to *Somerset Bank v. Edmund*, 10 Ann.Cas. p 726 (76 Ohio St. 396, 81 N.E. 641, 11 L.R.A.,N.S., 1170), the headnote to which reads:

"Public policy and sound morals alike forbid that a public officer should demand or receive, for services performed by him in the discharge of official duty, any other or further remuneration or reward than that prescribed and allowed by law."

This rule of public policy has been relaxed only in those instances where the Legislature for sufficient public reason has seen fit by statute to extend the stimulus of a reward to the public without distinction, as in the case of *United States v. Mathews*, 173 U.S. 381, 19 S.Ct. 413, 43 L.Ed. 738, where the Attorney General, under an act for "the detection and prosecution of crimes against the United States," made a public offer of reward sufficiently liberal and generic, to comprehend the services of a federal deputy marshal. Exceptions of that character upon familiar principles serve to emphasize the correctness of the rule, as one based upon sound public policy.

The judgment below for that reason must be reversed.

NOTE

The court dealt with the same problem in *Taft v. Hyatt*, ante. 51. *Restatement, Contracts*, § 76(a), states an applicable rule.

HARTLEY v. INHABITANTS OF GRANVILLE.

Supreme Judicial Court of Massachusetts, 1913.

216 Mass. 38, 102 N.E. 942, 48 L.R.A.,N.S., 392, Ann.Cas.1915A, 725.

Action by Harry S. Hartley against the Inhabitants of Granville. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

RUGG, C. J. This is an action to recover the amount of a reward which the selectmen of the defendant in 1909 offered "to any person furnishing evidence that will convict the person or persons who" had set recent fires in that town. The plaintiff was duly elected and qualified as a constable of the defendant town for that year. There was no evidence tending to show that any regular compensation was paid to the plaintiff as constable, or that he had any special arrangement with the defendant for pay, or that his duties were any other than such as by the common and statute law of the commonwealth are incumbent upon constables. [The court here discussed the position of a constable in the community and his customary duties.]

These considerations reinforce the conclusion that the obligation is not incumbent upon the constable to give up his ordinary occupation and spend substantial time in search for evidence which may or may not lead to the detection of criminals, nor perform the work commonly done by detectives. The general rule with reference to peace officers is well settled that a promise or reward for additional compensation to a public officer for services rendered in the performance of his duty cannot be enforced, either as being without consideration or contrary to public policy. *Pool v. Boston*, 5 Cush. 219; *Dunham v. Stockbridge*, 133 Mass. 233; *Davies v. Burns*, 5 Allen, 349; *Brophy v. Marble*, 118 Mass. 548. This rule is based upon sound considerations and ought not to be narrowed in any respect. But it is also true that a contract to pay a public officer for services rendered outside and not inconsistent with his official duty is valid and may be enforced. A reward offered for such service is also enforceable. [Citations omitted.] The many cases cited and relied on by the defendant are not in conflict with this principle. Most of them follow either the authority or reasoning of *Pool v. Boston*, *ubi supra*, and relate to facts which bring them within its rule.

There was evidence in the case at bar that the plaintiff spent substantial time in the performance of purely detective work in the investigation and collection of evidence in consequence of the offer of reward outside the service rendered in serving the warrant and doing in other respects what the law required him to do by virtue of his office as constable. The case on its facts is rather close to the line, but it cannot be said that the finding of fact made by the judge was not warranted. This being so, no error was made in the ruling of law.

Exceptions overruled.

NOTE

In *Reif v. Paige*, 55 Wis. 496, 13 N.W. 473, 42 Am.Rep. 731 (1882), a fireman was held entitled to a reward offered for rescuing the body of defendant's wife; his duty not requiring him to risk his life in that way.

See Restatement, Contracts, § 84(c).

HAY v. FORTIER.

Supreme Judicial Court of Maine, 1917. 116 Me. 455, 102 A. 294.

Action by George G. Hay against Mary A. Fortier. Case reserved. Judgment for plaintiff.

KING, J. The case made by the agreed statement is this: The defendant became a surety on a 15-day bond given by one Henry H. Sawyer to the plaintiff. The conditions of the bond were not complied with, and the defendant was notified of her liability under the bond and requested to make payment thereof. On February 4, 1915, the defendant's attorney wrote the attorney of the plaintiff as follows:

"I have seen Mrs. Fortier, who says it will be a great hardship to pay this entire amount at the present time as the other signers are worthless. She suggests * * * that she will pay you \$100 next week, if the papers are regular, and settle the balance by payments, the whole bill to be paid before your April term of court. * * *"

To that the plaintiff, through his attorney, replied sending copies of the papers and saying:

"I am willing to accept \$100 on account, providing you send same to me immediately and the balance on or before the first Tuesday of April. * * *"

The defendant paid the \$100 forthwith, but no more. The plaintiff waited till long after the first Tuesday of April, and on June 1, 1915, brought an action of debt on the bond against the principal and all the sureties. Mrs. Fortier answered to that action at the return term thereof, and at a subsequent term, on November 3, 1915, by agreement, that action was "discontinued without costs and without prejudice," the counsel of the respective parties signing the docket entry to that effect. Why that action was thus discontinued does not appear in this case. On the following day, November 4, 1915, this action was brought against Mrs. Fortier, based upon a breach of her alleged special promise to pay the balance due under the bond before the April term of court, as stated in the correspondence referred to. The declaration is not made a part of the case, but the parties stipulate that it "is in due form." The defense is that the alleged promise on which the action is based was without a legal consideration and is therefore nonenforceable.

We think the agreed statement justifies the conclusion, that the defendant promised to pay at once \$100, and the balance due under the bond before the April term of court, provided the plaintiff would forbear action on the bond, and that the plaintiff on his part, in consideration of such part payment at once, and the promise to pay the balance on or before the time specified, agreed to forbear, and did in fact forbear, action on the bond until after the time specified. And a promise to forbear and give time for the payment of a debt followed by actual forbearance for the time specified or for a reasonable time when no definite time is named, is certainly a sufficient consideration for a promise to pay the debt. *Moore v. McKenney*, 83 Me. 80, 90, 21 A. 749, 23 Am.St.Rep. 753.

On the other hand, it is obvious that the defendant by her special promise did not agree to do anything that she was not then legally bound to do. Her liability under the bond was then due and payable. She might then have been required to pay it all forthwith. And it is a well-recognized principle that the payment, or promise of payment, of money which is then due and payable by virtue of an existing valid contract of the promisor, is not in contemplation of law a sufficient consideration for any new contract. *Wescott v. Mitchell*, 95 Me. 377, 383, 50 A. 21; *Dunn v. Collins*, 70 Me. 230; *Wimer v. Worth Township Poor Overseers*, 104 Pa. 317; *Mathewson v. Strafford Bank*, 45 N.H. 104; *Parmelee v. Thompson*, 45 N.Y. 58, 6 Am.Rep. 33; *Bedford's Ex'r v. Chandler*, 81 Vt. 270, 273, 69 A. 874, 17 L.R.A., N.S., 1239, 130 Am.St.Rep. 1057; 6 R.C.L. 664. The defendant therefore contends that the plaintiff's promise to forbear action on the bond was without a legal consideration and not binding on him; in other words, that he could have brought action on the bond immediately after the part payment was made, in total disregard of his promise to wait until the April term of court. We think that contention is sound, and well supported by authorities. In *Warren v. Hodge*, 121 Mass. 106, the court said:

"It is too well settled to require discussion or reference to authorities that an agreement to forbear to sue upon a debt already due and payable, for no other consideration than a payment of a part of the debt, is without legal consideration, and cannot be availed of by the debtor, either by way of contract or of estoppel."

But it does not follow, as the defendant claims, that this action against her is not maintainable, simply because the plaintiff's promise to forbear action on the bond could not have been enforced against him during the specified period of forbearance.

"If a contract, although not originally binding for want of mutuality, is nevertheless executed by the party not originally bound, so that the party asserting the invalidity of the contract has actually received the benefit contracted for, the latter will be estopped from refusing

performance on his part on the ground that the contract was not originally binding on the other, who has performed." 6 R.C.L. 690.

Granting that the parties, through the correspondence referred to, entered into a bilateral contract, and that there was want of mutuality in that contract because the plaintiff was not bound to perform his part of it, nevertheless, he did fully perform the contract on his part, and the defendant received the full benefit contracted for. Having enjoyed the forbearance of the plaintiff from bringing action against her on the bond for the full period agreed upon, the defendant is now estopped from refusing performance on her part on the ground that the contract was not originally binding on the plaintiff, who did, nevertheless, perform it and she received the benefit thereof.

It is therefore the opinion of the court that this action is maintainable, and that the plaintiff is entitled to judgment against the defendant for \$175.60 and costs, with interest from the date of the writ.

So ordered.

QUESTIONS:

1. Was the plaintiff's forbearance the exchange that was "bargained for" by the defendant, as required by Restatement, Contracts, § 75? See, also, § 63; and Comment in 27 Yale L.Jour. 535.
2. In what cases, if any, will a *performance* be a sufficient consideration even though a *promise of such performance* would not be?
3. Are there any cases in which a *promise* is a sufficient consideration even though the actual rendition of the promised performance would not be?

NOTE

Consider this case again in the succeeding Chapter, Section 2, dealing with Reliance on a Promise as Cause for Enforcement.

In Ward v. Goodrich, 34 Colo. 369, 82 P. 701 (1905), a husband promised to furnish support for his wife and child in return for the wife's promise to vacate an alimony order. The wife's promise was without sufficient consideration and void; but her actual performance of it by vacating the alimony order was a sufficient reason for the enforcement of the husband's promise to do his duty. Of course, the husband's previously existing duty was already enforceable, but not in a contract action.

CHAPTER 3

INFORMAL CONTRACTS WITHOUT MUTUAL
ASSENT OR CONSIDERATION

INTRODUCTORY NOTE

The two preceding chapters have dealt with Bargains—transactions in which two parties agree upon an exchange of a promise for either a reciprocal promise or an actual performance (action or forbearance). The making of a Bargain requires mutual expressions of assent to the exchange, one party proposing the exchange and stating its terms and the other party accepting the proposal. The validity of a Bargain and the enforceability of any promise contained in it depend upon the legal sufficiency of that which is exchanged for the promise—the Consideration for it. Throughout the entire history of Anglo-American law, and in all other systems of law as well, there have always been many promises that are enforceable, even though they were not a part of any Bargain or mutual agreement for an exchange, and no Consideration was either requested or given. The enforceability may be due to the form in which they are made, as by a sealed writing or by a solemn “recognizance” before a court or magistrate; such formal contracts will be dealt with in a subsequent chapter. But enforceability may be due to reasons other than formality. The present chapter deals with these reasons—with the causes regarded as sufficient for the enforcement of Informal Promises made without any Consideration.

In the Roman Law, and in the modern systems of law that are based on it, there is no doctrine of “Consideration.” To be enforceable, however, a promise must either be in some specific Form or it must have a sufficient cause (*causa*). During the more than a thousand years of the development of Roman Law, there is no doubt that the requirement of *cause* underwent a continuous evolutionary change; and its full statement (or Restatement) is as difficult as is that of the doctrine of Consideration. It is mentioned here only to call attention to the fact that we also have Causes for the enforcement of promises other than a bargained-for exchange. These causes may be found in an event that occurred at a time prior to the making of the promise and also in one that occurs subsequently to its making. An event of the former sort has for some five centuries been described in judicial language as “Past Consideration.” Although the American Law Institute has abandoned it, the term is still in judicial use; it can

not be avoided in a casebook that deals with those antecedent causes for the making of a promise that are held to be a sufficient reason for enforcing it.

The first Section in this Chapter will be entitled "Past Consideration", even though it is obvious that these antecedent events do not fall within the Institute's definition of Consideration. The problem here is to determine what kinds of past transactions and events are a sufficient reason for the enforcement of a subsequent promise. To be so operative they must have some causal relation to the promise. Not only must the past transaction or event be a cause of the making of the promise, it must also appear to the court to be a sufficient reason for the enforcement of the promise.

The second Section of this Chapter will deal with Reliance on a Promise as Cause for Enforcement.

SECTION 1.—PAST CONSIDERATION

MOORE v. WILLIAMS.

In the King's Bench, 1586. Moore, K. B. 220.

Between Moore and Williams the case was that Williams, being the lessee for years the reversion belonging to Moore, was sued in ejectment [by a third person] and in defense of his title had spent a large sum of money, and therefore he came to Moore and told him that he had spent much money and asked contribution or other payment. Moore replied that in consideration of this he should have another certain lease after the expiration of his term, as he requested. The term expired and Williams asked for a new lease. Moore would not execute a new lease, and Williams brought an action on the case in *assumpsit*. It was held not maintainable because the consideration was executed before the promise was made. • • •

HARFORD AND GARDINER'S CASE.

In the King's Bench, 1588. 2 Leon. 30.

In an action upon the case, the plaintiff declared, that the defendant in consideration that the father of the plaintiff had employed his service about the business of the testator of the defendant, to the great profit of the testator; and in consideration of love and affec-

tion that the testator bore to the plaintiff, promised to give unto him £100. *Curia*. Love is not a consideration, upon which an action can be grounded; the like of friendship. *Wray*. If the plaintiff declares, that the defendant in consideration that he was indebted unto the plaintiff in divers sums of money, and promised to pay him £100 it is not good for the incertainty; also the consideration here, was past and executed before the promise made, and nothing is done by the son. And afterwards judgment was given against the plaintiff.

NOTE

Bequests by will and executed gifts of land, goods, or services are often made because of the love and affection that the donor has for the donee or for some third person who wishes the gift to be made. These are not invalid by reason of the absence of Consideration, although the creditors of an insolvent donor can sometimes have them set aside. Not infrequently a person gives his promissory note or other informal promise to make a gift to one who is the object of his affection. Neither the love of the donor for the promisee nor the love of the promisee for the donor is a sufficient reason for enforcement. In *Fink v. Cox*, 18 Johns. (N.Y.) 145 (1820), a father gave his son a promissory note for \$1,000 because this son was not as wealthy as his brother. In *Dougherty v. Salt*, 227 N.Y. 200, 125 N.E. 94 (1919), an aunt gave her promissory note for \$3,000 to a nephew.

SIDENHAM AND WORLINGTON'S CASE.

In the Common Pleas, 1585. 2 Leon. 224.

In an action upon the case upon a promise, the plaintiff declared, that he at the request of the defendant, was surety and bail for J. S. who was arrested in the King's Bench, upon an action of £30 and that afterwards, for the default of J. S. he was constrained to pay the £30 after which, the defendant meeting with the plaintiff, promised him for the same consideration, that he would repay the £30 which he did not pay, upon which the plaintiff brought the action; the defendant pleaded, *non assumpsit*, upon which issue was joyned, which was found for the plaintiff. *Walmsley*, Serjeant, for the defendant, moved the Court, that this consideration will not maintain the action, because the consideration and promise did not concur and go together; for the consideration was long before executed, so as now it cannot be intended that the promise was for the same consideration, as if one giveth me a horse, and a month after, I promise him £10 for the said horse, he shall never have debt for the £10 nor *assumpsit* upon that promise; for there is neither contract, nor consideration, because the same is executed.

ANDERSON, This action will not lie; for it is but a bare agreement, & *nudum pactum*, because the contract was determined, and not in

esse at the time of the promise; but he said, it is otherwise upon a consideration of marriage of one of his cosins; for marriage is always a present consideration. WINDHAM agreed with ANDERSON, and he put the case in 3 H. VII. If one selleth a horse unto another, and at another day he will warrant him to be sound of limb and member, it is a void warrant, for that such warranty ought to have been made or given at such time as the horse was sold.

PERIAM, Justice, conceived, that the action did well lie; and he said, that this case is not like unto the cases which have been put of the other side; for there is a great difference betwixt contracts and this case; for in contracts upon sale, the consideration, and the promise, and the sale, ought to meet together, for a contract is derived from *con* and *trahere*, which is a drawing together, so as in contracts every thing which is requisite, ought to concur and meet together, viz. the consideration of the one side and the sale or the promise on the other side; but to maintain an action upon an *assumpsit*, the same is not requisite, for it is sufficient, if there be a moving cause or consideration precedent; for which cause or consideration the promise was made; and such is the common practice at this day: for in an action upon the case, upon a promise, the declaration is laid, that the defendant, for, and in consideration of £20 to him paid (*postea scil.*), that is to say, at a day after *super se assumpsit*, and that is good; and yet there the consideration is laid to be executed; and he said, that the case in *Dyer*, 10 Eliz. 272, would prove the case: for there the case was, that the apprentice of one Hunt, was arrested when his master Hunt was in the country, and one Baker, one of the neighbours of Hunt, to keep the said apprentice out of prison, became his bail, and paid the debt; afterwards Hunt the master, returning out of the country, thanked Baker for his neighbourly kindness to his apprentice, and promised him, that he would repay him the sum which he had paid for his servant and apprentice: and afterwards upon that promise, Baker brought an action upon the case against Hunt, and it was adjudged in that case, that the action would not lie, because the consideration was precedent to the promise, because it was executed and determined long before. But in that case, it was holden by all the justices, that if Hunt had requested Baker to have been surety or bail, and afterwards Hunt had made the promise for the same consideration, the same had been good, for that the consideration did precede, and was at the instance and request of the defendant.

RHODES, Justice, agreed with PERIAM; and he said, that if one serve me for a year, and hath nothing for his service, and afterwards, at the end of the year, I promise him £20 for his good and faithful service ended, he may have and maintain an action upon the case upon the same promise, for it is made upon a good consideration; but if a serv-

ant hath wages given him, and his master, ex abundanti, doth promise him £10 more after his service ended, he shall not maintain an action for that £10 upon the said promise; for there is not any new cause or consideration preceding the promise; which difference was agreed by all the justices, and afterwards, upon good and long advice, and consideration had of the principal case, judgment was given for the plaintiff, and they much relied upon the case of *Hunt and Baker*, 10 Eliz. Dyer, 272. See the case there.

NOTE

Service rendered by the plaintiff at the request of a third person is not sufficient reason for the enforcement of a subsequent promise by the defendant to pay therefor. *Thorner v. Field*, 1 Bulst. 120 (1612); *Dearborn v. Bowman*, 3 Metc. (Mass.) 155 (1841), service at request of Democratic committee in a campaign in which defendant was candidate; *Royer v. Kelly*, 174 Cal. 70, 161 P. 1148 (1916).

LAMPLEIGH v. BRAITHWAIT.

In the Common Bench, 1616. Moore, K.B. 866.

In assumpsit it was alleged that Braithwait having killed a man requested the plaintiff to endeavour to obtain a pardon, by reason whereof the plaintiff went to Royston to the King to obtain the pardon, and in consideration that he had made this endeavour the defendant promised him £100. This declaration was demurred to because the consideration was executed before the promise was made. *NICHOLS*, *WINCH*, and *HOBART* held that the action was well brought, because there is alleged a request before the acts were performed, and where there is such a precedent request an assumpsit made after the execution of the consideration is binding. * * *

NOTE

During the period immediately following this case, there were many decisions in harmony with it. Some American cases have applied the same rule. When one man requests service or other performance by another, it is only by knowing the accompanying circumstances that we can tell whether the one rendering the service is justified in understanding that he will be paid for it, or that the request is that the service shall be rendered as a gift and without compensation. If compensation was reasonably expected, an action of Debt might have been maintained therefor except for the fact that the amount of it was not a sum certain. In such a case, if the one who requested the service promised afterwards to pay a reasonable sum, the promise was enforced in Assumpsit. No consideration for that promise was required. In such a case, it may be said that a promise to pay was "implied" at the very time that the request was

made; much may be done by the process called "implication." On this theory, it has been argued that the new promise is not a contract; it is merely a new coal for Newcastle, the affirmation of a valid contract already made.

This last was not the theory of the courts. They enforced the new express promise at a time when no remedy was available prior to the making of the express promise. In some cases, they expressly stated that the new promise was enforceable even though no promise could be "implied" from the request itself. In *Bosden v. Sir John Thinne*, *Yelv.* 40 (1603), Sir John, being perhaps in poor credit himself, asked Bosden to become surety for Flud for the price of two pipes of wine to be purchased of Roberts. Sir John was not himself the purchaser. The price was £51. The kindly Bosden complied, giving his penal bond in the sum of £100 as security. Flud did not pay; Bosden was arrested and had to pay £67 in settlement. Sir John later promised Bosden to pay him this amount; and the court sustained an action of Assumpsit on this promise. It was argued for Sir John "that the promise shall not have relation to the first request of giving credit to Flud, because the entreaty for the credit was but for two pipes of wine amounting to £51 and the promise is for £67 and so they differ in the sums." The three judges thought the argument bad, "for altho' upon the first request only assumpsit does not lie, yet the promise coming after shall have reference to the first request; * * * because it has its essence and commencement from the first request."

Long afterwards, legal theorists who had reached an enlightening oversimplification that consideration must be a bargained-for equivalent given for the promise (Restatement, § 75), projected it back through the centuries and said that "past consideration is no consideration." Given the assumed major premise, the conclusion follows as of course; "You can get out of a major premise all you put into it."

Restatement, Contracts, §§ 85-94, provides for the enforceability of many promises for which no consideration, as above defined, is given. Among these it does not include cases like *Bosden v. Thinne*. An express promise to pay a pre-existing debt is enforceable [§ 86(1)]; but services rendered by request create such a debt only in case there was then an "implied" promise to pay for them.

In *Bradford v. Roulston*, 8 *Irish C.L.Rep.* 468 (1858), the court said: "It is clearly established that, where a past consideration, that is, a thing previously done by the plaintiff at the request of the defendant, is one from which the law implies a promise, an express promise different from, or in addition to, that which the law implies, is *nudum pactum*, on the ground that the whole consideration is exhausted by the promise which the law implies. [See, also, *Trask v. Weeks*, 81 *Me.* 325, 17 *A.* 162 (1889); *Hopkins v. Logan*, 5 *M. & W.* 241 (1839).] * * * But it has also been held, in a long series of decided cases, that where there is a past consideration, consisting of a previous act done at the request of the defendant, it will support a subsequent promise; the promise being treated as coupled with the previous request."

ALLEN v. BRYSON.

Supreme Court of Iowa, 1885. 67 Iowa 591, 25 N.W. 820, 56 Am.Rep. 358.

Both parties are attorneys at law, and this action was brought to recover for professional services performed by the plaintiff for the defendant. Trial by jury. Verdict and judgment for the plaintiff, and defendant appeals.

SEEVERS, J. * * * 3. The defendant pleaded that he and the plaintiff were brothers-in-law, and, in substance, that each of them was engaged in the practice of the law, and had been in the habit of assisting each other as a matter of mutual accommodation, and that "all and each of the professional services for which plaintiff seeks to recover in this action were rendered by him as matters of mutual accommodation and interchange of courtesies, and without charge or expectation of payment or reward by one as against the other." The court instructed the jury: "If, however, such services were rendered by the plaintiff without expectation of reward, or intention on his part to charge therefor, or by any agreement or understanding that the services were to be gratuitous, the plaintiff cannot recover unless, after such services were rendered, and in consideration thereof, defendant agreed with or promised plaintiff to pay for the same. In the latter case the valuable character of the service, and the moral obligation to pay for the same, would be a sufficient consideration to support the promise, and enable the plaintiff to recover the reasonable value of such service." We understand this instruction to mean that where one person renders services for another gratuitously, and with no expectation of being paid therefor, that a moral obligation is incurred by the latter which will support a subsequent promise to pay. In our opinion, this is not the law. If the services are gratuitous, no obligation, either moral or legal, is incurred by the recipient. No one is bound to pay for that which is a gratuity. No moral obligation is assumed by a person who receives a gift. Suppose the plaintiff had given the defendant a horse, was he morally bound to pay what the horse was reasonably worth? We think not. In such case there never was any liability to pay and therefore a subsequent promise would be without any consideration to support it. That there are cases which hold that where a liability to pay at one time existed, which, because of the lapse of time, or for other reasons, cannot be enforced, the moral obligation is sufficient to support a subsequent promise, will be conceded.

These cases are distinguishable, because the instructions contemplate a case where an obligation to pay never existed until the promise was made. We do not believe a case can be found where a moral obligation alone has been held to be a sufficient consideration for a subsequent promise. To our minds, however, it is difficult to find a

moral obligation to pay anything in the case contemplated in the instructions, prior to the promise. The following cases support the view above expressed: *Cook v. Bradley*, 7 Conn. 57, 18 Am.Dec. 79; *Williams v. Hathaway*, 19 Pick.(Mass.) 387; *Dawson v. Dawson*, 12 Iowa 515; *McCarty v. Hampton Building Ass'n*, 61 Iowa 287, 16 N.W. 114. * * *

Reversed.

NOTE

In *Moore v. Elmer*, 180 Mass. 15, 61 N.E. 259 (1901), Holmes, J., said: "The modern authorities which speak of services rendered upon request as supporting a promise must be confined to cases where the request implies an undertaking to pay, and do not mean that what was done as a mere favor can be turned into a consideration at a later time by the fact that it was asked for."

ROSCORLA v. THOMAS.

In the Queen's Bench, 1842. 3 Q.B. 234.

Assumpsit. The declaration stated that, whereas heretofore, to wit, etc., in consideration that plaintiff, at the request of defendant, had bought of defendant a certain horse, at and for a certain price, etc., to wit, etc., defendant promised plaintiff that the said horse did not exceed five years old, and was sound, etc., and free from vice; nevertheless defendant did not perform or regard his said promise, but thereby deceived and defrauded plaintiff in this, to wit, that the said horse, at the time of the making of the said promise, was not free from vice, but, on the contrary thereof, was then very vicious, restive, ungovernable, and ferocious; whereby, etc.

Pleas: 1. Non assumpsit. Issue thereon.

2. That the horse, at the time of the supposed promise, was free from vice, and was not vicious, restive, ungovernable or ferocious, in manner, etc.; conclusion to the country. Issue thereon.

On the trial, before Wightman, J., at the Cornwall Spring Assizes, 1841, a verdict was found for the plaintiff on both the above issues. In Easter Term, 1841, Bompas obtained a rule nisi for arresting the judgment on the first count.

LORD DENMAN, C. J., in this term (May 30th) delivered the judgment of the Court.

This was an action of assumpsit for breach of warranty of the soundness of a horse. The first count of the declaration, upon which alone the question arises, stated that, in consideration that the plaintiff, at the request of the defendant, had bought of the defendant a horse for the sum of £30, the defendant promised that it was sound and free from

vice. And it was objected, in arrest of judgment, that the precedent executed consideration was insufficient to support the subsequent promise. And we are of opinion that the objection must prevail.

It may be taken as a general rule, subject to exceptions not applicable to this case, that the promise must be co-extensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be co-extensive with it, would be to deliver the horse upon request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him. It is clear therefore, that the consideration stated would not raise an implied promise by the defendant that the horse was sound or free from vice.

But the promise in the present case must be taken to be, as in fact it was, express; and the question is, whether that fact will warrant the extension of the promise beyond that which would be implied by law; and whether the consideration, though insufficient to raise an implied promise, will nevertheless support an express one. And we think that it will not.

The cases in which it has been held that, under certain circumstances, a consideration insufficient to raise an implied promise will nevertheless support an express one, will be found collected and reviewed in the note to *Wennall v. Adney* [3 Bos. & P. 249], and in the case of *Eastwood v. Kenyon* [11 A. & E. 438]. They are cases of voidable contracts subsequently ratified, of debts barred by operation of law, subsequently revived, and of equitable and moral obligations, which, but for some rule of law, would of themselves have been sufficient to raise an implied promise. All these cases are distinguishable from, and indeed inapplicable to, the present, which appears to us to fall within the general rule, that a consideration past and executed will support no other promise than such as would be implied by law.

The rule for arresting the judgment upon the first count must therefore be made absolute.

Rule absolute.

QUESTIONS:

1. When one sells an automobile there is an "implied warranty" that it is fit for service, unless expressly excluded. In the sale of a horse why is there not an "implied warranty" that it is sound and not vicious?
2. If a man buys a horse for the agreed price of \$200 and the horse later unexpectedly wins the Derby, is a promise by the happy buyer to pay the seller \$5,000 more an enforceable promise?
3. Two hours after selling his business at a good price the seller signs a written promise not to open a competing business for one year. See *Kimbrow v. Wells*, 112 Ark. 126, 165 S.W. 645 (1914).

4. After a nurse rendered faithful service at the agreed rate, the grateful employer gave her his promissory note for \$300 as additional compensation. See *Meginnes v. McChesney*, 179 Iowa 563, 160 N.W. 50 (1916).
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EASTWOOD v. KENYON.

Court of Queen's Bench, 1840. 11 Adol. & El. 438.

Assumpsit. The declaration stated, that one John Sutcliffe made his will, and appointed plaintiff executor thereof, and thereby bequeathed certain property in manner therein mentioned; that he afterwards died without altering his will, leaving one Sarah Sutcliffe, an infant, his daughter and only child and heiress at law surviving; that after making the will John Sutcliffe sold the property mentioned therein, and purchased a piece of land upon which he erected certain cottages, but the same were not completed at the time of his death; which piece of land and cottages were at the time of his death, mortgaged by him; that he died intestate in respect of the same, whereupon the equity of redemption descended to the said infant as heiress at law; that after the death of John Sutcliffe, plaintiff duly proved the will and administered to the estate of the deceased; that from and after the death of John Sutcliffe until the said Sarah Sutcliffe came of full age, plaintiff, executor as aforesaid, "acted as the guardian and agent" of the said infant, and in that capacity expended large sums of money in and about her maintenance and education, and in and about the completion, management, and necessary improvement of the said cottages and premises in which the said Sarah Sutcliffe was so interested, and in paying the interest of the mortgage money chargeable thereon and otherwise relative thereto, the said expenditure having been made in a prudent and useful manner, and having been beneficial to the interest of the said Sarah Sutcliffe to the full amount thereof; that the estate of John Sutcliffe deceased having been insufficient to allow plaintiff to make the said payments out of it, plaintiff was obliged to advance out of his own monies, and did advance, a large sum, to wit £140, for the purpose of the said expenditure; and, in order to reimburse himself, was obliged to borrow, and did borrow, the said sum of one A. Blackburn, and, as a security, made his promissory note for payment thereof to the said A. Blackburn or his order on demand with interest; which sum, so secured by the said promissory note, was at the time of the making thereof and still is wholly due and unpaid to the said A. Blackburn; that the said sum was expended by plaintiff in manner aforesaid for the benefit of the said Sarah Sutcliffe, who received all the benefit and advantage thereof, and such expenditure was useful and beneficial to her to the full amount thereof; that when the said Sarah Sutcliffe came of full age she had notice of the premises, and

then assented to the loan so raised by plaintiff, and the security so given by him, and requested plaintiff to give up to one J. Stansfield as her agent, the controul and management of the said property, and then promised the plaintiff to pay and discharge the amount of the said note; and thereupon caused one year's interest upon the said sum of £140 to be paid to A. Blackburn. That thereupon plaintiff agreed to give up, and did then give up, the controul and management of the property to the said agent on behalf of the said Sarah Sutcliffe; that all the services of plaintiff were done and given by him for the said Sarah Sutcliffe, and for her benefit, gratuitously and without any fee, benefit, or award whatever; and the said services and expenditure were of great benefit to her, and her said property was increased in value by reason thereof to an amount far exceeding the said £140. That afterwards defendant intermarried with the said Sarah Sutcliffe, and had notice of the premises, and the accounts of plaintiff of and concerning the premises were then submitted to defendant, who then examined and assented to the same and upon such accounting there was found to be due to plaintiff a large sum of money, to wit, &c., for monies so expended and borrowed by him as aforesaid; and it also then appeared, that plaintiff was indebted to A. Blackburn in the amount of the said note. That defendant, in right of his wife, had and received all the benefit and advantage arising from the said services and expenditure. That thereupon in consideration of the premises defendant promised plaintiff that he would pay and discharge the amount of the said promissory note; but that, although a reasonable time for paying and discharging the said note had elapsed and A. Blackburn, the holder thereof, was always willing to accept payment from defendant, and defendant was requested by plaintiff to pay and discharge the amount thereof, defendant did not, nor would then, or at any other time pay or discharge the amount, &c., but wholly refused, &c.

Plea: non assumpsit. Verdict for the plaintiff.

Cresswell, in the following term, obtained a rule nisi according to the leave reserved, and also for arresting judgment on the ground that the declaration shewed no consideration for the promise alleged. In Trinity vacation, 1839.

Alexander and W. H. Watson shewed cause.

[They argued on the basis of moral obligation because of the faithful management by the plaintiff and the pecuniary benefit to the defendant and his wife. Cresswell in reply, said that moral obligation is sufficient only in cases of infancy, bankruptcy, and the statute of limitations as stated in the note to *Wennall v. Adney*, 3 Bos. & P. 249. He admitted that the defendant might be bound if his wife had been so bound prior to their marriage.]

LORD DENMAN, C. J. * * * The second point arose in arrest of judgment—namely, whether the declaration showed a sufficient consideration for the promise. It stated, in effect, that the plaintiff was executor under the will of the father of the defendant's wife, who had died intestate as to his real estate, leaving the defendant's wife, an infant, his only child; that the plaintiff had voluntarily expended his money for the improvement of the real estate, while the defendant's wife was sole and a minor; and that, to reimburse himself, he had borrowed money of Blackburn, to whom he had given his promissory note; that the defendant's wife, while sole had received the benefit, and, after she came of age, assented and promised to pay the note, and did pay a year's interest; that after the marriage the plaintiff's accounts were shown to the defendant, who assented to them, and it appeared that there was due to the plaintiff a sum equal to the amount of the note to Blackburn; that the defendant in right of his wife had received all the benefit, and, in consideration of the premises, promised to pay and discharge the amount of the note to Blackburn.

Upon motion in arrest of judgment this promise must be taken to have been proved, and to have been an express promise, as indeed it must of necessity have been, for no such implied promise in law was ever heard of. It was then argued for the plaintiff that the declaration disclosed a sufficient moral consideration to support the promise.

Most of the older cases on this subject are collected in a learned note to the case of *Wennall v. Adney* [3 Bos. & P. 249], and the conclusion there arrived at seems to be correct in general, "that an express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original cause of action, if the obligation, on which it is founded, never could have been enforced at law, though not barred by any legal maxim or statute provision." Instances are given of voidable contracts as those of infants ratified by an express promise after age, and distinguished from void contracts, as of married women, not capable of ratification by them when widows; *Loyd v. Lee* [1 Stra. 94]; debts of bankrupts revived by subsequent promise after certificate, and similar cases. Since that time some cases have occurred upon this subject, which require to be more particularly examined. *Barnes v. Hedley* [2 Taunt. 184] decided that a promise to repay a sum of money, with legal interest, which sum had originally been lent on usurious terms, but, in taking the account of which, all usurious items had been by agreement struck out, was binding. *Lee v. Muggeridge* [5 Taunt. 36] upheld an assumpsit by a widow that her executors should pay a bond given by her while a feme covert to secure money then advanced to a third person at her request. On the latter occasion the language of Mansfield, C. J., and of the whole Court of Common Pleas, is very

large, and hardly susceptible of any limitation. It is conformable to the expressions used by the judges of this Court in *Cooper v. Martin* [4 East, 76] where a stepfather was permitted to recover from the son of his wife, after he had attained his full age, upon a declaration for necessities furnished to him while an infant, for which, after his full age, he promised to pay. It is remarkable that in none of these there was any allusion made to the learned note in 3 Bosanquet & Puller above referred to, and which has been very generally thought to contain a correct statement of the law. * * *

The eminent counsel who argued for the plaintiff in *Lee v. Mugeridge* spoke of Lord Mansfield as having considered the rule of nudum pactum as too narrow, and maintained that all promises deliberately made ought to be held binding. I do not find this language ascribed to him by any reporter, and do not know whether we are to receive it as a traditional report, or as a deduction from what he does appear to have laid down. If the latter, the note to *Wennall v. Adney* shows the deduction to be erroneous. If the former, Lord Tenterden and this Court declared that they could not adopt it in *Littlefield v. Shee*. Indeed the doctrine would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it.¹

The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society; one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult.

Taking, then, the promise of the defendant, as stated on this record, to have been an express promise, we find that the consideration for it was past and executed long before, and yet it is not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* [7 T.R. 348] shows that it would not have been sufficient), and the declaration really discloses nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money. [The court then called attention to the fact that the ex-

¹In criticism of this sentence, the court in *Muir v. Kane*, 55 Wash. 131, 104 P. 153, 26 L.R.A., N.S., 519, 19 Ann. Cas. 1180 (1909), said that it "is more specious than sound, for it entirely ignores the distinction between a promise

to pay money which the promisor is under a moral obligation to pay, and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay."

penditures by the plaintiff had been at the request of neither Sarah nor her husband, the present defendant. It said that there was no authority for enforcement of a promise to pay for benefits enjoyed by the defendant but resulting from the plaintiff's having acted without request and as a "voluntary courtesy."]

Rule to arrest judgment absolute.

QUESTIONS:

1. Was Sarah Sutcliffe bound by her promise made after becoming of age?
2. If Sarah was bound, should her husband now be held bound by his promise to pay her debt?
3. Does the "learned note" to Wennall v. Adney include all the kinds of cases in which a "past consideration" is now held to make a promise enforceable?

NOTE

Although Sarah Sutcliffe did not request the plaintiff to spend money on her unfinished houses, it seems probable that he acted reasonably as her guardian and the executor of her father's will and that the expenditures were necessary to preserve her property. On such a showing, the plaintiff would have had a right to reimbursement by the Roman and Continental law (the rule being referred to under the title *Negotiorum Gestio*); and there is respectable authority for the same thing in the United States. If Sarah was bound by this "quasi contractual" duty to the plaintiff, her express promise made after becoming of age would be enforceable. The English courts, Lord Mansfield excepted, were very slow to recognize quasi contractual obligations; but the House of Lords has recently followed Lord Mansfield's example. If Sarah was legally bound to pay, so also was her husband Kenyon at common law (wife's antenuptial debts). His recognition of his obligation by an express promise should have made it unnecessary even to join his wife (uxor) as a formal defendant.

EDSON v. POPPE.

Supreme Court of South Dakota, 1910.
24 S.D. 466, 124 N.W. 441, 26 L.R.A., N.S., 534.

Action by George F. Edson against William Poppe. Judgment for plaintiff, and defendant appeals. Affirmed.

McCoy, J. The plaintiff recovered judgment upon the verdict of a jury in the circuit court. The case was tried upon the following complaint: That the defendant at all the times hereinafter named was the owner of the following described premises situated in Turner county, S. D., to wit (describing the land); that at all the times herein named

George Poppe was in possession of said premises as the tenant of defendant; that during the year 1904 this plaintiff, at the instance and request of said George Poppe, drilled and dug upon said premises a well 250 feet deep, and obtained water in said well, and placed casing therein; that the reasonable value of the digging and casing of said well was and is the sum of \$250; that said well was and is a valuable improvement upon the said premises, and greatly adds to the value thereof, and has been used by the occupants of said premises since the said digging thereof, with the knowledge and consent of defendant; that on or about the 5th day of August, 1905, the defendant, at the said premises, after having examined the said well, and in consideration of the said well to him, and of the improvement it made upon said premises, expressly ratified the acts of his said tenant in having said well drilled, and then and there promised and agreed to pay plaintiff the reasonable value of the digging and casing of the said well as aforesaid; that defendant has since refused, and still refuses to pay plaintiff anything for said well. Wherefore, etc. To the said complaint defendant made the following answer: Denies generally and specifically each and every allegation in said complaint, except such as is hereinafter specifically admitted. Defendant admits that he is the owner of the said premises as stated in the complaint. At the opening of the trial, and upon the offer of testimony on the part of plaintiff, defendant objected to the introduction of any evidence, for the reason that the complaint did not state a cause of action, in that the consideration alleged in the contract is a past consideration, and no consideration for any promise, if any was made, and no consideration for the promise alleged. The objection was overruled, and defendant excepted. This ruling of the trial court is assigned and now urged as error, but we are of the opinion that the ruling of the learned trial court was correct.

It seems to be the general rule that past services are not a sufficient consideration for a promise to pay therefor, made at a subsequent time, and after such services have been fully rendered and completed; but in some courts a modified doctrine of moral obligation is adopted, and it is held that a moral obligation, founded on previous benefits received by the promisor at the hands of the promisee, will support a promise by him. 9 Cyc. 361; Doty v. Wilson, 14 Johns. (N.Y.) 378; Oatfield v. Waring, 14 Johns. (N.Y.) 188; Glenn v. Savage, 14 Or. 567, 13 P. 442. The authorities are not so clear as to the sufficiency of past services, rendered without previous request, to support an express promise; but, when proper distinctions are made, the cases as a whole seem to warrant the statement that such a promise is supported by a sufficient consideration if the services were beneficial, and were not intended to be gratuitous. Trimble v. Rudy, 53 L.R.A., note p. 373, and cases cited. In Drake v. Bell, 26 Misc.Rep. 237, 55 N.Y.

S. 945, a mechanic, under contract to repair a vacant house, by mistake repaired the house next door, which belonged to the defendant. The repairing was a benefit to the latter, and he agreed to pay a certain amount therefor. It was held that the promise rested upon sufficient consideration. Gaynor, J., says: "The rule seems to be that a subsequent promise, founded on a former enforceable obligation, or on value previously had from the promisee, is binding." In *Glenn v. Savage*, 14 Or. 567, 13 P. 442, it was held that an act done for the benefit of another without his request is deemed a voluntary act of courtesy, for which no action can be sustained, unless after knowing of the service the person benefited thereby promises to pay for it. In *Boothe v. Fitzpatrick*, 36 Vt. 681, it is held that if the consideration, even without request, moves directly from the plaintiff to the defendant, and inures directly to the defendant's benefit, the promise is binding though made upon a past consideration. In this case the court held that a promise by defendant to pay for the past keeping of a bull, which had escaped from defendant's premises and been cared for by plaintiff, was valid, although there was no previous request, but that the subsequent promise obviated that objection; it being equivalent to a previous request. The allegation of the complaint here is that the digging and casing of the well in question inured directly to the defendant's benefit, and that, after he had seen and examined the same, he expressly promised and agreed to pay plaintiff the reasonable value thereof. It also appears that said well was made under such circumstances as could not be deemed gratuitous on the part of plaintiff, or an act of voluntary courtesy to defendant. We are therefore of the opinion that, under the circumstances alleged, the subsequent promise of defendant to pay plaintiff the reasonable value for digging and casing said well was binding, and supported by sufficient consideration. We are also of the opinion that the instructions based on this complaint, and in particular as to the validity of the subsequent promise of defendant, properly submitted the issues to the jury.

• • •

Finding no error in the record, the judgment of the circuit court is affirmed.

QUESTIONS:

1. Did the plaintiff have an enforceable right against George Poppe?
2. Was the debt of George a sufficient consideration for the promise of William?
3. Was William under a noncontractual obligation to pay the reasonable value of the plaintiff's labor before he promised to do so?

NOTE

Some other decisions, not very many, can be found in accord with the above case.

In *Sharp v. Hoopes*, 74 N.J.L. 191, 64 A. 989 (1906), Sharp had a house for rent. Hoopes, a real estate agent, knew of the fact, and, without being requested, exhibited the house to a prospective tenant. The tenant later rented the house directly from Sharp. Hoopes then asked for a commission; and Sharp promised to pay it. This promise was held to be unenforceable.

EDMONDS' CASE.

In the Common Pleas, 1587. 3 Leon. 164.

In an action upon the case against Edmonds, the case was, that the defendant being within age, requested the plaintiff to be bounden for him to another, for the payment of £30 which he was to borrow for his own use; to which the plaintiff agreed, and was bounden, ut supra, afterwards the plaintiff was sued for the said debt, and paid it; and afterwards, when the defendant came of full age, the plaintiff put him in mind of the matter aforesaid, and prayed him that he might not be damnified so to pay £30 it being the defendant's debt: whereupon the defendant promised to pay the debt again to the plaintiff: upon which promise, the action was brought. And it was holden by the Court, that although here was no present consideration upon which the assumpsit could arise; yet the Court was clear, that upon the whole matter the action did lie, and judgment was given for the plaintiff.

WILLIAMS v. MOOR.

In the Court of Exchequer, 1843. 11 Mees. & W. 258.

Debt for work and materials, for goods sold and delivered, for interest, and for money due on an account stated.

Plea, infancy.

Replication, that the defendant, before the commencement of the suit, to wit, on the 10th day of December, 1837, attained his full age of twenty-one years, and before the commencement of the suit, to wit, on the 27th September, 1839, in writing then signed by him, assented to and ratified and confirmed the said contract in the declaration mentioned, and then agreed to pay the plaintiff the said moneys therein mentioned.—Verification.

To this replication the defendant demurred on the following grounds, viz., that an action on an account stated did not lie against an infant;

that the replication stated that the defendant was an infant at the time of stating the account, and that an infant, though he state an account cannot be sued upon it; that an infant could not ratify such a contract after he came of age or be liable in consequence of such subsequent ratification on an account stated by him when he was a minor; that the action should have been brought in *assumpsit*, and not debt: that an infant is not liable for interest.

Joinder and demurrer.

PARKE, B. This was an action of debt on the common counts for work and materials, and for goods sold and delivered, with a count on an account stated.

Plea, that at the time of making the alleged contracts, defendant was an infant. Replication, that, after defendant attained his age of twenty-one years, and before the commencement of the suit, he ratified and confirmed the said contract. To this replication there was a demurrer, on the ground that an account stated by an infant is absolutely void, and that no subsequent ratification of it, after the infant has attained his age of twenty-one years, will set it up, so as to enable the other party to the account to sue upon it. It is not necessary that we should decide what is the precise legal operation of the ratification by a party who has attained his age of twenty-one years, of a contract entered into during his minority; whether it is to be treated as an act giving validity to an otherwise invalid contract, or as a new contract voluntarily entered into after the party has obtained the capacity of contracting, the consideration being the moral duty arising from the previous transactions. * * *

But the argument on behalf of the defendant was, that the case is different in an action on an account stated; for that an account stated by an infant is not merely voidable, but actually void, so that no subsequent ratification can make it of any avail. But we can see no sound or sensible distinction in this respect between the liability of an infant on an account stated, and his liability for goods sold and delivered, or on any other contract.

The contract of an infant for goods sold and delivered (not being necessities) is as completely void as his contract on an account stated, if by the word "void" is meant incapable of being enforced. The plea of infancy will be a bar to any demand on the one contract as well as on the other. But if by "void" is meant incapable of being ratified, then we can discover neither principle nor authority for the distinction relied on.

The principle on which the law allows a party who has attained his age of twenty-one years to give validity to contracts entered into during his infancy is, that he is supposed to have acquired the power of deciding for himself, whether the transaction in question is one of a

meritorious character, by which in good conscience he ought to be bound; and there seems nothing in the liability on an account stated to take that out of this general principle. It was indeed argued for the defendant, that on an account stated an infant derives no benefit; that he does not, as on a purchase of goods, get any thing valuable; that he has no *quid pro quo*. But this is a fallacy; an infant stating an account gets precisely the same benefit as an adult gets on a similar transaction. He makes certain the previously uncertain state of transactions between himself and the person with whom he is stating accounts, and he gets rid of the necessity of preserving vouchers. This, in the case of an adult, is a sufficient consideration to create a debt; and we can discover no reason why it should not have the same effect in the case of an infant, supposing him to adopt and ratify it after he comes of age. * * *

The general doctrine is, that a party may, after he attains his age of twenty-one years, ratify, and so make himself liable on contracts made during infancy. We think that, on principle unopposed by authority, this may be done on a contract arising on an account stated, as well as on any other contract. Judgment must therefore be for the plaintiff.

Judgment for the plaintiff. * * *

NOTE

In *Edmunds v. Mister*, 58 Miss. 765 (1881), the court said: "It is an anomaly in pleading that the plaintiff declares upon the original contract, and to a plea of infancy replies the new promise, while all the authorities declare that the recovery is not upon the original contract, but upon the new promise; and yet undoubtedly the anomaly exists."

As to ratification of an infant's promise, see *Restatement, Contracts*, § 89.

In *Merriam v. Wilkins*, 6 N.H. 432 (1833), the plaintiff sued for the price of goods sold to the defendant while an infant. The court held that this suit could not be supported by proof of a new promise made after majority but also after this suit was brought. The court regarded the new promise as the only enforceable contract and "cause of action." Of course, that new promise was necessary to the plaintiff's case; but under modern procedure it should not be necessary to bring a new suit.

LEE v. MUGGERIDGE et al.

In the Common Pleas, 1813. 5 Taunt. 36.

Assumpsit. The verdict for the plaintiff established the following facts: At the request of Mary Muggeridge, a married woman having a large separate estate, and in reliance upon her penal bond exe-

cuted at that time undertaking to repay the money, the plaintiff had loaned £2,000 to one J. Hiller, Mary's son-in-law. The money was not repaid, and Mrs. Muggeridge, who meantime had become a widow and competent to contract, wrote to the plaintiff promising that the debt "would be settled by her executors." Mrs. Muggeridge died leaving an ample estate, and the defendants are her executors and residuary legatees. There was a motion in arrest of judgment on the ground that there was no consideration for the promise of the deceased. A rule nisi was obtained.

MANSFIELD, C. J. The counsel for the plaintiff need not trouble themselves to reply to these cases; it has been long established, that where a person is bound morally and conscientiously to pay a debt, though not legally bound, a subsequent promise to pay will give a right of action. The only question therefore is, whether upon this declaration there appears a good moral obligation. Now I cannot conceive that there can be a stronger moral obligation than is stated upon this record. Here is this debt of £2,000 created at the desire of the testatrix, lent in fact to her, though paid to Hiller. After her husband's death, she knowing that this bond had been given, that her son-in-law had received the money, and had not repaid it; knowing all this, she promises that her executors shall pay; if then it has been repeatedly decided that a moral consideration is a good consideration for a promise to pay this declaration is clearly good. This case is not distinguishable in principle from *Barnes v. Hedley*, 2 Taunt. 184; there not only the securities were void, but the contract was void; but the money had been lent, and therefore when the parties had stripped the transaction of its usury, and reduced the debt to mere principal and interest, the promise made to pay that debt was binding. Lord Mansfield's judgment in the case of *Doe on the demise of Carter v. Strapham*, Cowp. 201, is extremely applicable. Here in like manner the wife would have been grossly dishonest if she had scrupled to give a security for the money advanced at her request. As to the cases cited, of *Lloyd v. Lee*, 1 Str. 94, and *Barber v. Fox*, 2 Saund. 134, there was no forbearance, and those cases proceeded on the ground that no good cause of action was shown on the pleadings.

GIBBS, J. I agree in this case the plaintiff is entitled to recover. It cannot, I think, be disputed now that wherever there is a moral obligation to pay a debt, or perform a duty, a promise to perform that duty, or pay that debt, will be supported by the previous moral obligation. There cannot be a stronger case than this of moral obligation. The counsel for the defendant did not dare to grapple with this position, but endeavored to show that there was no case, in which a subsequent promise had been supported, where there had not been an antecedent legal obligation at some time or other; from whence he wished it to be inferred, that unless there had been the antecedent

legal obligation, the mere moral obligation would not be a sufficient consideration to support the promise. But in *Barnes v. Hedley*, certainly Hedley never was for a moment legally bound to pay a farthing of that money for which he was sued; for it appears to have been advanced upon a previously existing usurious contract, and whatever was advanced upon such a contract certainly could not be recovered at any one moment. The borrower, availing himself of the law, so far as he honestly might, and no further, reducing it to mere principal and interest, does that which every honest man ought to do in like circumstances, promises to pay it, and that promise was held binding. As to the cases of *Lloyd v. Lee* and *Barber v. Fox*, they have sufficiently been answered by my Lord and my Brother Chambre, that if a man will state on his declaration a consideration which is no consideration, and shows no other consideration on his declaration, although another good consideration may exist, when that which he does show fails, he cannot succeed upon the proof of the other which he has not alleged. Now in the first of those cases there was clearly no forbearance, because forbearance must be a deferring to prosecute a legal right, but no legal right to recover previously existed. Whatever other consideration might exist for the promise, it was not stated in the declaration; it is therefore clear that this rule must be discharged upon the ground, that wherever there is an antecedent moral obligation, and a subsequent promise given to perform it, it is of sufficient validity for the plaintiff to be able to enforce it.

Rule discharged.

NOTE

In accord are *Goulding v. Davidson*, 26 N.Y. 604 (1863); *Sharpless' Appeal*, 140 Pa. 63, 21 A. 239 (1891). The decision above was doubted in *Littlefield v. Shee*, 2 B. & Adol. 811 (1831); and it was often disapproved in the United States except in the States that declare a promise may be binding if based upon an existing moral obligation, on the ground that at common law the promise of a married woman was so "void" that it could not be ratified. The question may never arise again because of statutes giving married women full power to bind themselves by contract.

JANSON v. COLOMORE.

In the King's Bench, 1617. 1 Rolle, 398.

Janson brought an action on the case against Colomore and alleged that the defendant being indebted to him on an account was found to be in arrears a certain amount, and in consideration thereof promised to pay the said amount at a certain future day, and for breach of this promise action was brought. After verdict for the plaintiff it was moved in arrest of judgment that an action on the case does not lie,

for the reason that the contract was prior to the promise sued upon and was executed, and this promise to pay at a future day cannot turn it into an executory contract.

HAUGHTON said that the action lies, because when the defendant was found to be in arrears he then and there promised, so that at the instant the arrears were determined the debt became definite and certain, and upon this the express assumpsit made at the same time is good. This was conceded to be correct by CROKE and DODDERIDGE and the latter said that Slade's case established the rule that every executory debt includes an assumpsit. (The discussion of another point is omitted.)

NOTE

Among the causes for making a promise to pay a sum of money is the fact that the promisor already owes the amount as a money debt that the law requires him to pay. Restatement, Contracts, § 86(1). The debt being already enforceable, it may be thought that making a new promise to pay it is merely carrying a new lump of coal to Newcastle; such is not the case. Ever since the 21st year of James I there have been statutes of limitation that bar the maintenance of an action after the lapse of a stated period of time after the accrual of the cause of action. The making of the new promise causes this period of time to start anew and thus extends the time of enforceability.

The new promise may itself be treated as the cause of action; it is a binding promise—a contract. This was a fact of major importance in the early history of the common law forms of action. In the action of Debt, which was not regarded as an action for the enforcement of any promise, there was a defense called “wager of law,” whereby the defendant would go free if he would take oath that he was not indebted and would produce eleven oath-helpers who would swear that they believed him. In time when the taking of an oath became a less fearsome rite, this defense was subject to great abuse by dishonest debtors and handy perjurers. Creditors, therefore, began to shift from Debt to Assumpsit, wager of law not being traditionally available in the latter action. This shift was sustained if the defendant had in fact promised to pay.

In *Slade's Case*, 4 Coke, 92b, Yelv. 21, Moore, K.B. 433, 667 (1602), it was held after a tremendous struggle that where a legal debt existed the form of action known as assumpsit would lie, and that even if no promise had been made in terms the law would “imply” a promise. If assumpsit would lie to collect a past debt in the absence of an express promise, a *fortiori* it would lie if such a promise is made.

“No case can be found in which a man's own debt has been ruled to be an insufficient consideration between him and his creditor, for a mortgage or other security received by the latter from his debtor.” *Turner v. McFee*, 61 Ala. 468, 472 (1878); *Paine v. Benton*, 32 Wis. 491 (1873); *Duncan v. Miller*, 64 Iowa 223, 20 N.W. 161 (1884); *Williams v. Silliman*, 74 Tex. 626, 12 S.W. 534 (1889). It would not be a sufficient consideration for his executory promise to give a new security.

The existing debt of A is not a sufficient reason for the enforcement of a promise by B to pay it; to be enforceable B's promise must be in a specially enforceable Form or must be given for a Consideration (which may be a forbearance to sue the debtor). Nor is an existing debt a sufficient reason for the enforcement of a promise by the debtor himself to pay a sum in excess of the debt or to pay in advance of the due date or to render any performance other than payment of the debt or some part thereof.

LITTLE v. BLUNT.

Supreme Judicial Court of Massachusetts, 1830. 9 Pick. 433.

Assumpsit. The writ was dated December 1, 1828.

The first, second and third counts were severally on three promissory notes, payable to one Somerby on demand, with interest, dated at Newburyport, one on August 29, 1807, another on September 12, 1807, and the third on April 26, 1810, and alleged to have been indorsed to the plaintiff each on the day of its date.

The fourth, fifth and sixth counts were similar to the first three, except that the indorsements to the plaintiff are alleged to have been made on December 20, 1822.

The defendant pleads, 1, the general issue, which is joined; 2, non assumpsit *infra sex annos*.

To the second plea the plaintiff replies, as to the fourth, fifth and sixth counts, that on the 17th of April, 1822, the defendant, in a letter written by him at New York to Somerby, promised to pay Somerby the notes declared on; that Somerby, after the receipt of the letter, viz. on the 20th of December, 1822, indorsed the notes to the plaintiff; and that always afterward, to wit, from the 17th of April, 1822, to the date of the writ, the defendant has been absent from the commonwealth and has had no property within the commonwealth that could by the ordinary process be attached.

To this replication the defendant demurred generally.

St. 1786, c. 52, § 4, provides, that if any person, against whom there shall be any cause of suit, was, at the time the same accrued, without the limits of the commonwealth, and did not leave property therein that could by the common and ordinary process of law be attached, the person entitled to bring such suit shall be at liberty to commence the same within the periods before limited in the statute, after such person's return into this government.

WILDE, J., afterward drew up the opinion of the Court. Two questions are raised by these pleadings. The first is, whether the original cause of action was barred by the statute of limitations; and if so,

then, secondly, whether this action can be maintained on the new promise made in 1822. * * *

Then can this action be maintained on the new promise?

In the replication to the plea to the fourth, fifth and sixth counts, it is averred that this new promise was made on the 17th of April, 1822, that always afterwards, viz. from the 17th of April, 1822, to the date of the writ, the defendant had been absent from the commonwealth, and that he had no property within the state that could by ordinary process be attached. If the defendant had been living within this state at the time this new promise was made, an action no doubt would lie at any time within six years after, and the statute would not operate as a bar. If the defendant in such a case had pleaded, that the cause of action did not accrue within six years before the commencement of the action, the plaintiff might reply that it did; and the new promise would support the affirmation of the issue. The reason is, that the new promise is regarded as a new cause of action upon which the statute operates in the same manner, and for the same period of time, as it did before on the original cause of action. Or it may be considered that the original cause of action is revived, and the statute again commences its operation; and this operation is limited by all the exceptions contained in the statute. Indeed the new promise is essentially a new cause of action. In the present case, before the promise in 1822 these demands had been long barred by the statute.

If the debt remained, the remedy was gone; and there was no subsisting cause of action. The new promise therefore was a new cause of action, for without it there was no cause of action. That alone gave the remedy. There was a sufficient consideration for this promise. A debt barred by the statute of limitations is a good consideration for an express promise. But it is not necessary to declare on the new promise. According to the established rules of pleading, the plaintiff had a right to declare on the original promise; and when the statute of limitations was pleaded, he might reply the new promise. When the pleadings assume this shape, the original promise is apparently the cause of action, but it is the new promise alone that gives it vitality; and that substantially is the cause of action. * * *

The defendant is clearly liable to an action on the new promise, and the statute could not be pleaded in bar. Or the plaintiff might amend by transferring the averments in the replication to the declaration, and setting forth the original cause of action as the consideration of the new promise. But there is no reason for turning the plaintiff round to a new action, or to require him to amend the declaration. The form of the pleadings cannot vary the construction or operation of the statute. We must regard substance rather than form, and sub-

stantially the new promise is the cause of action, whatever may be the form of the declaration.

Judgment for plaintiff on fourth, fifth, and sixth counts.

NOTE

That a past debt that has been barred by statute of limitations is a sufficient reason for the enforcement of the debtor's promise to pay it (that is, a sufficient "past consideration" for the promise), see Restatement, Contracts, § 86.

In *Clark v. Jones*, 233 Mass. 591, 124 N.E. 426 (1919), enforcing a new promise made after a statutory bar, the court said: "The remedy indeed had perished, but the debt not having been satisfied, the moral obligation to pay it afforded a sufficient consideration for the debtor's promise in writing signed by him with the unequivocal intention of liquidating the balance remaining on the old notes, as well as to avoid the expense and uncertainty of the litigation.

It was formerly argued by many scholars that, when a new promise is made to pay a debt that is barred by statute or discharged in bankruptcy, the new promise is not itself enforceable, being wholly without consideration, and that it is still the original obligation that is now enforced. The new promise was said to be merely the "waiver of a defense." Having adopted a theory of contract and of consideration for a promise, they tried to show that these new-promise cases were not inconsistent with their theory. The argument is no longer accepted. No trace of it is found in Restatement, Contracts, §§ 85-94.

CARSHORE v. HUYCK.

Supreme Court of New York, 1849. 6 Barb. 583.

By the Court, HARRIS, J. * * * The principal, and I think the only question in this case, is whether, after a justice's judgment has become barred by the statute of limitations, it will be so revived by a new promise of payment, as that an action of debt may be maintained upon it. Incidentally a question of pleading is involved, but the decision of the question I have stated must determine the right of the parties in this action. The plaintiffs maintain the affirmative of this proposition. Unless they can sustain it, their action must fail. The defendant contends, that a promise to pay a judgment, cannot entitle the plaintiff in that judgment to maintain an action upon it, as a subsisting cause of action; that a judgment once barred by the statute of limitations can not have its vitality restored by a mere promise to pay.

The question is not without its difficulty; and neither party is without eminent authority to sustain his position. It seems, however, to be settled against the defendant, in this state. Upon a full examination of the cases in which the subject has been discussed I am satis-

fied that, at least in this state, the doctrine is too firmly established to be again unsettled, that where the operation of the statute of limitations is avoided by a new promise, the old demand, and not the new promise, is to be the foundation of the action. I confess that were I at liberty to reason upon the question, the inclination of my mind would be to the other side of this question. The doctrine rests for its support upon a distinction between the cause of action itself, and the remedy. The distinction is too thin and subtle to be received with satisfaction. An existing, continuing cause of action, without any remedy to enforce it, is, to my mind, a mere abstraction. To say that a man has a cause of action left, after he has lost, by the operation of the statute, his remedy upon it, seems to me little less absurd, than to say I still have my property after I have actually lost it. If a debtor obtain a discharge under an insolvent act, a subsequent promise to pay the debt discharged, is regarded as a new contract, supported, it is true, by the pre-existing moral obligation, as a consideration for the new promise, but to be enforced as a new contract, and, like every other contract, according to its own terms. The reasonableness of this doctrine is much more manifest, at least to my mind, than that which has been established in this state in respect to the revival of debts barred by the statute of limitations. The best defense of the latter doctrine, with which I have met, is contained in the opinion of Mr. Justice Marcy, in *Dean v. Hewit*, 5 Wend. 257. His argument is, that the new promise rebuts the presumption of payment upon which the statute of limitations proceeds, and has the same effect, in keeping alive the remedy, whether made before or after the statute attaches. I am unable to perceive the conclusiveness of this reasoning. In the one case, the new promise, made before the statute has barred the debt, arrests its course, and a new starting point is made, from which it again commences to run. It cannot be said, in that case, that the new promise revives the debt; for it never was extinct. But when the statute has once attached, the debt is in fact, however it may be in theory, extinct. It has lost all its vitality. If, afterwards, it has any "legal use or validity," it is through the reanimating principle of the new promise. And it is only useful for this purpose, as furnishing, by virtue of its continuing moral obligation, a sufficient consideration for the promise. But it would not be profitable further to examine the foundations of this doctrine. It is enough, for the present occasion, that the question is entirely settled by adjudged cases in our own courts. I cheerfully yield to their authority, and even where I cannot clearly see the reason upon which they are founded, I can say with Lord Kenyon, "it is my wish and comfort to stand super antiquas vias." See *Sands v. Gelston*, 15 Johns. 511; *Bell v. Morrison*, 1 Pet. 351, 7 L.Ed. 174; *Depuy v. Swart*, 3 Wend. 135, 20 Am.Dec. 673;

The doctrine is perhaps as clearly stated in *Dean v. Hewit* as any where else. "A demand," says Justice Marcy, "the remedy for the recovery of which is continued or revived by a new promise, is precisely the same, after the remedy has been continued or revived, as it was before the statute had or could have attached." In that case, the action was upon a negotiable note. The new promise relied upon to relieve it from the operation of the statute of limitations, was made to the payee. It was held, that the negotiability of the note was co-existent with the demand, and that the remedy upon the note having been revived, while the note remained in the hands of the payee, an indorsee, to whom it had been subsequently transferred, might maintain his action upon it. The same was held in *Pinkerton v. Bailey*, 8 Wend. 600; also in *Soulden v. Van Rensselaer*, above cited. If, then, the new promise so completely restores life, and gives effect to the original demand, as in the case of a negotiable instrument, to enable a subsequent holder, to maintain an action upon it, I think it must follow, that in case of a justice's judgment barred by the same statute, a new promise will enable the plaintiff in the judgment to maintain an action upon it, with the same effect as before the statute had attached. It is true, that all the cases in which the question has been presented were actions upon contract. It is only since the adoption of the revised statutes, that justices' judgments have been subject to the operation of the statute of limitations. *Pease v. Howard*, 14 Johns. 479. But if a new promise can have the effect of sustaining an action upon a negotiable security in the hands of an indorsee, to whom it has been transferred after the promise, much more should it have the effect to enable the plaintiff in a justice's judgment to whom the promise was made, to maintain an action of debt upon it. * * *

Upon the whole case, therefore, the plaintiffs are, in my opinion, entitled to judgment.

Judgment for the plaintiffs.

NOTE

Restatement, Contracts, § 86(1), expressly excepts a "judgment debt" from its stated rule that a promise to pay a debt is enforceable even though enforcement of the debt has been barred by statute of limitations. Doubtless the reason for making this exception is that it was required by the "weight of authority." Nevertheless, it is believed that the weight of reason and justice is clearly the other way. The above decision should be followed. The antecedent New York authorities that the learned judge cheerfully followed were better than his own predilections.

The debtor's new promise to pay the barred judgment debt is not a renewal of the judgment. A judgment is the decision and order of a court. It may well be that the new promise does not cause the court's barred judgment to be once more enforceable by a writ of execution. But that judgment created a legal duty in the debtor, one enforceable by the action

of Debt or by the modern Civil Action. In this respect, its legal operation is the same as that of a contract voluntarily made by the debtor himself. In both cases alike, the statute of limitations bars the remedy (not merely raising a "presumption" of payment); in both alike the moral obligation to pay remains. The reason for enforcement of the debtor's new promise is certainly no less strong in case of the judgment debt than in the case of a contract debt.

It should not be said, however, that "the old demand and not the new promise is the foundation of the action." Both are necessary factors in enforcement; both together constitute the "foundation of the action." The judge was quite right in thinking that after the statutory bar, a good "cause of action" did not exist. Neither would the new promise, standing alone, constitute a good "cause of action." Put the two together, however, and we have such a cause of action. It is merely a matter of procedure, not of the substantive law as to what facts create legal duty, whether these two operative factors are both alleged at once in the declaration or complaint, or are alleged separately in declaration and replication as the New York procedure formerly permitted.

It was held in *Wolffe v. Eberlein*, 74 Ala. 99 (1883), that the new promise of a debtor to pay a judgment debt that had been discharged in bankruptcy required no new consideration to make it enforceable. The court discussed the theories advanced by scholars and judges, and recognized that the terms of the new promise determine the extent of the duty now enforced. On the ground that it was long accepted procedure, the court sustained an action "brought on a judgment" even though the defendant pleaded a discharge in bankruptcy, a new express promise being pleaded in the plaintiff's replication. Such a replication is not a "variance" from the declaration; it bolsters it up with a new operative fact that was made necessary by the fact alleged in the defendant's plea.

BARKER v. HEATH.

Supreme Court of New Hampshire, 1907. 74 N.H. 270, 67 A. 222.

Action by Levi Barker against Kate P. Heath on a note for \$734.52, dated April 1, 1895, and payable to plaintiff on demand with interest. Suit was brought November 2, 1905, and defendant pleaded limitations, to which plaintiff replied, alleging new promise within six years. A verdict was rendered in favor of plaintiff, and the case was transferred to the Supreme Court. Exceptions sustained.

The following indorsements are upon the back of the note: April 10, 1895, \$5; September 19, 1895, \$5; October 16, 1895, \$5; December 16, 1895, \$5; September 19, 1896, \$3; August 25, 1898, \$2; December 26, 1899, \$2. The plaintiff testified as follows: He received the foregoing sums from the defendant at the dates mentioned, and made the indorsements in her presence. At the time of the last payment the defendant said, in substance, that it was all she could

give him at that time; that she would give him more as soon as she could, and would pay him just as fast as she could; that she was having a hard time, her boarders had left her, her eyes were troubling her, and she had to go to an oculist; that it was taking her money, but she would pay him as fast as she could. At the dates of the indorsements she always promised to pay as fast as she could and as soon as she was able, and wanted him to be easy with her. In a conversation subsequent to December 26, 1899, she said she had no money for him then, but would give him some just as soon as she could. The defendant's evidence tended to prove that she did not make either of the last two payments indorsed on the note; that she did not promise the plaintiff at any time that she would pay the balance of the note, because she knew it was impossible for her to do so; and that she did not promise him on December 26, 1899, or at any subsequent date, that she would pay the note as soon as she was able, or as soon as she could, or promise anything to that effect. * * *

The court, after instructing the jury that their verdict must be for the defendant unless she, by her acts or promises, gave the plaintiff to understand within six years that she recognized the existence of the note and intended to pay it, further instructed them that the promise must be absolute, or, if conditional, that the condition must have been fulfilled; and that a promise by the defendant to pay as soon as she could, or when she was able, would be regarded by the law of this state as an absolute promise. Continuing, the court said: "So if you find that within six years she said, 'I will pay it as soon as I can,' or 'as soon as I am able,' then you will regard it as having been an absolute and unqualified promise on her part." To this portion of the charge the defendant excepted.

CHASE, J. It was held in the earlier cases of assumpsit in this state that, while a simple acknowledgment of a debt would not prevent the statute of limitations from operating upon it, such acknowledgment was evidence from which, if there was nothing to rebut it, a jury might find a new promise. If the acknowledgment was accompanied by a condition, limitation, or qualification of any kind, its effect as evidence was modified correspondingly. *Stanton v. Stanton*, 2 N.H. 425; *Buswell v. Roby*, 3 N.H. 467; *Atwood v. Coburn*, 4 N.H. 315. * * * In case there is a condition, the creditor must show that it has been fulfilled or complied with to entitle himself to the implication of a new promise. * * * A partial payment of a promissory note by the maker, under circumstances which show that he understood it was partial only, and which do not indicate an unwillingness on his part to pay the balance, is evidence from which, if there is nothing to control it, a jury should find a new promise. Indorsements upon a note will not be received as evidence of such payments unless shown to be in the handwrit-

ing of the maker, or there is other evidence of their genuineness and truthfulness. * * *

According to the plaintiff's testimony, the defendant made a payment of \$2 upon the promissory note in suit within six years of the time when the action was brought, and said, in substance, at the time of making the payment, that it was all she could then pay, that she would pay more as soon as she could, would pay just as fast as she could on the note. This testimony, if credited by the jury, would justify them in finding that the defendant understood she was making a partial payment upon a promissory note which she regarded as a subsisting debt that she was liable to pay, and was willing to pay as fast as she could or was able. Her statements relating to losing her boarders, and to the extraordinary expenses to which she was subjected by reason of the trouble in her eyes, tend to prove that her willingness to pay was conditional and depended upon her future pecuniary ability. In effect, she promised that she would make payments on the note as fast as her pecuniary ability would enable her to do so. The later statement in evidence was to the same effect. In *Butterfield v. Jacobs*, 15 N.H. 140, 141, the court said: "Where a person, on being applied to for payment of a debt declares his inability to pay it, but promises to pay it when he shall become able, the happening of the contingency is in its nature susceptible of being proved. His pecuniary ability is a matter of fact no more indefinite nor uncertain than most facts ordinarily in controversy. Such a promise is clearly conditional, dependent on the happening of a future event. Evidence of the promise and of the pecuniary ability has therefore been held sufficient to take a case out of the operation of the statute."

* * * It is quite clear that if the plaintiff's testimony in the present case is believed, the defendant's willingness to pay the balance of the note depended upon her pecuniary ability to pay it. Recent cases fully justify this view. *Stowell v. Fowler*, 59 N.H. 585; *Rossiter v. Colby*, 71 N.H. 386, 52 A. 927. See also, *Atwood v. Coburn*, 4 N.H. 315, 318; *Betton v. Cutts*, 11 N.H. 170; *Manning v. Wheeler*, 13 N.H. 486. The defendant's exception to the charge of the court must therefore be sustained. * * *

NOTE

The old transaction supports the new promise to pay the unpaid debt, if such a promise is made. The debtor, in making the new promise, can limit his newly created duty as he pleases. The new promise, reasonably interpreted, determines the extent of the duty. A part payment "on account," made in such a way as fairly to be understood as a recognition of a duty to pay the whole, has the effect of a new promise. See *Restatement, Contracts* § 86(2b). If, on making a payment, the debtor says, "That is all you will get," no promise has been made and no action lies for the balance. *Gillingham v. Brown*, 178 Mass. 417, 60 N.E. 122 (1901). If the debtor makes a new promise to pay, conditional on the happening of

some event, the promise is a valid one, but no action lies until the event occurs. See Restatement, Contracts, § 91.

The obligation to make reparation for a tort is commonly barred by statute in a comparatively short period. It has been held that such a barred obligation can not be revived by a mere promise made without consideration. It is possible that sound policy requires that stale claims for unliquidated damages for a tort should never be litigated. But if the tort was one that enriched the tort-feasor and created a quasi-contractual money debt, a promise to pay that debt made after a statutory bar is enforceable.

Restatement, Contracts, § 86, is limited in terms to promises to pay antecedent money debts, either contractual or quasi-contractual in character. If an obligation to build a house or to deliver goods has become barred by statute, the inference seems to be that a new promise of such performance would not make the duty again enforceable. Usually, there are other factors that would prevent such a late enforcement of contracts like these.

Where a contract has become unenforceable by reason of the nonperformance of a condition precedent, a new promise to perform is binding (the condition being said to be "waived") if the unperformed condition was not also a material part of the consideration. *Hurlburt v. Bradley*, 94 Conn. 495, 109 A. 171 (1920), indorser of a note "waived" demand and notice of default. See Restatement, Contracts, § 88, for a more detailed statement and illustrations.

EARLY v. MAHON

Supreme Court of New York, 1821. 19 Johns. 147, 10 Am. Dec. 204.

This was an action of assumpsit, tried at the Delaware Circuit, in June, 1820, before Mr. Chief Justice Spencer.

The plaintiff lent the defendant certain sums of money, for which the defendant gave a bond and warrant of attorney, in which bond was included usurious interest on the money lent. A judgment was entered upon the bond, in the Court of Common Pleas of Delaware county; and the Court, afterwards, on motion for that purpose, set aside the judgment on the ground of usury. The defendant, afterwards, promised to pay the plaintiff the original sum actually borrowed, but not the usurious interest contained in the bond. On this promise, the present suit was brought. At the trial, the plaintiff produced the bond and note, which had also been given by the defendant, and offered to deliver them up, to be cancelled.

The Chief Justice was of opinion that the actual money lent, was a sufficient consideration to support the promise of repayment, though the securities taken were usurious and void; and the jury, under his direction, found a verdict for the plaintiff, for \$569.84, subject to the opinion of the Court, on a case to be made.

SPENCER, C. J., delivered the opinion of the court. There are two questions presented by the case: 1. Whether, when money has been lent upon an usurious contract, and the contract is afterwards vacated, there yet exists such a moral and equitable duty on the part of the borrower, that a subsequent promise by him to pay the money actually lent, can be enforced at law, in an action founded on the promise?
• • •

1. The case of *Barnes v. Hedley*, 2 Taunt. 182, contains all the authorities and decisions in the British courts, on the first point; and, in my opinion, places the validity of the promise, and the sufficiency of the consideration, beyond a doubt. In that case, the original security was confessedly usurious; it was, by mutual consent, delivered up and cancelled and the borrowers promised to repay the principal and interest; and it was decided that the plaintiffs were entitled to recover the principal and legal interest. It was an issue out of Chancery and the Judges merely certified the result of their decision without giving their reasons at large. It has been repeatedly decided in this Court, that an equitable or moral duty is a sufficient consideration for an actual promise to pay. In *Hawkes v. Saunders*, Cowp. 289, Buller, J., said, "if such a question were stripped of all authority, it would be resolved, by inquiring, whether law were a rule of justice, or whether it was something that acts in direct contradiction to justice, conscience and equity; but (he added) the matter has been repeatedly decided." I consider it entirely settled, that notwithstanding the security be usurious, the money lent is a debt in equity and conscience, and ought to be repaid. This principle has long been acknowledged, and acted upon in courts of equity. 2 Vesey, 567; 2 Brown's Ch.Cas. 649. In the latter case, upon an application to set aside a judgment tainted with usury, it was decided, that it could be displaced only by doing what was just, and that it must stand for the money actually paid, with legal interest. In *Rogers v. Rathburn*, 1 Johns.Ch. 367, the Chancellor pronounced it to be a settled principle, that he who seeks equity, must do equity; that if the borrower came into that court for relief against his usurious contract, he must do what is right, as between the parties, by bringing into court the money actually advanced, with the legal interest; and that then the court would lend him its aid, as against the usurious excess. The statute to prevent usury (1 N.Y.L. 1813, p. 64), after regulating the rate of interest, and forbidding a higher rate than seven per cent. per annum, to be taken, declares, that all bonds, bills, notes, contracts and assurances upon, or for any usury, by which there shall be reserved or taken, or secured, or agreed to be reserved or taken, above seven per cent. shall be utterly void. This provision of the statute relates wholly to the contract; and it makes that entirely void. Hence, it has been frequently held, that where there was an antecedent valid debt, and a security was given by the debtor, reserving illegal

interest so as to be usurious, that the security being void, the pre-existing debt might be recovered, if even the security was one of a higher nature. 3 Camp,N.P. 119; 1 Hen.Bl. 462. I do not mean to say, that in this case, the plaintiff can recover, on the ground that the defendant has had his money, and the bond he took for it was void; and, that, therefore, he can maintain an action on the implied assumpsit. Here, the lending, and the usurious agreement, were contemporaneous acts; the usury infected the whole transaction; but I do say, in the words of Mr. Justice Lawrence, "the usury could not annihilate the sum of money itself, nor the fact of the receipt of the money"; and it does not admit of a doubt, that the defendant having had the plaintiff's money, without any consideration or security, but a void bond, the promise subsequently to repay this money, was founded on a moral and equitable duty. In *Fitzroy v. Gwillim*, 1 Term Rep. 153, in trover for goods which had been pledged for money advanced on an usurious contract, it was held, that to entitle the plaintiff to recover, it was necessary to prove a previous tender of the money actually due. This was a recognition by a court of law, of the principle adopted in courts of equity, that although the contract was void, there was yet a subsisting duty on the part of the borrower. It is observable, too, that the plaintiff has not committed an act which is *malum in se*, but *malum prohibitum* merely; and this distinguishes this case from giving money to one to commit a crime. In such case, it could not be recovered back, even upon a promise to restore it; and, it is to be borne in mind, that the present contract is free from usury. * * *

Judgment for the plaintiff.

NOTE

In early English history any one who charged interest for the use of money seems to have been called a "usurer"; but the common law did not regulate rates of interest. Statutes regulating such rates fix various penalties for charging illegal interest; they are generally such as to prevent the lender from getting any judgment for either principal or interest.

The rule of the above case is approved in Restatement, Contracts, § 535, although nothing is said about it in the chapter on Consideration.

In *McClure v. Williams*, 7 Vt. 210, 213 (1835), the court said: "The taint of usury is indeed upon him, but if the borrower promises to pay the honest debt, why is not the promise binding? The cash lent is still due and unpaid, and therefore as much a moral right and duty as a sum justly due on a note against which the statute of limitations has run, or that has been discharged by a certificate of bankruptcy; and no reason is perceived why the promise need be in writing in this any more than in those cases. In those cases, the original contract or note having been valid, it is declared upon, and the new promise removes the bar. Here the new

promise is declared upon, because the first security was void, and the second good, which some judges have intimated should be the mode in case of a new promise, which avoids the statute of limitations."

EARLE v. OLIVER.

In the Court of Exchequer, 1848. 2 Exch. 71 [Welsby, H. & G.]

Assumpsit. The declaration stated that the plaintiff had become surety for the defendant in a sum not to exceed £250, by a continuing guaranty in favor of a certain bank giving credit to the defendant. Later, and after the bank had made advances to the defendant, bankruptcy proceedings were brought against him. During such proceedings the defendant promised the plaintiff in writing that if the plaintiff should be forced to pay to the bank the sum of £250 by virtue of the guaranty, he would repay that sum to the plaintiff with interest thereon without regard to the certificate of discharge in bankruptcy, "Whenever it should be in his power to do so." The plaintiff was later forced to pay £250 to the bank and has been repaid only £50 by the defendant. It was alleged that it had been and still was within the power of the defendant to pay as promised, and judgment was asked for £200 with interest amounting to £52.

There were several pleas, a replication and a general demurrer, and the question was whether or not the declaration stated a cause of action.

PARKE, B. This case was very fully and ably argued before my BROTHERS ALDERSON, ROLFE, PLATT, and myself, at the sittings after last Michaelmas term. Two questions arose,—the first, as to the sufficiency of the first count on general demurrer; the second, whether the pleadings to the second count, which was money paid, disclosed a sufficient defence. The first count was, in substance, on a promise in writing by the defendant to the plaintiff, in consideration of the defendant's liability, to repay the plaintiff a debt which he had contracted with a banking company as surety for the defendant before the bankruptcy; and the promise was made, before the certificate, to repay the debt when the plaintiff should have paid it, and also the interest on that debt from the time it should be paid by the plaintiff to the time of repaying by the defendant. There was a plea stating that the promise was before certificate, and a special demurrer to the plea, on the ground that it merely stated what was admitted before in the declaration. That is true, and the consequence is, that the question is simply whether the first count is good on demurrer.

So far as relates to the objection that the promise was made before the certificate, the case of *Kirkpatrick v. Tattersall*, 13 Mees. & W.

766, is an answer. It may be worth while to state that a similar point had been previously decided by Lord Chief Justice Eyre in the case of *Roberts v. Morgan*, 2 Esp. 736.

The next objection was that, although an existing debt which would be barred by a certificate, and which was due by the bankrupt to the plaintiff, was a good consideration to support a promise to pay it, a mere liability to repay the plaintiff when he should have first paid the debt for the defendant was not. This goes a step further than the cases above cited, but seems to us to fall within the same principle. This liability, like the debt, would be discharged by the certificate; and it seems to us as just and reasonable for the bankrupt, after the fiat, to waive the benefit of his certificate with respect to it, as it is to waive it with respect to a debt; and, if the debt so discharged is a good consideration for a promise to pay it, the liability which is discharged in the same way is a good consideration for a promise to continue liable.

Two further objections were made, on the supposition that this liability is to be put on the same footing as a debt, and is a good consideration: First, that this debt or liability, in a course of being barred by a certificate, cannot be treated as the executed consideration for a promise which a debt or liability, not barred by a certificate, would not support, and that by the course of modern decisions, beginning with the case of *Hopkins v. Logan*, 5 Mees. & W. 241, and ending with *Roscorla v. Thomas*, 3 Q.B. 234, a debt cannot be laid as an executed consideration for any promise which the law would not imply from it; and that a promise to pay whenever the party was able was never implied. The second was that a promise to pay interest could not be supported by the consideration, and was as objectionable as if the promise had been to do any collateral thing. We think that these objections ought not to prevail.

The strict rule of the common law was no doubt departed from by Lord Mansfield in *Hawkes v. Saunders*, Cowp. 290, and *Atkins v. Hill*, Id., 288. The principle of the rule laid down by Lord Mansfield is that where the consideration was originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, which is only what an honest man ought to do, he is then bound by the law to perform it. There is a very able note to the case of *Wennall v. Adney*, 3 Bos. & P. 252, explaining this at length. The instances given to illustrate the principle are, amongst others, the case of a debt barred by certificate and by the statute of limitations; and the rule in these instances has been so constantly followed that there can be no doubt that it is to be considered as the established law. Debts so barred are unquestionably a sufficient consideration for every promise, absolute or unqualified, qualified or conditional, to pay them.

Promises to pay a debt simply, or by installments, or when the party is able, are all equally supported by the past consideration; and, when the debts have become payable instanter, may be given in evidence in the ordinary declaration in *indebitatus assumpsit*. So, when the debt is not already barred by the statute, a promise to pay the creditor will revive it, and make it a new debt, and a promise to an executor to pay a debt due to a testator creates a new debt to him. But it does not follow that, though a promise revives the debt in such cases, any of those debts will be sufficient consideration to support a promise to do a collateral thing, as to supply goods, or perform work and labour; and so indeed it was held in this court in the case of *Reeves v. Hearne*, 1 Mees. & W. 323. In such case it is but an accord unexecuted, and no action will lie for not executing it.

We think, therefore, that the conditional promise to pay the debt would be good in this case, and supported by the original consideration; and a conditional promise, which, when absolute, will be only a renewal of the original liability, and to the same extent, is equally good and supported by the original consideration.

The next objection relates to the interest. It seems to us to be supported by the same consideration as the original promise. The promise is to pay the debt conditionally; and, if the debt be unpaid, that the defendant will pay interest for it. We are of opinion, therefore, that the first count is good. • • •

QUESTIONS:

1. If a promise to pay \$1,000 is made unenforceable by infancy, bankruptcy, or a statute of limitations, would the promisor's new promise to discharge the debt by working 100 days or by delivering an automobile be enforceable without new consideration?
2. Would a new promise to pay the debt in ten monthly installments, or to pay it if cotton goes to 20 cents by Christmas, be so enforceable?

HERRINGTON v. DAVITT et al.

Court of Appeals of New York, 1917. 220 N.Y. 162, 115 N.E. 476.

COLLIN, J. The action is upon a promissory note made by the defendants' testator. After the note was delivered the maker was adjudicated a bankrupt, under the federal act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 544 [11 USCA § 1 et seq.]), and thereunder received his discharge. A composition was effected, under the provisions of the act, between the bankrupt and his creditors. The plaintiff duly accepted the offer of the composition and the 20 per centum of the face

value of the note payable under it. The defendants' testator thereafter wrote to the plaintiff a letter as follows:

"Troy, N. Y., Dec. 6, 1904.

"My Dear Sister: Your letter received. Was somewhat surprised at its contents. In regard to your claim against me you will be paid every dollar of it with inst as soon as I sell the mill. If anything happens to me the farm is in my name and you will be paid. I have left orders to that effect. Tell Lester to see what balance there is due me on the books for wood and to pay it to you for inst money.

"Yours truly,

A. W. Davitt."

The claim mentioned in the letter was the note. The mill referred to in the letter was sold and conveyed by the testator in January, 1907. This action upon the note was commenced June 8, 1912. Upon the trial judgment in favor of the plaintiff for the unpaid balance payable by the terms of the note was ordered. The Appellate Division unanimously affirmed the consequent judgment.

The action was properly brought upon the note. For the purpose of the remedy, the original debt might still be considered the cause of action. *Dusenbury v. Hoyt*, 53 N. Y. 521, 13 Am.Rep. 543. It might, had the plaintiff so elected, have been brought upon the new promise. It would be more accurate and consistent with the provisions of section 481 of the Code of Civil Procedure and the other sections regulating the pleadings in an action to allege the new promise as the real foundation of the action. The note was a debt provable in the bankruptcy proceedings. The legal obligation which it created or evidenced was, by virtue of the confirmation of the composition offer and the discharge in the proceedings, discharged by force of the statute, and the remedy of plaintiff existing at the time the discharge was granted to recover her debt by action barred. The right of action is given by a new and efficacious promise. The practice of bringing the action upon the original demand is, however, sanctioned by usage. The discharge in bankruptcy is, under such practice, regarded as a discharge of the debt sub modo only, and the new promise as a waiver of the bar to the recovery of the debt created by the discharge. The new promise with such other facts as are essential to constitute it a valid cause of action may, however, be alleged. See *Wolffe v. Eberlein*, 74 Ala. 99, 49 Am.Rep. 809; *Taylor v. Hotchkiss*, 81 App.Div. 470, 80 N.Y.S. 1042, affirmed 179 N.Y. 546, 71 N.E. 1140; *Scheper v. Briggs*, 28 App.Div. 115, 50 N.Y.S. 869.

The appellants assert and argue that the letter of December 6, 1904, does not contain or constitute a promise or agreement to pay the sum unpaid. At its writing, a statute provided: "Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertak-

ing; * * * 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy. * * *” Personal Property Law (Laws 1897, c. 417) § 21.

The statute has remained in force. Personal property law (Consol. Laws, c. 41) § 31. The debtor does not promise to pay the debt discharged in bankruptcy, unless there is a distinct and unequivocal expression by him, by a writing of the prescribed form, of a clear intention to bind himself to its payment. The acknowledgment of the existence of the debt by the payment of a part of it or of interest upon it or by express written words is not sufficient. For the purpose of creating anew the liability, the law does not imply a promise. The promise need not be made to the creditor, but it must with certainty refer to the debt. No particular form of words need be used. The promise is constituted by words which, in their natural import, express the present intention to obligate or undertake to pay. The payment may, however, depend upon a contingency or condition. If so dependent, it must be proved that the contingency has happened or the condition has been performed. *Lawrence v. Harrington*, 122 N.Y. 408, 25 N.E. 406; *Nathan v. Leland*, 193 Mass. 576, 79 N.E. 793; *Elwell v. Cumner*, 136 Mass. 102; *Bigelow v. Norris*, 139 Mass. 12, 29 N.E. 61; *Kraus v. Torrey*, 146 Ala. 548, 40 So. 956; *Meech v. Lamon*, 103 Ind. 515, 3 N.E. 159, 53 Am.Rep. 540; *Scheper v. Briggs*, 28 App.Div. 115, 50 N.Y.S. 869. A promise made at any time after the adjudication, and, perhaps, after the filing of the petition, is actionable. *Zavelo v. Reeves*, 227 U.S. 625, 33 S.Ct. 365, 57 L.Ed. 676, Ann.Cas.1914D, 664; *Everett v. Judson*, 228 U.S. 474, 33 S.Ct. 568, 57 L.Ed. 927, 46 L.R.A.,N.S., 154.

The letter of the defendant's testator constituted a distinct and unqualified promise to pay the debt. In effect and in truth it said to the plaintiff, I will pay you every dollar remaining unpaid upon the note, with interest, and will so pay you as soon as I sell the mill. He stated positively that he then undertook and obligated himself to pay. The construction of the words used by the debtors and the conclusions stated in the judicial decisions above cited adequately support such decision.

The rule of law is well-nigh universal that such a promise made has an obligating and validating consideration in the moral obligation of the debtor to pay. The debt is not paid by the discharge in bankruptcy. It is due in conscience, although discharged in law, and this moral obligation, uniting with the subsequent promise to pay, creates a right of action. *Dusenbury v. Hoyt*, 53 N.Y. 521, 13 Am.Rep. 543. The appellant asserts that the rule does not obtain or have applicability where, as in the present case, there was a composition between the bankrupt and his creditors, assented to and accepted by the cred-

itors seeking to enforce the unpaid debt. The clear weight of judicial opinion and correct reasoning declare such assertion erroneous. In *Cohen v. Lachenmaier*, 147 Wis. 649, 133 N.W. 1099, the facts, in the particular under consideration, were as are the facts here. The trial court awarded judgment for the balance unpaid on the note. The Supreme Court of Wisconsin in affirming the judgment said:

"It is further contended that each promise, if made, is *nudum pactum*, because the plaintiff, as one of the creditors, joined with the majority of the creditors in number and amount in accepting the defendant's offer of a composition with the creditors in settlement of their claims. This claim is based upon the ground that a discharge in bankruptcy in a composition is not a discharge by operation of law but is one effected by the voluntary assent of the creditors. The adjudications are to the effect that a debt which has been extinguished by a voluntary agreement of the debtor and creditor will not support a new promise and that one discharged by operation of law will support one. The proceeding resulting in the discharge of a debtor from liability, based on a composition after bankruptcy proceedings are instituted, is not in its nature such a voluntary act of the creditor as is considered in law as being a voluntary assent of the creditor to the satisfaction of the debt."

In *Matter of Merriman's Estate*, 44 Conn. 587, Fed.Cas.No.9,479, the court stated the principal question as being "whether an express promise made by a bankrupt to a creditor to pay the amount of his debt is valid, such creditor having theretofore expressly assented to a composition made and confirmed under the seventeenth section of the amended Bankruptcy Act of June 22, 1874," and carried into effect and held that the promise was valid. It enunciated that an express promise to pay a debt, which had been theretofore discharged by operation of law, was valid. The adequate consideration was the moral obligation to keep the original promise; this rule does not apply to a composition *inter partes* which derives its validity merely from the will of the parties; and if a debt is legally discharged by the voluntary act of the party, there remains no obligation which can be deemed a consideration for a promise; a discharge by performance of the terms of a bankruptcy composition is a discharge by operation of law; the composition is as to the assenting creditor both a voluntary act and an act of the law, but its efficiency is derived from the compulsory power of the law. There are other decisions of like reasoning and effect. • • •

It is to be noted that the decisions thus cited sustain the proposition that a promise to pay a debt voluntarily discharged is not binding for want of a legal consideration, but do not hold that a discharge in bankruptcy through a composition is a voluntary release or extinguishment of the debt.

We do not find merit in the other grounds for reversal urged by the appellant.

The judgment should be affirmed, with costs.

Judgment affirmed.

NOTE

The rule in this case is approved whether the new promise is made after the discharge in bankruptcy is granted by the court, or theretofore but after the filing of the bankruptcy petition. See *Zavelo v. Reeves*, 227 U.S. 625, 33 S.Ct. 365, 57 L.Ed. 676 (1913); Restatement, Contracts, § 87. A new promise made by the debtor before the filing of the petition would be an enforceable promise; but it would also be included within the discharge thereafter granted.

If the debtor's new promise is conditional, it is not enforceable until the condition occurs. *Koletsky v. Resnik*, 104 Conn. 311, 132 A. 898 (1926), promise to pay as soon as the debtor got back into business. Restatement, Contracts, § 91.

Even though the debt that had been discharged in bankruptcy was a judgment debt, a new promise to pay it was held enforceable in *Wolffe v. Eberlein*, 74 Ala. 99 (1883).

WARREN v. WHITNEY.

Supreme Judicial Court of Maine, 1845. 24 Me. 561, 41 Am.Dec. 406.

SHEPLEY, J. It appears from the case stated, that the defendants were indebted to the plaintiff before Jan. 16, 1836, on a promissory note; and that on that day they made an assignment of their property for the benefit of their creditors. The assignment contained a release of all debts due from the defendants to their creditors. The plaintiff became a party to it, and thereby released his debt, and received a dividend upon it from the assignees. The defendants, by a contract in writing, made on March 14, 1836, promised to pay the plaintiff any balance of the debt, which might remain unpaid by the assignees. And they afterward paid a small amount of such balance. The plaintiff having voluntarily released his debt upon an agreement to receive his proportion of the property conveyed to the assignees, the transaction was equivalent to an accord and satisfaction. There was no longer a subsisting debt due from the defendants to the plaintiff; and no consideration for the new promise; unless a moral obligation to pay a debt, which has been discharged by payment of part only, can be considered sufficient.

This court had occasion to consider and to deny, that a moral obligation can constitute in all cases a legal consideration for a contract, and to lay down some rules respecting it, in the case of *Farnham v. O'Brien*, 22 Me. 475. It was there stated, that when a person had re-

ceived a benefit from, or occasioned a loss to another, and a statute or rule of public policy protected him from making compensation, the moral obligation to do it remained, and would constitute a legal consideration for a promise to do it. When a debt has been voluntarily discharged, a case is not presented within the rule. The case of *Willing v. Peters*, 12 Serg. & R. (Pa.) 177, would however authorize the plaintiff to recover in this case. The authority of that case must be considered as essentially impaired, if not wholly destroyed, by the case of *Snevily v. Reed*, 9 Watts (Pa.) 396. In the latter case, the plaintiff had discharged the defendant from custody under a ca. sa.; and thereby discharged the debt. The defendant subsequently promised to pay it; and the Court considered, that there was no legal consideration for the promise.

The case of *Stafford v. Bacon*, 1 Hill (N.Y.) 533, 37 Am.Dec. 366, decided, that a promise to pay a debt voluntarily discharged, was not binding for want of a legal consideration.

The counsel for the plaintiff insist upon a distinction, that when the release is made at the request and for the benefit of the debtor, the new promise is binding; and that when not so made, it is not. The case of *Valentine v. Foster*, 1 Metc. (Mass.) 520, 35 Am.Dec. 377, is referred to as establishing such a distinction. If the debt be released for the benefit of the debtor, it is not the less perfectly discharged. When a moral obligation has been properly held to constitute a legal consideration a plea of accord and satisfaction could not have been supported. The party must have pleaded a statute bar, or facts to bring the case within some rule of public policy forbidding a recovery, such as infancy or coverture. There is little similarity between such cases and a case, in which a party could have pleaded and have sustained his plea, that he had satisfied and paid the debt.

A nonsuit is to be entered.

STRAUS v. CUNNINGHAM.

Supreme Court of New York, Appellate Division, 1913.
159 App.Div. 718, 144 N.Y.S. 1014.

Action by Ferdinand Straus against James W. Cunningham. From an order denying plaintiff's motion for judgment on the pleadings and sustaining a demurrer to the complaint, plaintiff appeals. **Reversed.**

SCOTT, J. The question presented by this appeal is: When will a moral obligation survive the release of a debt by a composition agreement so as to furnish a sufficient consideration to support a subsequent promise to pay the debt?

The latest and most comprehensive decision upon this subject in this state is to be found in *Taylor v. Hotchkiss*, 81 App.Div. 470, 80 N.Y.S. 1042, affirmed 179 N.Y. 546, 71 N.E. 1140. In that case Mr. Justice Hiscock, writing for the Appellate Division, stated the general rule as follows:

"If plaintiff, under proceedings in bankruptcy or other involuntary form, had been compelled to accept the stock received by him in full legal settlement of an indebtedness which it did not in fact actually pay, a moral obligation upon the part of the debtor to pay the deficiency would have survived his discharge from his legal and enforceable obligations which would be a sufficient consideration for a subsequent promise to pay such balance. Upon the other hand * * * if plaintiff, without further agreement or provision by voluntary proceedings of compromise, had accepted the stock in question in full settlement and satisfaction of the indebtedness due to him, no moral obligation on the part of the debtor would have survived which would have furnished an adequate consideration for a subsequent promise to pay."

That these two propositions, so far as they go, accurately state the law upon the subject, seems to be conceded and, at all events, is well settled.

There is a third case, however, not precisely covered by either of the foregoing propositions, and that third case is illustrated by *Taylor v. Hotchkiss*. In that case the firm of H. L. Hotchkiss & Co., being financially embarrassed and unable to pay its debts, made a general assignment. It then sought an adjustment with its creditors and issued a circular letter to them suggesting that they should accept certain stocks and bonds at a valuation of 80 per cent of their par value, and should thereupon release the firm so that it might resume business on the Stock Exchange. This was accepted and a general release executed. In their circular letter Hotchkiss & Co. said:

"We propose to offer a moral obligation to take those securities back from our creditors at 80 at a date not later than April 1, 1895."

Then followed an explanation as to how the firm proposed to fulfill this moral obligation. Of course, this proposition was intended to, and doubtless did, have an influence in inducing the creditors to execute the composition agreement, although of itself it did not amount to a binding agreement to take the stock back. The court, however, found that after the execution of the release Hotchkiss renewed by independent agreements his obligation to retake the stock at 80. The question was whether a moral obligation arose out of the composition agreement sufficient to serve as a consideration for the new promise. The court held that it did, notwithstanding the composition and release were voluntary acts on the part of the creditors. The court was of the opinion that, even in case of a voluntary composition, the debtors may,

by their acts, expressly provide for that survival of the moral obligation to pay, in the future, in full the indebtedness compromised which would serve as a sufficient consideration for a new promise.

This seems to be a reasonable rule in view of the wide power which individuals have to contract as between themselves. Nor is it necessary that the reservation of this moral obligation be so closely interwoven with the composition agreement as it was in *Taylor v. Hotchkiss*. We see no reason why a debtor may not, at the time he accepts a voluntary extinguishment of his debts, expressly reserve a moral obligation to pay in full, if able, which will support a subsequent promise to pay.

The facts alleged in the complaint in the present case, which for the purpose of this appeal must be taken as true, are that in March, 1905, the firm of Ellingwood & Cunningham owed the plaintiff the sum of \$27,000; that said firm entered into a composition agreement with certain of their creditors wherein and whereby said creditors for certain consideration therein expressed agreed to release said firm and the members thereof from all their legal obligation to pay the debts and obligations due to said creditors; that plaintiff signed said agreement and became a party thereto. The complaint then proceeds as follows:

"IV. That prior to and simultaneously with the making of the said agreement, the defendant expressly reserved from the operation of the said agreement and release his moral obligation to pay the debt of the plaintiff, amounting, as aforesaid, to the sum of \$27,000 and interest, and duly acknowledged and recognized said moral obligation as then existing and continuing to exist thereafter.

"V. That thereafter and on or about the 19th day of April, 1905, the defendant recognizing his said moral obligation to pay to the plaintiff the said debt of \$27,000, and in consideration thereof, did then and there promise that he would pay to the plaintiff the said sum of \$27,000 with interest from April 19, 1905, as follows: \$8,000 on or about May 22, 1906, and the balance within a year thereafter, the said defendant, however, to be credited on account of said payment with all sums which the plaintiff might receive from the trustees or assignees under said composition agreement.

"VI. That thereafter, from time to time, the defendant made payments upon account of the said sum agreed to be paid by him, as aforesaid, in the amounts and at the times set forth in the annexed schedule, which is marked schedule 'A' and made part thereof as though the same were herein specifically set forth in full, and the plaintiff received various sums from the trustees or assignees under said composition agreement at the times and in the amounts set forth in said schedule 'A'."

It is also alleged that from time to time plaintiff sent to defendant statements of account which were received and accepted by defend-

ant. Attached to the complaint is a schedule showing the payment of several thousand dollars by defendant to plaintiff between June 1, 1905, and January 20, 1908.

Those allegations, as it seems to us, bring the present case fairly within the principle of *Taylor v. Hotchkiss*.

It was certainly competent for the defendant to reserve a moral obligation to pay his debt in full, if possible, and perhaps most honorable men would feel that such an obligation rested upon them. It may well be, although not so alleged, that the defendant's recognition and reservation of this moral obligation had weight with the creditors in consenting to compromise and release the debts.

The rule is we think satisfied by holding that, unless specially reserved, no moral obligation to pay the debts survives a voluntary composition and release, but that where at the time of the release the debtor expressly recognizes and reserves a moral obligation to pay notwithstanding the release, that express reservation keeps alive the obligation after release to the extent that it will furnish a sufficient consideration for a subsequent and quite distinct promise to pay. It is entirely optional with a debtor, under such circumstances, whether or not he will reserve a moral obligation, and if he elects to do so we can see no rule of law which is violated by holding that that reservation will support a subsequent promise to pay.

The appellant devotes no small space in his brief to demonstrating that it does not appear on the face of the complaint that the alleged reservation was a fraud upon other creditors. It is quite clear that it does not so appear, and the respondent expressly disclaims making any such contention, admitting in express terms, as is the undoubted fact, that on the face of the complaint no preference is shown to have been obtained by the plaintiff over any other creditor.

The order appealed from must therefore be reversed, with \$10 costs and disbursements, and plaintiffs' motion for judgment on the pleadings granted, with \$10 costs, with leave to the defendant to withdraw his demurrer and answer over within 20 days upon payment of all costs of the action.

NOTE

If in making a composition with creditors the debtor makes a part payment and promises to pay the balance when able, that promise is enforceable. In exchange for that promise the debtor bargains for and receives an extension of time for payment. Such a promise made to one creditor, without the knowledge of the other creditors taking part in the composition, is regarded as fraudulent and gives them power to avoid the composition.

The creditor in the present case bargained for no more than the debtor's "moral obligation" to pay the balance when able; that is, for the debtor's promise to pay, with the understanding that it should not be a legally en-

forceable promise. The question now is whether the original debt and the "moral obligation" so reserved constitute a sufficient cause for the legal enforcement of an express promise subsequently made and not accompanied by an understanding that it should not be legally enforceable.

Whether the reservation of the "moral obligation"—the making of the unenforceable promise—without the knowledge of the other creditors should be regarded as fraudulent is another question.

BENTLEY v. MORSE.

Supreme Court of New York, 1817. 14 Johns. 468.

In error, on certiorari to a justice's court.

The plaintiff in error had an account, for work, against the defendant in error, which the latter paid, and took the receipt of the plaintiff in error for \$24.90. In November, 1815, the plaintiff in error brought an action against the defendant in error, on his account, and recovered judgment. It did not appear that any defence was made. In December, in the same year, the parties happening to be together, the defendant in error observed to the plaintiff in error, that he had paid him a sum of money, and held his receipt for it (alluding to the receipt above mentioned), and had been since compelled to pay him a second time; the plaintiff in error denied any knowledge of the payment or of giving a receipt, but promised, that if the defendant in error had such receipt, he would repay him the amount of it. The present action was founded on that promise; and the defendant in error, who was plaintiff in the court below, at the trial, produced the receipt in evidence. The defendant below offered the record of the former judgment in evidence, as a bar to the action, but it was overruled, and a verdict and judgment were rendered for the defendant in error.

PER CURIAM. In consequence of the omission of the defendant in error, to make a defence in the former action against him, and to produce his receipt to show the payment of the debt, he was forever barred from maintaining an action to recover back the money he had paid; and the question now is, whether the promise to repay the amount of the money expressed in the receipt is valid in law.

The debt having been paid, the recovery in the former action was clearly unjust; and though, in consequence of his neglect, the defendant in error lost all legal remedy to recover back his money; yet there was such a moral obligation, on the part of the plaintiff in error to refund the money, as would be a good consideration to support an assumpsit or express promise to pay it. The moral obligation is as strong as any in the cases in which it has been held sufficient to revive a debt barred by statute or some positive rule of law. It is like the promise

of an infant to pay a debt contracted during his non-age, or of an insolvent or bankrupt to pay a debt from which he is discharged by his certificate.

Judgment affirmed.

WEBB v. McGOWIN et al.

Court of Appeals of Alabama, 1935. 27 Ala.App. 82, 168 So. 196.

Action by Joe Webb against N. Floyd McGowin and Joseph F. McGowin, as executors of the estate of J. Greeley McGowin, deceased. From a judgment of nonsuit, plaintiff appeals.

Reversed and remanded.

BRICKEN, Presiding Judge. This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

"On the 3d day of August, 1925, appellant while in the employ of the W. T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for appellant to fall with it to the ground below. Appellant did this, and by

holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of \$15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts." * * *

1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his life, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. *Pittsburg Vitrified Paving & Building Brick Co. v. Cerebus Oil Co.*, 79 Kan. 603, 100 P. 631; *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441, 26 L.R.A., N.S., 534; *Drake v. Bell*, 26 Misc. 237, 55 N.Y.S. 945.

In *Boothe v. Fitzpatrick*, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor. *Lycoming County v. Union County*, 15 Pa. 166, 53 Am.Dec. 575, 579, 580; *Ferguson v. Harris*, 39 S.C. 323, 17 S.E. 782, 39 Am.St.Rep. 731, 734; *Muir v. Kane*, 55 Wash. 131, 104 P. 153, 26 L.R.A.,N.S., 519, 19 Ann.Cas. 1180; *State ex rel. Bayer v. Funk*, 105 Or. 134, 199 P. 592, 209 P. 113, 25 A.L.R. 625, 634; *Hawkes v. Saunders*, 1 Cowp. 290; *In re Sutch's Estate*, 201 Pa. 305, 50 A. 943; *Edson v. Poppe*, 24 S.D. 466, 124 N.W. 441, 26 L.R.A.,N.S., 534; *Park Falls State Bank v. Fordyce*, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339; *Baker v. Gregory*, 28 Ala. 544, 65 Am.Dec. 366. In the case of *State ex rel. Bayer v. Funk*, supra, the court held that a moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for which he subsequently expressly promised to pay.

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. *Park Falls State Bank v. Fordyce*, supra. Here the promisor received a material benefit constituting a valid consideration for his promise.

3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made. *McMorris v. Herndon*, 2 Bailey (S.C.) 56, 21 Am.Dec. 515; *Chadwick v. Knox*, 31 N.H. 226, 64 Am.Dec. 329; *Kenan v. Holloway*, 16 Ala. 53, 50 Am.Dec. 162; *Ross v. Pearson*, 21 Ala. 473.

Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request.

4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. *Fisher v. Bartlett*, 8 Greenl. (Me.) 122, 22 Am.Dec. 225; *State ex rel. Bayer v. Funk*, supra.

5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary. * * *

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say, in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

SAMFORD, Judge (concurring). The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in *Hoffman v. Porter*, Fed.Cas.No.6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice,

where it is at most doubtful," I concur in the conclusions reached by the court.

The Supreme Court of Alabama affirmed the above decision. See 232 Ala. 374, 168 So. 199. The court said: "The opinion of the Court of Appeals here under consideration recognizes and applies the distinction between a supposed moral obligation of the promisor, based upon some refined sense of ethical duty, without material benefit to him, and one in which such a benefit did in fact occur. We agree with that court that if the benefit be material and substantial, and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered."

NOTE

A doctrine of the Roman Law, commonly referred to by the phrase *negotiorum gestio*, provided that one who under justifying circumstances preserves the property of another in the latter's absence is entitled to reasonable compensation for the service. It was not necessary that the latter should subsequently make any promise. This doctrine has received a substantial amount of recognition in the United States. See Restatement, Restitution, §§ 112, 116, 117. The obligation to pay is described as a quasi-contractual debt. Such a debt, as in the case of other legally enforceable debts, is a sufficient cause for the enforcement of an express promise to pay it. This doctrine might well be extended to such a case as *Webb v. McGowin*, although it was the life of the promisor that was preserved instead of his property. If so extended, the court's decision need not be rested on a rule as to moral obligation, unless it be said that the quasi-contractual debt itself rests on moral obligation.

MILLS v. WYMAN.

Supreme Judicial Court of Massachusetts, 1825. 3 Pick. 207.

This was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being

suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe, J., before whom the cause was tried in the court of common pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

PARKER, C. J. General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in *foro conscientiæ* to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preëxisting obligation which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preëxisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a *quid pro quo*; and according to the principles of natural justice the party receiving ought

to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience. If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps, wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor discharged by the statute of limitations or

bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessities, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he incurs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & P. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of

sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the court of common pleas was right, and that judgment be entered thereon for costs for the defendant.

NOTE

Lord Mansfield laid it down as a general rule that a moral obligation is a sufficient consideration for a subsequent express promise. In *Hawkes v. Saunders*, Cowper, 289 (1782), he said: "Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."

In a few states, including Georgia, Illinois, Maryland, New York, Pennsylvania, Washington, and Wisconsin, the same rule has been expressed either by statute or by the courts. It is not certain, however, that the courts of these states will enforce more promises on the ground that they are supported by a pre-existing moral obligation than will the courts of other states. In most of the states the existence of such a general rule is denied; but in all of them there are several kinds of "past consideration" that are held to be sufficient cause for enforcement of a subsequent promise for the reason that they clearly involve a moral obligation to do what the party afterwards promises to do. The trouble with Lord Mansfield's general rule is its uncertainty of application. Restatement, Contracts, recognizes no such rule; indeed, it contains no section that would include such cases as *Bentley v. Morse*, *Straus v. Cunningham*, and *Webb v. McGowin*. In no state does a bare promise, without consideration, "past" or present, create such moral obligation as will support a subsequently made promise. A promissory note, executed as a gift, is not enforceable by the promisee; nor is a second note subsequently executed in renewal thereof.

Austin, *Jurisprudence*, 224 (3d Ed.) says: "By the English law, a promise to give something or to do something for the benefit of another is not binding without a consideration, that is, a motive assigned for the promise, which motive must be of a particular kind. Lord Mansfield, however, overruled the distinct provisions of the law by ruling that moral obligation was a sufficient consideration. Now moral obligation is an obligation imposed by opinion, or an obligation imposed by God; that is, moral obligation is anything which we choose to call so, for the precepts of positive morality are infinitely varying, and the will of God, whether indicated by utility or by a moral sense, is equally matter of dispute. This decision of Lord Mansfield, which assumes that the judge is to enforce morality, enables the judge to enforce just whatever he pleases." But "the law"

that the judge enforces is less uncertain only in degree. It is based on mores and business practices; these are never wholly uniform, and slowly change with time.

SECTION 2.—RELIANCE ON A PROMISE AS CAUSE FOR ENFORCEMENT

INTRODUCTORY NOTE

At this point read again the early cases printed in the Chapter on Consideration, Section 1, especially the Anonymous Case (1520) and *Wheatley v. Low*, Cro.Jac. 668 (1623). Also, Ames, "History of Assumpsit," 2 Harv.L.Rev. 1 (1888). Long before *Wheatley v. Low*, an action on the case had been maintained against bailees, surgeons, smiths, and others who had assumed (assumpsit) to render services, for harm suffered by the plaintiff by reason of the defendant's unskillful performance. Since these were practically always cases of misfeasance, not mere nonfeasance, they have in recent times been classified as being cases in "tort" rather than in "contract." At the time, however, there was as yet no general theory of contract; and the only boundary lines were those between the forms of action. It is clear that the remedy in these cases was based on the harm suffered by reason of reliance on the defendant's undertaking and that there was no thought of a "consideration" as a bargained-for subject of exchange.

The cases included in the present section are selected to show the development, down to date, of the idea that a promise may become enforceable by reason of subsequent action or forbearance in reasonable reliance thereon, even though such action or forbearance may not have been bargained for by the promisor as the consideration for his promise or the equivalent of the performance that he promises to render.

In the early cases in which Assumpsit was maintained, the damages awarded were measured by the extent of the harm suffered by the plaintiff. But just as in the case of our so-called rules of substantive law, there has been a continuous evolutionary development in our remedial law and procedure. In the action of Debt, the principal emphasis was put upon the *quid pro quo* received by the defendant, the amount of the recovery being measured by its value rather than by any harm suffered by the plaintiff. When, for various practical reasons, Assumpsit came to be used instead of Debt, in such case being described as *Indebitatus Assumpsit*, the recovery was measured in

many sorts of cases by the value received by the defendant. As commerce expanded and bargaining transactions increased, Assumpsit was the form generally used for enforcement of the special promises made therein. For breach of such a promise, the damages awarded came to be measured by the value of the performance that was promised, not by the value of what the defendant had received or by the harm that the plaintiff had suffered in reliance or by the amount of the consideration that he had given. In his "History of Assumpsit," 2 Harv.L. Rev. 1, 15, Ames dismisses this shift in the measure of recovery by saying: "Damages were soon assessed, not upon the theory of reimbursement for the loss of the thing given for the promise, but upon the principle of compensation for the failure to obtain the thing promised."

There was nothing sudden or revolutionary in this remedial shift; the process was slow and to a great extent subconscious. Indeed, there was no shift in the sense of a total substitution; there was an expansion of remedial justice, making available a greater variety of remedies. In the modern Civil Action, known to Code Procedure, we have available all the remedies that were created by the courts of the past. When the facts justify, the court can recognize and enforce payment of a debt, promissory or non-promissory; it can give a restitutionary remedy measured, as in the old *Indebitatus Assumpsit*, by the value of what the defendant received; it can decree that the defendant render specifically the performance that he promised, as did the court of Chancery; it can assuage the plaintiff's disappointment by awarding the value of the performance that was promised him; and lastly, it is possible to restore the plaintiff's former position by money damages measured not by the amount of his expected gain but by the amount of his harm suffered, his losses and his expenditures in reliance on the promise that have been caused to be futile by its breach.

In view of the recent development of the idea that a promise should become enforceable by reason of action or forbearance in reliance upon it, even though nothing was given in exchange for it—an idea crystallized to some degree in Restatement, Contracts, § 90—we may reasonably expect a greater use of the last form of remedy described above. It may often seem more just to award to the plaintiff the amount of his actual loss, suffered by his change of position in reliance on the promise, than to award him the full value of the performance that was promised without an agreed consideration. This phase of remedial law, to accompany the rule in Restatement, § 90, appears not to have been considered in the recent cases.

ROBINSON v. THREADGILL, 35 N.C. (13 Iredell) 39 (1851). The plaintiff put two notes in the hands of the defendant, who promised gratuitously to collect them. Action was held to lie for the defendant's

failure to use diligence to collect. The court said: "In the case of a bailment, the bare being trusted with another's goods is a sufficient consideration, if the bailee once enters upon the trust and takes the goods into his possession. * * * Here the defendant undertook a duty for the plaintiff, that of collecting or returning certain notes. If nothing more had taken place between the parties, the agreement would have been a nudum pactum, binding upon neither. But it did not; the plaintiff delivered to the defendant, and he took into his possession the notes."

In a case like this, the measure of the plaintiff's recovery is the amount that could have been collected by diligent action, the value of the notes delivered into the defendant's hands. It is not the market value of the promised service as a collecting agent.

ALLIANCE BANK v. BROOM.

In the Court of Chancery, 1864. 2 Drew. & S. 289.

This case came on upon a demurrer.

It appeared, from the bill, that in June, 1864, the Alliance Bank opened a loan account with the defendants, who are merchants at Liverpool, and that such loan account was continued down to September 19th, 1864, when there was a balance due from the defendants to the bank on such loan account to the amount of £22,205 15s. 1d.

On September 19th, 1864, the plaintiffs requested the defendants, Messrs. Broom, to give them some security for the amount so due, and the defendants, who stated that they were entitled to certain goods, wrote to the manager of the bank the following letter:

"Liverpool, September 19th, 1864.

"Dear Sir: We hand you the following particulars of produce, which we propose to hypothecate against our loan account, and at the same time undertake to pay the proceeds as we receive them, to the credit of the said account."

The letter then contained a list of goods and their values, and was signed by Messrs. Broom.

In pursuance of this letter the plaintiffs, on September 20th, 1864, applied to the defendants for the warrants for delivery of the goods mentioned in the letter, and the defendants promised to deliver the warrants to the plaintiffs as soon as they could obtain them from the warehouses.

The bill stated that the defendants refused to deliver the warrants, or other documents relating to the goods, to the plaintiffs, and threatened and intended to deliver them to other persons; and the bill charg-

ed that the plaintiffs were entitled to a lien or charge upon the goods mentioned in the letter by virtue of the agreement, and prayed for a declaration to that effect. The bill also prayed that the defendants might be ordered to deliver to the plaintiffs the warrants and other documents relating to the title of said goods, and cause the said goods to be delivered to the plaintiffs, by way of security for the amount due to them on the loan account. The bill also prayed an injunction to restrain the defendants from dealing with the warrants or goods in the mean time.

To this bill the defendants filed a demurrer, on the ground that the agreement contained in the letter was without consideration; and therefore one which the Court would not enforce.

The VICE-CHANCELLOR: The defendant demurs to the plaintiff's bill in this case, on the ground that the promise to give security, which the plaintiff seeks to enforce, was without any consideration—that it is, in fact, a nudum pactum, which the Court will not enforce; and in support of this proposition it is argued that the plaintiffs, so far from giving any consideration for the promise, could at any time have brought an action for the payment of the debt; and that they could have done so is perfectly true.

Now, according to the facts stated in the bill, a demand was made by the creditor for security; and upon that demand a promise and agreement was made by the debtor that he would give such security; and that, although it might take some time to get the warrants, he would hand them over to the creditor when he obtained them.

It appears to me, that when the plaintiffs demanded payment of their debt, and, in consequence of that application, the defendant agreed to give certain security, although there was no promise on the part of the plaintiffs to abstain for any certain time from suing for the debt, the effect was, that the plaintiffs did, in effect, give, and the defendant received, the benefit of some degree of forbearance; not, indeed, for any definite time, but, at all events, some extent of forbearance. If, on the application for security being made, the defendant had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it. It is very true that, at any time after the promise, the creditor might have insisted on payment of his debt, and have brought an action; but the circumstances necessarily involve the benefit to the debtor of a certain amount of forbearance, which he would not have derived if he had not made the agreement.

On this ground the demurrer must be overruled.

QUESTIONS:

1. Was not the defendant's *debt* itself a sufficient "consideration," as in *Janson v. Colomore*, ante, p. 342?
2. Was the creditor's forbearance to take steps for collection bargained for by the debtor in exchange for his promise to give security?
3. Suppose that when Broom was being pressed, his friend Smith had written to the bank promising to deliver as security for Broom's debt some warehouse receipts for goods belonging to Smith. Would the promise have been enforceable?

DEVECMON v. SHAW.

Court of Appeals of Maryland, 1888. 69 Md. 199, 14 A. 464, 9 Am.St.Rep. 422.

BRYAN, J. John Semmes Devecmon brought suit against the executors of John S. Combs, deceased. He declared on the common counts, and also filed a bill of particulars. After judgment by default, a jury was sworn to assess the damages sustained by the plaintiff. The evidence consisted of certain accounts taken from the books of the deceased, and testimony that the plaintiff was a nephew of the deceased, and lived for several years in his family, and was in his service as clerk for several years. The plaintiff then made an offer of testimony which is thus stated in the bill of exceptions: "That the plaintiff took a trip to Europe in 1878, and that said trip was taken by said plaintiff, and the money spent on said trip was spent by the said plaintiff, at the instance and request of said Combs, and upon a promise from him that he would reimburse and repay to the plaintiff all money expended by him in said trip; and that the trip was so taken, and the money so expended, by the said plaintiff, but that the said trip had no connection with the business of said Combs; and that said Combs spoke to the witness of his conduct, in being thus willing to pay his nephew's expenses, as liberal and generous on his part." On objection the court refused to permit the evidence to be given, and the plaintiff excepted.

It might very well be, and probably was the case, that the plaintiff would not have taken a trip to Europe at his own expense. But, whether this be so or not, the testimony would have tended to show that the plaintiff incurred expense at the instance and request of the deceased, and upon an express promise by him that he would repay the money spent. It was a burden incurred at the request of the other party, and was certainly a sufficient consideration for a promise to pay. Great injury might be done by inducing persons to make expenditures beyond their means, on express promise of repayment, if the law were otherwise. It is an entirely different case from a promise to make another a present, or render him a gratuitous service. It is nothing to the purpose that the plaintiff was benefited by the expenditure of his own mon-

ey. He was induced by this promise to spend it in this way, instead of some other mode. If it is not fulfilled, the expenditure will have been procured by a false pretense.

As the plaintiff, on the theory of this evidence, had fulfilled his part of the contract, and nothing remained to be done but the payment of the money by the defendant, there could be a recovery in indebitatus assumpsit, and it was not necessary to declare on the special contract. The fifth count in the declaration is for "money paid by the plaintiff for the defendants' testator in his life-time, at his request." In the bill of particulars we find this item: "To cash contributed by me, J. Semmes Devecmon, out of my own money, to defray my expenses to Europe and return, the said John S. Combs, now deceased, having promised me in 1878 'that, if I would contribute part of my own money towards the trip, he would give me a part of his, and would make up to me my part,' and the amount below named is my contribution, as follows," etc. It seems to us that this statement is a sufficient description of a cause of action covered by the general terms of the fifth count. The evidence ought to have been admitted. * * *

Judgment reversed, and new trial ordered.

QUESTIONS:

Should this transaction be interpreted as a Bargain, the plaintiff's trip and expenditure being bargained for and given in exchange for the uncle's promise, or a promise of a gift on condition that the trip be taken, or a promise of a gift in reliance on which the promisee took substantial and foreseeable action?

NOTE

There are many cases similar to this one in which the court has enforced a promise made to induce, or to enable, the plaintiff to take certain action that he might not otherwise take—action that is partly or wholly beneficial to the plaintiff (donee) and is for that reason desired or suggested by the promisor, although it is of no pecuniary or material benefit to him. Consider the following cases: *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898), promissory note for \$2,000 given to the maker's granddaughter, to induce her to give up working as a bookkeeper; *Shadwell v. Shadwell*, 30 L.J.C.P. 145 (1860), promise of an annuity by an uncle to his nephew to assist the latter to marry and to begin practice as a barrister; *Young v. Boyd*, 107 Md. 449, 69 A. 33 (1908), plaintiff attended a school "at the instance of the defendant and upon a promise by the defendant" to pay expenses; *Bigelow v. Bigelow*, 95 Me. 17, 49 A. 49 (1901), uncle promised nephew a farm if he would give up his work and move to the farm; *Davies v. Rhondda Dist. Urban Council*, 87 L.J.K.B. 166 (1917), enforcing a resolution of the Council that all teachers enlisting in the war should be paid their salaries.

When a promise is made subject to an express condition the fulfilment of which requires action or forbearance by the promisee that is of material benefit to the promisor, there is more reason for inferring that the promisor is bargaining for that action or forbearance and for holding that it is given as a "consideration" for the promise.

A promise by the owner of land to make a conveyance of it as a gift has very often been specifically enforced in favor of the promisee who has gone into possession and made valuable improvements in reliance on the promise. Such cases are *Messiah Home for Children in City of New York v. Rogers*, 212 N.Y. 315, 106 N.E. 59 (1914); *Freeman v. Freeman*, 43 N.Y. 34, 3 Am.Rep. 657 (1870); *Seavey v. Drake*, 62 N.H. 393 (1882); *Neale v. Neales*, 76 U.S. (9 Wall.) 1, 19 L.Ed. 590 (1869). In some cases such enforcement has been granted because the promisee has taken other kinds of substantial and irrevocable action in reliance.

Observe that in *Devecmon v. Shaw*, the amount that the uncle promised to pay was exactly the same as the amount spent by the promisee in reliance on the promise. Also, that the action brought by the promisee was a common law action, using the "common counts" in *Assumpsit*. In some of the cases cited in this Note there was not the same equivalence between the action in reliance and the performance promised; yet the remedy given was either the enforcement in equity of that specific performance or a common law judgment for its full value as damages for breach.

KIRKSEY v. KIRKSEY.

Supreme Court of Alabama, 1845. 8 Ala. 131.

Assumpsit by the defendant, against the plaintiff in error.

The plaintiff was the wife of defendant's brother, but had for some time been a widow, and had several children. In 1840, the plaintiff resided on public land, under a contract of lease, she had held over, and was comfortably settled, and would have attempted to secure the land she lived on. The defendant resided in Talladega county, some sixty or seventy miles off. On the 10th October, 1840, he wrote to her the following letter:

"Dear Sister Antillico,—Much to my mortification, I heard that brother Henry was dead, and one of his children. I know that your situation is one of grief and difficulty. You had a bad chance before, but a great deal worse now. I should like to come and see you, but cannot with convenience at present. * * * I do not know whether you have a preference on the place you live on or not. If you had, I would advise you to obtain your preference, and sell the land and quit the country, as I understand it is very unhealthy, and I know society is very bad. If you will come down and see me, I will let you have a place to raise your family, and I have more open land than I can tend;

and on the account of your situation, and that of your family, I feel like I want you and the children to do well."

Within a month or two after the receipt of this letter, the plaintiff abandoned her possession, without disposing of it, and removed with her family, to the residence of the defendant, who put her in comfortable houses, and gave her land to cultivate for two years, at the end of which time he notified her to remove, and put her in a house, not comfortable, in the woods, which he afterwards required her to leave.

A verdict being found for the plaintiff, for \$200, the above facts were agreed, and if they will sustain the action, the judgment is to be affirmed, otherwise it is to be reversed.

ORMOND, J. The inclination of my mind is that the loss and inconvenience which the plaintiff sustained in breaking up and moving to the defendant's a distance of sixty miles is a sufficient consideration to support the promise to furnish her with a house and land to cultivate until she could raise her family. My brothers, however, think that the promise on the part of the defendant was a mere gratuity, and that an action will not lie for its breach.

The judgment of the court below must therefore be reversed, pursuant to the agreement of the parties.

QUESTIONS:

1. Did the defendant make an offer to the plaintiff and receive a consideration for his promise?
2. Is the rule in Restatement, Contracts, § 90, reasonably applicable in this case?
3. Is it material to know the relative values of the plaintiff's action in reliance and the performance promised by the defendant?

NOTE

In *Richards' Ex'r v. Richards*, 46 Pa. 78, 82 (1863), Lowrie, C. J., said: "No doubt there is evidence that the testator said he would pay that balance, and that he drew up notes that would have held him to it, if they had been passed as at first intended; but they were given up and destroyed, and therefore go for nothing, and the securities actually given do not hold him. We have nothing, therefore, but his advice to the plaintiff to buy the farm, and not move to the West, accompanied with an assurance that he would furnish him with the balance of the purchase-money. But this does not make a legal contract. Assurances of assistance accompanying kind advice are never intended as contracts. And conformance to advice is never intended to stand as a legal consideration for the kind assurances that accompany the advice, though it is a motive for their fulfillment. It would be exceedingly hurtful to the freedom of social intercourse to create even a suspicion in the public mind, that those kind

offers of advice and assistance, which take place among friends and kindred, could be converted into contracts which the law would enforce."

In *Boord v. Boord*, Pelham, So.Aust. 58 (1866), the defendant wrote to his brother in England, promising him a present of £500 on his arrival in Australia. The brother went to Australia, relying on the promise; but the court denied enforcement.

MARTIN et al. v. MELES et al.

Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 114, 60 N.E. 397.

HOLMES, C. J. This is an action to recover the contribution promised by the following paper, which was signed by the defendants and others:—"January 21, 1896. We, the undersigned manufacturers of leather, promise to contribute the sum of five hundred (500) dollars each, and such additional sums as a committee appointed by the Massachusetts Morocco Manufacturers Association may require; in no case shall the Committee demand from any manufacturer or firm a total of subscriptions to exceed the sum of two thousand (2,000) dollars, such sum to be employed for legal and other expenses, under the direction of the Committee, in defending and protecting our interests against any demands or suits growing out of Letters Patent for Chrome Tanning, and in case of suit against any of us, the Committee shall take charge thereof and apply as much of the fund as may be needed to the expense of the same."

The plaintiffs are the committee referred to in the agreement, and subscribers to it. They were appointed and did some work before the date of the agreement, and then prepared the agreement which was signed by nine members of the association mentioned, and by the defendants who were not members. They went on with their work, undertook the defence of suits, and levied assessments which were paid, the defendants having paid \$750. In November, 1896, the defendants' firm was dissolved, and two members of it, Meles and Auerbach, ceased tanning leather. The defendants notified the plaintiffs of the dissolution, and on June 23, 1897, upon demand for the rest of their subscription refused to pay the same. The main questions insisted upon, raised by demurrer and by various exceptions, are whether the defendants' promise is to be regarded as entire and as supported by a sufficient consideration.

It will be observed that this is not a subscription to a charity. It is a business agreement for purposes in which the parties had a common interest, and in which the defendants still had an interest after going out of business, as they still were liable to be sued. It contemplates the undertaking of active and more or less arduous duties by the committee, and the making of expenditures and incurring of liabilities on

the faith of it. The committee by signing the agreement promised by implication not only to accept the subscribers' money but to perform those duties. It is a mistaken construction to say that their promise, or indeed their obligation, arose only as the promise of the subscribers was performed by payments of money.

If then the committee's promise should be regarded as the consideration, as in *Institute v. French*, 16 Gray, 196, 201 (see *Institute v. Haskell*, 71 Me. 487), its sufficiency hardly would be open to the objection which has been urged against the doctrine of that case, that the promise of trustees to apply the funds received for mere benevolence to the purposes of the trust imposes no new burden upon them. *Johnson v. University*, 41 Ohio St. 527, 531. See *Presbyterian Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am.St.Rep. 767. Neither would it raise the question whether the promise to receive a gift was a consideration for a promise to make one. The most serious doubt is whether the promise of the committee purports to be the consideration for the subscriptions by a true interpretation of the contract.

In the later Massachusetts cases more weight has been laid on the incurring of other liabilities and making expenditures on the faith of the defendant's promise than on the counter-promise of the plaintiff. *Cottage St. Church v. Kendall*, 121 Mass. 528, 23 Am.Rep. 286; *Sherwin v. Fletcher*, 168 Mass. 413, 47 N.E. 197. Of course the mere fact that a promisee relies upon a promise made without other consideration does not impart validity to what before was void. *Bragg v. Danielson*, 141 Mass. 195, 196, 4 N.E. 622. There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise. There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support, and such agreements have been so interpreted. *Sherwin v. Fletcher*, *ubi supra*.

What we have said justifies, in our opinion, the finding of a consideration either in the promise or in the subsequent acts of the committee, and it may be questioned whether a nicer interpretation of the contract for the purpose of deciding which of the two was the true one is necessary. It is true that it is urged that the acts of the committee would have been done whether the defendants had promised or not, and therefore lose their competence as consideration because they cannot be said to have been done in reliance upon the promise. But that is a speculation upon which courts do not enter. When an act

has been done, to the knowledge of another party, which purports expressly to invite certain conduct on his part, and that conduct on his part follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct, whether in case of consideration,—*Williams v. Carwardine*, 4 Barn. & Adol. 621 (see *Institute v. Haskell*, 71 Me. 487),—or of fraud. *Windram v. French*, 151 Mass. 547, 553, 24 N.E. 914, 8 L. R.A. 750. In *Cottage St. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286, the form of the finding in terms excluded subsequent acts as consideration, and therefore it did not appear whether the facts were such that reliance upon the promise would be presumed. In *Academy v. Gilbert*, 2 Pick. 579, 13 Am.Dec. 457, the point was that merely signing a subscription paper without more did not invite expenditure on the faith of it. See *Academy v. Cowls*, 6 Pick. 427, 438, 17 Am.Dec. 387; *Ives v. Sterling*, 6 Metc. 310, 316. In this case the paper indisputably invited the committee to proceed.

A more serious difficulty if the acts are the consideration is that it seems to lead to the dilemma that either all acts to be done by the committee must be accomplished before the consideration is furnished, or else that the defendant's promise is to be taken distributively and divided up into distinct promises to pay successive sums as successive steps of the committee may make further payments necessary and may furnish consideration for requiring them. The last view is artificial and may be laid on one side. In the most noticeable cases where a man has been held entitled to stop before he has finished his payments, the ground has not been the divisibility of his undertaking but the absence of consideration, which required the court to leave things where it found them. In *re Hudson*, 54 Law J.Ch. 811; *Presbyterian Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am. St.Rep. 767. As against the former view, if necessary, we should assume that the first substantial act done by the committee was all that was required in the way of acts to found the defendants' obligation. See *Academy v. Cowles*, 6 Pick. 427, 438, 17 Am.Dec. 387. But if that were true, it would follow that as to the future conduct of the committee their promise not their performance was the consideration, and when we have got as far as that, it may be doubted whether it is not simpler and more reasonable to set the defendants' promise against the plaintiffs' promise alone. We are inclined to this view, but do not deem a more definite decision necessary, as we are clearly of opinion that, one way or the other, the defendants must pay.

What has been said pretty nearly disposes of a subordinate point raised by the defendants. It is argued that, by notice pending performance that they would not go on with the contract, the defendants, even if they incurred a liability to damages, put an end to the right of the plaintiffs to go on and to recover further assessments, as in the

case where an order for work is countermanded at the moment when performance is about to begin under the contract,—*Davis v. Bronson*, 2 N.D. 300, 50 N.W. 836, 16 L.R.A. 655, 33 Am.St.Rep. 783,—or when at a later moment the plaintiff was directed to stop. *Clark v. Marsiglia*, 1 Denio (N.Y.) 317, 43 Am.Dec. 670, followed by many later cases in this country. See *Collins v. Delaporte*, 115 Mass. 159, 162. We assume that these decisions are right in cases where the continuance of work by the plaintiff would be merely a useless enhancement of damages. But we are of opinion that they do not apply. In the first place, it does not appear that such a notice was given. The first definite notice and the first breach was a refusal to pay on demand. At that time the liability was fixed, and the damages were the sum demanded.

In the next place if a definite notice had been given by the defendants in advance that they would not pay, whatever rights it might have given the plaintiffs at their election (*Ballou v. Billings*, 136 Mass. 307), it would not have been a breach of the contract (*Daniels v. Newton*, 114 Mass. 530, 19 Am.Rep. 384), and it would not have ended the right of the plaintiffs to go on under the contract in a case like the present, where there was a common interest in the performance, and where what had been done and what remained to do probably were to a large extent interdependent (*Davis v. Campbell*, 93 Iowa 524, 61 N.W. 1053; *Gibbons v. Bente*, 51 Minn. 499, 53 N.W. 756, 22 L.R.A. 80; *Cravens v. Mills Co.*, 120 Ind. 6, 21 N.E. 981, 16 Am.St.Rep. 298). See *Frost v. Knight*, L.R. 7 Exch. 111, 112; *Johnstone v. Milling*, 16 Q.B.Div. 460, 470, 473; *Dalrymple v. Scott*, 19 Ont.App. 477; *John A. Roebling's Sons' Co. v. Lock-Stitch Fence Co.*, 130 Ill. 660, 22 N.E. 518; *Davis v. Bronson*, 2 N.D. 300, 303, 50 N.W. 836, 16 L.R.A. 655, 33 Am.St.Rep. 783.

Before leaving the case it is interesting to remark that the notion rightly exploded in *Cottage St. Church v. Kendall*, 121 Mass. 528, 530, 531, 23 Am.Rep. 286, that the subscription of others than the plaintiff may be a consideration, seems to have remained unquestioned with regard to agreements of creditors to accept a composition. Compare the remarks of Wells, J., in *Perkins v. Lockwood*, 100 Mass. 249, 250, 1 Am.Rep. 103 (*Farrington v. Hodgdon*, 119 Mass. 453, 457; *Trecy v. Jefts*, 149 Mass. 211, 212, 21 N.E. 360; *Emerson v. Gerber*, 178 Mass. 130, 59 N.E. 666), with what he says in *Music Hall Co. v. Carey*, 116 Mass. 471, 474.

It is not argued that whatever contract was made was not made with the plaintiffs. *Sherwin v. Fletcher*, 168 Mass. 413, 47 N.E. 197.

Demurrer overruled.

Exceptions overruled.

QUESTIONS:

1. If one or more members of the committee had resigned and stopped serving, would he have been guilty of a breach of contract?
2. Is it material that "this is not a subscription to a charity"?
3. Does Mr. Justice Holmes in this case support or contradict section 90 of the Restatement of the Institute?
4. Has the "notion" that Holmes says was "rightly exploded" been brought to life again in the Restatement, § 75(2)?
5. Was this transaction a Bargain between the members of the committee and each subscriber, and were the members entitled to keep any of the money as compensation?
6. If "the first substantial act done by the committee" was enough to "found the defendants' obligation", is there any necessity of implying a promise on their part to carry on the service to the end? See Restatement, Contracts, § 45.

WISCONSIN & M. RY. CO. v. POWERS.

Supreme Court of the United States, 1903.
191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229.

Mr. Justice HOLMES delivered the opinion of the court.

This is an appeal from a decree of the United States circuit court, dismissing the plaintiff's bill on demurrer. The bill seeks to enjoin the auditor general of the state of Michigan from collecting a tax, on the ground that the law imposing the tax is contrary to the Constitution of the United States as impairing the obligation of contracts, and interfering with interstate commerce.

The alleged contract is contained in a law of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal \$4,000 per mile, except," etc. Afterwards, on October 23, 1893, the Menominee & Northern Railroad Company was incorporated under the laws of the state, and forthwith conveyed all its property, rights, and franchises to the plaintiff, a Wisconsin corporation which is assumed to stand in the shoes of the Michigan company. The plaintiff thereupon constructed the road. This road is north of parallel forty-four, its gross earnings never have been equal to \$4,000 per mile, and it would be entitled to the exemptions just stated if the law of 1893 still were in force. But on June 4, 1897, the state passed a law amending the act of 1893, and levying a "specific tax upon the property and business of [every] railroad corporation

operated within the state," and enacted that "when the railroad lies partly within and partly without this state, *prima facie*, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried." This is the law which the plaintiff says is unconstitutional for the reasons above set forth.

The demurrer to the bill was sustained on the ground that the act of 1893 made no valid contract of exemption from taxation, and that the act of 1897, repealing the exemption granted in 1893, was a constitutional law. * * *

The first and main question, then, is whether the act of 1893 purported to make an irrevocable contract with such railroad as might thereafter comply with its terms. The question is pretty well answered by a series of decisions in this court. A distinction between an exemption from taxation contained in a special charter, and general encouragement to all persons to engage in a certain class of enterprise, is pointed out in *East Saginaw Salt Mfg. Co. v. East Saginaw*, 13 Wall. 373, 20 L.Ed. 611; *Id.*, 19 Mich. 259, 2 Am.Rep. 82. In earlier and later cases it was mentioned that there was no counter-obligation, service, or detriment incurred, that properly could be regarded as a consideration for the supposed contract. *Christ Church v. Philadelphia County*, 24 How. 300, 16 L.Ed. 602; *Tucker v. Ferguson*, 22 Wall. 527, 22 L.Ed. 805; *Grand Lodge, F. & A. M. v. New Orleans*, 166 U. S. 143, 17 S.Ct. 523, 41 L.Ed. 951. See *Tomlinson v. Jessup*, 15 Wall. 454, 459, 21 L.Ed. 204. But whatever the ground, thus far attempts like the present to make a contract out of the clauses in a scheme of taxation which happen to benefit certain parties have failed. See further *Welch v. Cook*, 97 U.S. 541, 24 L.Ed. 1112, and *Manistee & N. E. R. Co. v. Commissioner of Railroads*, 118 Mich. 349, 76 N.W. 633, in which the state court deals with this very act.

It may be that a state, by sufficient words, might bind itself without consideration, as a private individual may bind himself by recognizance or by affixing a seal. A state might abolish the requirement of consideration altogether for simple contracts by private persons, and, it may be that it equally might dispense with the requirement for itself. But the presence or absence of consideration is an aid to construction in doubtful cases,—a circumstance to take into account in determining whether the state has purported to bind itself irrevocably or merely has used words of prophecy, encouragement, or bounty, holding out a hope but not amounting to a covenant.

In the case at bar, of course the building and operating of the railroad was a sufficient detriment or change of position to constitute a consideration if the other elements were present. But the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting. If we are to deal with this proviso in a general tax law as we should deal with an alleged simple contract, while, no doubt, in some cases between private persons the above distinctions have not been kept very sharply in mind (*Martin v. Meles*, 179 Mass. 114, 117, 60 N.E. 397), it is clear that we should require an adequate expression of an actual intent on the part of the state to set change of position against promise before we hold that it has parted with a great attribute of sovereignty beyond the right of change. See *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U.S. 665, 668, 6 S.Ct. 625, 29 L.Ed. 770. Looking at the case in this way, then, we find no such adequate expression. No doubt the state expected to encourage railroad building, and the railroad builders expected the encouragement; but the two things are not set against each other in terms of bargain. See *Covington v. Kentucky*, 173 U.S. 231, 238, 239, 19 S.Ct. 383, 43 L.Ed. 679.

But this is a somewhat narrow and technical mode of discussion for the decision of an alleged constitutional right. The broad ground in a case like this is that, in view of the subject-matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy, and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore, it makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on the faith of, a statute, merely because their interest was obvious and their action likely, on the face of the law.

Decree affirmed.

QUESTIONS:

1. If we assume that the legislature made a promise for the state instead of merely announcing an encouraging policy of taxation, would building a railroad in reliance on it consummate a contract?

2. Would the transaction then be a bargaining agreement between the parties, with offer and acceptance and consideration, or would it be a gratuitous promise, followed by substantial and foreseeable action in reliance?

NOTE

In his early lectures, *The Common Law*, p. 292, Justice Holmes had expressed the same idea as to "Consideration" for a promise that he expresses above. Judges and writers familiar with Holmes' work have been influenced by it to adopt similar definitions and forms of expression. At the same time, like Holmes himself, they often held promises to be enforceable by reason of reliance by the promisee, sometimes referring to the "estoppel theory of consideration." See Cardozo in *DeCicco v. Schweizer*, ante; and in *McGovern v. New York*, 234 N.Y. 377, 138 N.E. 26, 25 A.L.R. 1442 (1923), where he said "Nothing is consideration, it has been held, that is not regarded as such by both parties." This view has prevailed with the American Law Institute, leading to the limited definition in *Restatement, Contracts*, § 75, and to its being supplemented by the newly stated rules in section 90 and several other sections.

In one of its principal aspects, the case printed above might well have been included with the cases at the very beginning of this volume.

BRAWN et al. v. LYFORD.

Supreme Judicial Court of Maine, 1907. 103 Me. 362, 69 A. 544.

Action by Charles H. Brawn and others against John F. Lyford. Case reported. Judgment for defendant.

PEABODY, J. The defendant on the 31st day of August, 1901, conveyed to the plaintiffs his farm in St. Albans, in the county of Somerset and state of Maine, and assigned to them his interest in a policy of fire insurance to the extent of the buildings insured, reserving the insurance on the personal property covered by the policy.

The policy was to insure \$1,350 on the buildings, and \$450 on the personal property, for a term of three years, about half of which was unexpired. The premium was \$27.

The defendant did not deliver the deed when it was signed, but did so at his home later in the day when he received the purchase price.

After the deed and assignment were signed the attorney who prepared the instruments called attention to the necessity of having the consent of the insurance company to the assignment, and the evidence shows that after conversation on the subject the defendant promised to send the assigned policy as soon as the deed was delivered by mail to Parks Bros., agents, at Pittsfield, Me., to obtain the assent of the insurance company to the assignment; that he neglected to do this; and

that on the 7th day of September the buildings were struck by lightning and wholly destroyed by the resulting fire.

The plaintiffs seek their remedy by a special action of assumpsit to recover of the defendant the amount of the insurance on the buildings, \$1,350, with interest from September 7, 1901, for the alleged breach of a promise to send the policy to the agents of the company for assent necessary to the validity of the assignment.

The defendant pleads the general issue, with a brief statement denying the alleged consideration, and alleging that any promise to send the policy to the insurance agents was without consideration and void, and denying also that not sending the policy was the legal cause of the buildings being uninsured, for which he should be held responsible.

The case is before the law court on report.

There is some conflict of evidence as to whether in the original trade the \$2,000, named as consideration in the deed included an assignment of the unexpired term of the insurance on the buildings. The defendant's testimony indicates that the subject came up when the parties met to have the deed drawn, but that of the plaintiffs and their witness Katen shows that it was previously agreed that the \$2,000 was to be paid for the property and insurance. But this is immaterial, since the trade as consummated was for the farm and insurance on the buildings.

There is nothing in the nature of the defendant's undertaking to constitute it a part of what was purchased by the plaintiffs. The payment of the consideration and the execution of the deed and assignment embraced the whole transaction. We cannot agree with the plaintiffs' theory that the promise of the defendant to send the policy to the agents of the company is based upon the pecuniary consideration paid. It was an independent matter. The defendant was under no more obligation to procure the consent of the company to the assignment than to procure the record of the deed. He volunteered to forward the policy by mail to the agents; and he claims that his promise was not legally binding, because without consideration. *Thorne et al. v. Deas*, 4 Johns. (N.Y.) 84, upon which he relies, was an action on the case for the defendant's neglect to fulfill his promise to procure insurance on a vessel owned jointly by himself and the plaintiff. Chief Justice Kent thus concludes his opinion in which he held that there should be a verdict for the defendant: "A short review of the leading cases will show that by the common law a mandatory who undertakes to do an act for another without reward is not responsible for omitting to do the act, and is only responsible when he attempts to do it and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages be averred." But it was not decided upon the ground that there was no consideration for the alleged promise as consideration was not an element of that form of the action, but that the defendant had not assumed a legal duty by

entering upon the execution of his undertaking. The doctrine of this case was reaffirmed in *Smedes v. Bank*, 20 Johns. (N.Y.) 372, although it was an action of assumpsit; but the plaintiff seems to have misconceived his remedy.

New rules have arisen from the development of the action of special assumpsit from an action on the case for deceit into one for the breach of a parol promise. Since the decision in *Rann v. Hughes*, 7 T.R. 350, note, a consideration for all promises not under seal has been necessary; and consideration is now generally defined as a benefit to the promisor, or a detriment to the promisee.

In this case the promisor's undertaking was not for any antecedent pecuniary consideration, or for an anticipated recompense, but the consideration, if any, was a detriment to the promisee. If, under the facts of the case, it may be considered that the plaintiffs, on the faith of the defendant's undertaking, parted with a present right, were delayed in the present use of a right, or suffered some immediate prejudice, it would be consideration, provided it was so treated by the parties. 5 Cyc. 168; *Harriman on Contracts*, §§ 91, 96; *Fire Insurance Association v. Wickham*, 141 U.S. 564, 12 S.Ct. 84, 35 L.Ed. 860; *Dutton's Estate*, 181 Pa. 426, 37 A. 582; *Ames v. Taylor*, 49 Me. 381.

The defendant claims that the policy remained in his custody; that he retained it because he had an interest under it; and that consequently it cannot be said that the plaintiffs parted with the document, or surrendered any present right, or suffered any prejudice on the faith of the defendant's undertaking. But we do not consider that this custody of the policy was inconsistent with the plaintiffs' legal possession. They had a right to it until it was presented to the insurance company for assent to the assignment, and they intrusted it to the defendant to do what they otherwise would presumably have done themselves for the protection of their legal rights. By reason of the defendant's "assumption" the plaintiffs were delayed in the present use of the assigned policy for a purpose recognized as important.

But the consideration of the assumpsit as "detriment to the promisee" lacks the element of inducement. *Fitch v. Snedaker*, 38 N.Y. 248, 97 Am.Dec. 791. It is true that a motive might be implied from circumstances; but it clearly appears that the intrusting of the policy to the defendant was not at his solicitation, and therefore was not the consideration of the promise, but a mere condition precedent to the performance of the promise. *Holmes' Common Law*, 291; *Haigh v. Brooks*, 10 Ad. & El. 309; *Hart v. Miles*, 4 C.B.N.S. 371.

The voluntary promise of the defendant to perform a gratuitous service was nudum pactum, and he cannot be held liable for its nonperformance as a breach of contract.

Judgment for the defendant.

QUESTIONS:

1. Was any one of the following either *a sufficient consideration*, or the *surrender of a right*, or a "prejudice suffered on the faith of the defendant's undertaking":
 - a. The payment of the purchase price?
 - b. The intrusting of the policy to the defendant?
 - c. The plaintiff's forbearance to procure the assent of the insurance company himself?
 2. Should Restatement, Contracts, § 90, now be held applicable against the defendant in this case?
 3. Did the defendant have reason to foresee that the plaintiff would rely upon his promise and fail to procure insurance?
 4. Did the defendant have reason to foresee that his failure to keep his promise promptly would cause the plaintiff a loss of \$1,350?
 5. Can the decision be justified on the ground that it is too severe a penalty for breach of a gratuitous promise to make the promisor an insurer of the buildings?
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CARR v. MAINE CENTRAL R. CO., 78 N.H. 502, 102 A. 532 (1917). The defendant company collected a freight overcharge from the plaintiff by mistake, but it could not make a rebate thereof without the consent of the Interstate Commerce Commission. It promised the plaintiff that, if he would make out the necessary papers, it would send them to the Commission and procure the consent. He made out the papers and delivered them to the defendant; but it neglected to send them in the time allowed by the rules of the Commission. The court sustained an action on the case for negligence, saying that no consideration was necessary, since the action was in tort. The papers entrusted to the defendant were not lost or injured; but the defendant's failure to keep its promise was believed to prevent the plaintiff from recovering the amount of the overcharge as a rebate. Is this case distinguishable from the preceding case? Does the recovery of the amount of the overcharge as damages unjustly penalize the defendant?

In the early history of the common law there was no clearly understood theory of "tort" differentiating it from "contract." Instead, the recognized boundary lines were between the forms of action; and there came to be much overlapping among these. While the fields of "tort" and "contract" are now clearly distinguishable in their principal areas, the border between them is still an overlapping fringe, not a clearly defined line. This is illustrated by the Maine Central case above; yet the supposedly wrongful "negligence" of the defendant was the mere "nonfeasance" of a promise. Did the court merely shift its descriptive terms in order to avoid the application of a contract rule? Would it now apply Restatement, § 90, and stay in the "contract" field?

UNDERWOOD TYPEWRITER CO. v. CENTURY REALTY CO.

Supreme Court of Missouri, 1909.

220 Mo. 522, 119 S.W. 400, 25 L.R.A.,N.S., 1173.

LAMM, J. This case is here from the St. Louis Court of Appeals on the dissent of Judge Bland. 118 Mo.App. 197, 94 S.W. 787. The majority opinion of that court reversed the judgment of the circuit court sustaining a demurrer to the petition, and remanded the case to be tried on its merits. We think the majority opinion is soundly reasoned on both principle and precedent. It should be read in connection with this; for we shall not restate its reasoning, but rest content with adopting it, only supplying a sufficient statement here to make this opinion intelligible, and adding some observations of our own.

The statement: Plaintiff was tenant of defendant in possession under a written lease for a five-year term beginning on the 1st day of February, 1901 and ending on the last day of January, 1906. The lease provided, *inter alia*, that plaintiff could not assign or underlet without the written consent of defendant indorsed on it. Thereafter plaintiff and defendant entered into a written agreement to the effect that defendant would give its written assent to an assignment of the lease to an acceptable tenant. The petition pleads the lease, the provision against assigning or subletting, and the subsequent written agreement to give consent in writing to an acceptable tenant; and then states, in substance, that plaintiff, in reliance on said written agreement, with the knowledge of defendant, expended a large amount of time and labor in securing an acceptable and satisfactory tenant, and did secure such tenant, but that, notwithstanding that fact, defendant refused and still refuses to consent to the assignment of said lease and to permit said tenant to enter into the possession of said premises, though often requested to do so; that by reason of defendant's refusal to consent to said assignment of said lease plaintiff was and is prevented by defendant from securing such tenant at a large advance over the rent reserved by defendant under said lease, to its damage in the sum of \$4,500. Wherefore, etc. The circuit court sustained a general demurrer to the petition. Thereat plaintiff stood on its petition, and, refusing to plead over, judgment went on the demurrer. From that judgment plaintiff appealed to the court of appeals, with the result indicated. When the case came here it was assigned to Division 1, and there argued and submitted. That division was evenly divided, and the cause came into banc. So much by way of statement.

The observations: True, the typewriter company was not bound to do anything under the written agreement. True, it was executory only, and may be called in a sense a nude pact *as born*. True, defendant realty company could at no time have sued the typewriter company on that agreement for failure to perform. Why should it sue? It already

had a tenant in the person of the typewriter company. It wanted no other. But mutuality, in its essence, is but a phase, strictly speaking, of the consideration that will support a contract. It is not the only phase. If mutuality, in a broad sense, was held to be an essential element in every valid contract, to the extent that both contracting parties could sue on it, there could be no such a thing as a valid unilateral or option contract, or a contract evidenced by a subscription paper, or a contract to enforce a reward offer, or a guaranty, or in many other instances readily put in ordinary business affairs. The contract sued on in this case was made for the benefit of the typewriter company. It could furnish an acceptable tenant to defendant to take its place, or let it alone. In that respect it does not differ from many contracts, the breach of which is actionable at the option of the promisee.

Being in writing, and signed by the party to be charged, it was not obnoxious to the statute of frauds. Being fully performed by the promisee, it was no longer a nude pact, but became clothed with a consideration executed on request. That performance, on the strength of the offer made, having been accomplished at an outlay of time and labor on the part of the offeree or promisee, with defendant's knowledge as alleged in the petition, makes it enforceable against the offerer or promisor so long as both parties were capable of contracting and their contract be not vitiated by fraud or as against good morals or public policy.

We take it as good doctrine worthy of all acceptance that it is the primary duty of courts to enforce contracts, not to abrogate them. A contract (such as this) between two parties not in fiduciary relation, but dealing at arm's length, free from taint of fraud, duress, or other form of overreaching or oppression, when performed by the promisee, comes into a court of justice entitled to every fair presumption of validity. Such a contract bespeaks, in the first instance, judicial diligence and astuteness to support the act of the party by the act and art of the law. To that extent, at least, those fine rules of personal honor obtaining between man and man, requiring one to keep his word with another, accord with the rules of law. * * *

In a learned note to *American Cotton Oil Co. v. Kirk*, 15 C.C.A. 543, Mr. Clark, author of *Clark on Contracts*, in speaking to the point says: "Again, contracts may be formed by the offer of a promise for an act and acceptance by performing the act, as where a man requests another to perform services for him, and the latter does so. The request is an offer of a promise to pay for the services, and performance of the services is an acceptance of the offer. This is described as consideration executed upon request. Here, also, the act of one party forms the consideration which supports the promise of the other. In these two cases one of the parties, in the formation of the contract, does all that he can be required to do, and there remains an outstanding obligation

on the other side only. The contract is unilateral. It is obvious that in these cases the question of mutuality of obligation or contract cannot arise. The question is whether the act is such as to supply a consideration for the promise of the other party."

To illustrate, if Roe writes Doe: "If you loan Lowe your Jersey cow, I will see she is returned in good order." And, if Doe (relying) loan her to Lowe and she is not returned in good order, is Roe not liable to Doe?

If Box write Cox: "If you find my lost horses, Bucephalus and Rosinante, I will release the debt of \$50 you owe me." And if Cox (relying) find and return Bucephalus and Rosinante, is his debt not paid to Box?

If Smith agree in writing with Jehu that he will pay him \$100 if he drive from Jefferson City to Kansas City and return in four days, and Jehu presently (relying) drives it in four days, is not Smith liable?

If John agree in writing with Gambrinus that if the latter will not drink beer for a year he will pay him a sum certain, and if Gambrinus (relying) drink no beer for that year, is not John bound?

Yet in each of these cases neither Doe, Cox, Jehu, nor Gambrinus was bound to do anything. In each of them there was no consideration other than acceptance by actual performance on request. In the last two and the first no benefit accrued to Roe, Smith, or John. But in each of them there was a consideration (i. e., performance) moving from the promisee in the form of labor done and inconvenience and detriment suffered. * * *

The upshot of it all is the conclusion that the petition was good and the demurrer bad. Hence, the judgment of the circuit court should be reversed, and the cause remanded to be tried on its merits. It is so ordered.

GANTT, FOX, and GRAVES, JJ., concur. Three judges dissented.

QUESTIONS:

1. Did the defendant "request" the plaintiff to procure another acceptable tenant or "bargain for" such action in exchange for its written promise?
2. In the four illustrations given by Judge Lamm, did the promisor bargain for the promisee's action in exchange for his promise?
3. The plaintiff alleged that it "expended a large amount of time and labor." Does "justice" require more of the defendant than that it should compensate the plaintiff for the time and labor so spent? Should the defendant have to pay \$4,500 as damages, however little the "time and labor" spent, on the ground that its breach of promise prevented the plaintiff from making that much profit?

SIEGEL v. SPEAR & CO.

Court of Appeals of New York, 1923.
234 N.Y. 479, 138 N.E. 414, 26 A.L.R. 1205

Action by William Siegel against Spear & Co. A determination of the Appellate Term affirming a judgment in favor of plaintiff was affirmed by the Appellate Division (195 App.Div. 845, 187 N.Y.S. 284), and defendant appeals by permission. Affirmed.

CRANE, J. The plaintiff commenced this action in the City Court of the city of New York, to recover his loss sustained by failure of the defendant to insure his household furniture stored in its storehouse. The action is based upon an alleged agreement to insure, made with the defendant's credit man. So far the plaintiff has been successful, the Appellate Division, however, certifying that in its opinion there is a question of law involved which should be reviewed by this court.

In August of 1917 and January of 1918 the plaintiff purchased of the defendant certain household furniture for the sum of \$909.25 and took it to his apartment in New York City. He gave back to the defendant two chattel mortgages, which provided for monthly payments of the purchase price, and also that the furniture should not be removed from the plaintiff's residence without the written consent of the mortgagee.

By May of 1918 the plaintiff had paid in all \$295. In that month, desiring to move from the city for the summer months and give up his apartment, the plaintiff went to the defendant's place of business in New York City to see about storing his furniture until his return. It was arranged with the defendant's credit man, McGrath, that the plaintiff should send his furniture by his own truck to the defendant's storehouse, and that the defendant would keep it for him free of charge. It is claimed that McGrath, at the time of making these arrangements, also promised and agreed to insure the furniture for the plaintiff's benefit. The furniture had not been insured by the plaintiff at any time. The conversation is given by Mr. Siegel as follows:

"At that time he said, 'You had better transfer your insurance policy over to our warehouse.' I said: 'I haven't any insurance. I never thought of taking it out, as I never had time to take it out.' But I said: 'Before the furniture comes down I will have my insurance man, who insures my life, have the furniture insured and transferred over to your place.' He said: 'That won't be necessary to get that from him; I will do it for you; it will be a good deal cheaper; I handle lots of insurance; when you get the next bill—you can send a check for that with the next installment.' "

The furniture was sent to the defendant's storehouse about the 15th of May, and about the 15th of the following June was destroyed by fire. No insurance had been placed upon it.

Upon these facts the plaintiff has recovered the amount of his loss. The defendant raises at least two objections to this result. It claims, first, that there was no consideration for the alleged agreement made with McGrath to insure the furniture, and, second, that McGrath had no authority to make any such contract even if he did.

We are inclined to think that if the contract were made—and we must assume it was, as there is evidence to sustain the findings of the jury to this effect—there was in the nature of the case a consideration sufficient to sustain the promise. It is, of course, a fact that the defendant undertook to store the plaintiff's property without any compensation. The fact that it had a chattel mortgage upon the property did not affect its relationship as a bailee without pay. Under these circumstances it was not liable for the destruction of the goods by fire unless due to its gross neglect. *Van Zile on Bailments and Carriers*, § 93; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N.Y. 278, 19 Am.Rep. 181. There is no such element in this case.

But if, in connection with taking the goods, McGrath also voluntarily undertook to procure insurance for the plaintiff's benefit, the promise was part of the whole transaction and was linked up with the gratuitous bailment. The bailee, if such a contract were within McGrath's agency, was then under as much of an obligation to procure insurance as he was to take care of the goods.

When McGrath stated that he would insure the furniture it was still in the plaintiff's possession. It was after his statements and promises that the plaintiff sent the furniture to the storehouse. The defendant or McGrath entered upon the execution of the trust. It is in this particular that this case differs from *Thorne v. Deas*, 4 Johns. 84, 99, so much relied upon by the defendant. In that case A. and B. were joint owners of a vessel. A. voluntarily undertook to get the vessel insured but neglected to do so. The vessel having been lost at sea, it was held that no action would lie against A. for the nonperformance of his promise, although B. had relied upon that promise to his loss. It was said that there was no consideration for the promise. In that case there was the mere naked promise of A. that he would insure the vessel. B. parted with nothing to A. He gave up possession of none of his property to A., nor of any interest in his vessel. The case would have been decided differently, no doubt, if he had. As Chancellor Kent said in referring to the earlier cases:

"There was no dispute or doubt but that an action upon the case lay for a misfeasance, in the breach of a trust undertaken voluntarily."

The same may be said regarding the case of *Brawn v. Lyford*, 103 Me. 362, 69 A. 544.

In the case of *Rutgers v. Lucet*, 2 Johns.Cas. 92, 95, the law on this point was stated to be as follows:

"A mere agreement to undertake a trust, in futuro, without compensation, it is true, is not obligatory; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms."

In *Hammond v. Hussey*, 51 N.H. 40, 50 (12 Am.Rep. 41), the court, quoting Professor Parsons, says:

"If a person makes a gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken."

Where one had gratuitously undertaken to carry the money of a bailor to a certain place and deliver it to another, and, after receiving the money, the bailee gave it to a neighbor who undertook to make delivery and lost it, it was held that the bailee had violated his trust in handling the money, that he was guilty of gross negligence in not fulfilling the terms of the bailment. *Colyar v. Taylor*, 41 Tenn. (1 Cold.) 372; *Van Zile on Bailments and Carriers*, § 98; *Davis v. Gay*, 141 Mass. 531, 534, 6 N.E. 549; *Isham v. Post*, 141 N.Y. 100, 106, 35 N.E. 1084, 23 L.R.A. 90, 38 Am.St.Rep. 766; *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275; 6 Ruling Case Law, p. 656, § 67.

From this aspect of the case we think there was a consideration for the agreement to insure. This renders it unnecessary to determine whether the plaintiff, in refraining from insuring through his own agent at the suggestion of McGrath, surrendered any right which would furnish a consideration for McGrath's promise.

I find that *Thorne v. Deas*, supra, has been seldom cited upon this question of consideration, and whether or not we would feel bound to follow it to-day must be left open until the question comes properly before us.

As to McGrath's authority to act in this matter, we do not find the point raised by any sufficient exception.

For the reasons here stated, the judgment must be affirmed, with costs.

QUESTIONS:

1. Was the surrender of the furniture to the defendant "bargained for in exchange" for the defendant's promise?
2. Does the case support section 90 of the Restatement of Contracts?
3. Was this a case of "misfeasance by a bailee"?

LINVITZ v. GALECKIS.

Supreme Court of Errors of Connecticut, 1929. 110 Conn. 174, 147 A. 592.

Action by Anna Linvitz, the payee, against Elizabeth Galeckis, the maker of a promissory note. From a judgment for plaintiff, defendant appeals. Error, and cause remanded, with direction.

BANKS, J. On May 4, 1927, the defendant's husband, who was then conducting a meat market in Hartford, borrowed \$500 from the plaintiff, and gave the plaintiff and her husband his note for the same. The defendant was possessed of considerable property of her own, and at various times advanced money to her husband to assist him in his meat business, and paid some of the bills of the business. The plaintiff made several unsuccessful attempts to collect the note, asking both the defendant and her husband for its payment, and on one or more of these occasions the defendant promised to pay it. In April, 1928, the defendant and her husband quarreled, and the defendant went to live with the plaintiff and her husband.

In June, 1928, the meat market owned by the defendant's husband was closed by a sheriff, and the plaintiff placed her claim in the hands of an attorney, who prepared a note for \$500, payable on demand to the order of the plaintiff, and delivered it to a constable for the purpose of having it signed by the defendant. The constable went to the home of the plaintiff, and in her presence and that of her husband requested the defendant to sign the note. The defendant was unwilling to sign it, and said that the plaintiff and her husband had bothered her every day for the money, and that she could not continue to live with them much longer because they were driving her almost crazy. The constable told her that, if she would sign the note, she would not be bothered again, and could continue to live with the plaintiff without any trouble. Thereupon, on being assured that the plaintiff would not rush her for payment, and upon an agreement that no interest would be charged, she signed the note in suit.

The plaintiff at no time expressly promised the defendant to forbear suit against the latter's husband upon his note, but no attempt was made by her to collect upon that note after the defendant had executed the note in suit. The husband's note was at no time delivered up to the defendant by the plaintiff, but was retained by the plaintiff and her husband, and was produced at the trial by the plaintiff's attorney. The court found by inference from these facts that the note in suit was received in lieu of, and in payment of, the note executed by the defendant's husband, and reached the conclusion that the note in suit was given for a valid consideration. Upon the trial the defendant claimed that there was no consideration for her note, and that it was executed by her under duress. Upon the argument in this court the latter claim

was withdrawn, and defendant rested upon the contention that the conclusion of the trial court that there was a valid consideration for her note does not find support in the subordinate facts found.

The consideration, if any, for the note in suit is to be sought in the claimed agreement by the plaintiff to forbear suit upon the note given by the defendant's husband. Such an agreement, if proven, would constitute a sufficient consideration for the defendant's note. The court does not find that there was such an agreement, but, on the contrary, finds that the plaintiff at no time expressly promised to forbear suit upon the husband's obligation, and that the question of such forbearance was never discussed by the parties. It is found, to be sure, that the plaintiff made no further attempt to collect the husband's note after the note in suit was executed. Actual forbearance is some evidence of an agreement to forbear, and, in the absence of proof to the contrary, might be incompatible with any other condition. *State ex rel. Marsh v. Lum*, 95 Conn. 199, 204, 111 A. 190.

But here the other facts found make it clear that the plaintiff's forbearance to sue the husband was because such action would have been fruitless. His meat market had been closed by the sheriff, and the only reasonable inference from the facts found was that the defendant was the only source from which the plaintiff had any expectation of getting her money. Not only was the plaintiff's failure to sue the husband of no immediate advantage to him, but, under the circumstances, it is obvious that it was not the moving consideration which led the defendant to execute the note in suit. She had quarreled with her husband, and was not living with him. She did not request the plaintiff to forbear to sue him, for that matter was not discussed between them. She was living with the plaintiff, who bothered her every day with her demands for the money, so that she could not continue to live with her much longer under the circumstances. She was told by the constable that, if she would sign the note, she would not be bothered again, and could continue to live with the plaintiff without trouble. It is obvious that this was the inducement which caused her to sign the note rather than any possible advantage accruing to her husband, from whom she had separated.

Furthermore the court's inference that the note in suit was received in payment of the note given by defendant's husband does not find support in the facts found. That note was retained by the plaintiff, and produced at the trial by her attorney. The only conclusion that could legally and logically be reached from the subordinate facts found is that there was no valid consideration for the note in suit.

There is error, and the cause is remanded to the city court of Hartford, with direction to enter judgment for the defendant.

NOTE

Savings Bank of Rockville v. Cohn, 116 Conn. 480, 165 A. 607 (1933), is a similar case in which a widow who was a trustee under her husband's will personally promised to pay a debt of her husband. The creditor solicited this promise; and the widow knew that the creditor intended to foreclose a mortgage securing the debt if she refused to sign the new promise. The court held that the widow's promise was not enforceable because the actual forbearance to foreclose was not bargained for by her or agreed upon as a "consideration." It disregarded a stated "consideration of one dollar." Observe that the defendant was a widow, that the court seems unaware of any rule like that in Restatement, sec. 90 (published in final form in 1932), and that the court sees no "injustice" in refusing to enforce the promise. Can the two Connecticut cases be reconciled with *Alliance Bank v. Broom*?

W. B. SAUNDERS CO. v. GALBRAITH et al.

Court of Appeals of Ohio, 1931. 40 Ohio App. 155, 178 N.E. 34.

Dr. Galbraith, who had been a selling agent for the plaintiff company, died owing it \$4,000. He left all his property by will to his wife Mary, the present defendant. Mary Galbraith desired that her son by a former husband named Phipps should be appointed as the plaintiff's agent to succeed his stepfather. She promised the plaintiff that she would sell some property left by Dr. Galbraith and other land of her own and would pay the money due to the plaintiff. As a result, the plaintiff filed no claim against the estate of Dr. Galbraith; and it is now too late to file such a claim. Young Phipps also promised to pay the debt and was made the plaintiff's agent, later becoming indebted in a further amount to the plaintiff. Thereafter Mary Galbraith promised in writing to pay the debts of Dr. Galbraith and Phipps to the plaintiff and executed her personal note therefor with a mortgage as security. The plaintiff sued to enforce payment of this note and to foreclose the mortgage. The defendant asserted want of consideration as a defense. [Statement of facts condensed.]

MAUCK, J. * * * While it is well understood as an elementary principle of the law of contracts that a consideration must exist to render a promise enforceable, there are several varieties of obligations that have long been held to be valid in which it is difficult to see any consideration. Among these are new promises to pay debts extinguished by a discharge in bankruptcy, or barred by the statute of limitations. Sometimes it has been said that these old obligations create a moral liability sufficient to stand as a consideration, although a mere moral obligation of itself is no consideration at all. Sometimes it has been said that this moral obligation is sufficient when joined

with a prior legal obligation, but if that prior legal obligation has been extinguished it is not easy to see how it adds anything to the valueless moral obligation. When those responsible for the new monumental Restatement of the Law of Contracts approached this problem, they swept away the ingenious efforts to locate and define the consideration underlying such obligations, and laid down the broad proposition that no consideration was required in such obligations. Section 85 et seq., Restatement of the Law of Contracts. Carrying out the same plan as to those obligations where the correlative promise of a promisee might not be discerned to constitute the consideration for the first promise, but the conduct of the parties was such as to estop the promisor from asserting a want of consideration, the Restatement laid down the law in section 90 as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

By following the admirable notes of Professor Ferson it would not be difficult to sustain the soundness of section 90 as the boiled-down essence of the law of Ohio. We are content, however, to take the restatement as the law of this state without exploring its soundness, and hold that of its own vigor it is adequate authority. This is not to say that the restatement is of necessity perfect, and that in it is to be found the law's last word. We only hold that he who would not have it followed has the burden of demonstrating its unsoundness.

The facts of the case at bar come squarely within the terms of the section referred to. Mrs. Galbraith's promise was reasonably expected to and did induce the plaintiff to forbear asserting its claim against the estate at a time when such assertion could have been effective. If her promise, so acted upon by the plaintiff, is not enforced, the plaintiff has lost its right to realize from the estate on an admittedly just claim, and this unjust loss can be avoided only by the enforcement of the defendant's promise. Mrs. Galbraith, in the light of the facts as now known, made an unfortunate bargain, but her promise was legal and enforceable.

We find it unnecessary to go into the other interesting questions discussed by counsel.

A decree will be entered for the plaintiff as prayed.

Decree for plaintiff.

QUESTIONS:

1. Did Mrs. Galbraith make a "bargain"?
2. What reason is there for enforcing Mrs. Galbraith's promise to pay the personal debt incurred by Phipps?

SIGMAN v. RUDOLPH WURLITZER CO.

Court of Appeals of Ohio, 1937. 57 Ohio App. 4, 11 N.E.2d 878.

TATGENHORST, Presiding Judge. This is an appeal on questions of law from the court of common pleas of Hamilton county.

Suit was instituted by the appellee, Thurse Sigman, to recover from the appellant, the Rudolph Wurlitzer Company, the amount of a pension claimed to be due him by reason of his compliance with the terms of the pension requirements.

The appellant was engaged in the business of manufacture and sale of musical instruments. The appellee had been in the employ of the appellant for more than twenty-seven years, when he was discharged because it had no further employment to which he was suited. He had served appellant as order clerk, salesman on the road, manager of its Victrola department, wholesale and retail, and manager in charge of its wholesale radio department.

From time to time during his employment, the appellant issued booklets containing various declarations covering the institution of a pension system, applicable to its employees and including the appellee. That such program was calculated to and did induce continued service in the corporation there can be no question. It constituted a continuing offer on the part of the company, which was continuously accepted by the employees who preserved their status with the company. We quote from the booklet:

"He who serves best receives most.

"Rules for Your Success

"And the policy outlined for your welfare

"The Rudolph Wurlitzer Co.

"Chicago, Cincinnati, New York, and all principal cities

"For You

"This booklet was written for you. It was written for your interest and the attention of every employee thruout the enormous organization of The Rudolph Wurlitzer Co.

"There is something on every page of this booklet that should be of vital importance to you, that is, of course, if you desire to become successful with the vast amount of opportunities before you. The employees who shoulder the greatest responsibilities and have become most successful in our organization today are only those who have strictly adhered to and closely observed the simple but necessary rules and policies.

"After all, the important part of any rule is the spirit of it. This is gained by understanding the wisdom and necessity of the rule, and not by mere obedience because it is a rule. No rule seems hard when

you see that it is wise—worked out from experience—made necessary by existing conditions.

“Every possible method has been outlined for your welfare and protection while in our employ. Your saving, bonus, compensation for promptness and efficiency, protection during sickness, pension and insurance has all been thoroughly explained in this booklet.

“All that we ask is that you kindly read every page and feel that you are a part of an organization which is doing everything within its power for your success and welfare.

“The Rudolph Wurlitzer Co.

“Pension System

“In order to take care of our loyal and trustworthy employees when old age overtakes them, we have put in this pension system: We will pay 2% on the entire amount you have earned each year, which will be paid to you in monthly instalments, and as long as you live. The largest pension we pay any one is \$100.00 per month, or \$1,200.00 a year. For example, we will take an employe that has earned \$900.00 per year:

“Worked 10 years at \$900.00 a year—\$9,000.00. Pension, \$15.00 per month.

“Worked 15 years at \$900.00 a year—\$13,500.00. Pension, \$22.50 per month.

“Worked 20 years at \$900.00 a year—\$18,000.00. Pension, \$30.00 per month.

“Worked 25 years at \$900.00 a year—\$22,500.00. Pension, \$37.50 per month.

“Worked 30 years at \$900.00 a year—\$27,000.00. Pension, \$45.00 per month.

“From the above table you can easily figure what your pension would amount to. It pays to be loyal. A rolling stone gathers no moss.”

At the bottom of the pages of the booklet are interesting statements designed apparently to encourage industry, faithfulness, loyalty, and continued service with the company. Among them, appears the following:

“No man in this world ever rightfully receives more than he gives.—Adams.

“A man with push can get there, but it takes a man with character to stay there.—Shepherd.

“Forget the past. Success lies in the future.

“No one can cheat you of final success but yourself.”

There is much good advice contained in the pamphlet, and the whole effect is to produce a feeling of confidence in the fairness and sincere concern of the company for the welfare of the employee.

[At this point the court discusses the question as to when the pension in question should begin, no specific age being specified. It interprets the booklet as promising a pension from the time when the company chooses to terminate the employment after the employee has served to such an age that he becomes less efficient making it difficult to get another similar job—a jury question. The age of the plaintiff when discharged was 52 years. The defendant's duty to pay the pension was not conditional on "senile decrepitude," but rather on a sort of "industrial old age." There was no discussion by the court of its statement that the booklet "constituted a continuing offer."]

The appellee had earned while in the service of the appellant more than \$54,000. During these years he was led to believe that 2 per cent of his earnings would be paid him when the company considered him more favorably in the position of a pensioner than as an employee receiving a full salary or wage. The appellant has made its election. It has concluded that he has reached the point of industrial old age. It is to its interest to discontinue the payment of the full wage. The employee must bow to the appellant's opinion and edict. He, however, cannot be in good faith and justice denied the alternative held out by the employer as an inducement, for more than a quarter of a century, to continue service with the appellant.

The judgment is affirmed.

NOTE

It has become a very general practice for corporations of all kinds, public, business, educational, to establish pension systems on which employees rely. They are in various forms; and the legal operation of each must be judged with respect to the particular facts. Frequently they are so worded that the employee is eligible for the pension only when reaching a specified age and after a specified number of years of service. The circumstances of employment may be such as to indicate that the employee has bargained for the promise of a pension as well as for his salary or wages. In many cases the pension system is voluntarily adopted long after the employment began and without any express agreement with the employees. Some employees, hired either before or after the adoption of the pension system, may not know of its existence. Should the enforcement of the employer's promise vary with these facts?

MABLEY & CAREW CO. v. BORDEN, 129 Ohio St. 375, 195 N.E. 697, 100 A.L.R. 511 (1935). The defendant company executed a certificate to an employee, Mrs. Anna Work, stating that in appreciation of her long service "there will be paid in the event of your death, if still an employee of this Company, to the party designated by you on the back of this certificate a sum equal to the wages you have received from this Company for the year next preceding the day of your death

* * * The issue and delivery of this certificate is understood to be purely voluntary and gratuitous * * * and may be withdrawn at any time by this Company." Mrs. Work was in the employ of the Company until her death; and in the year preceding death she had received as wages \$780. On the back of the certificate she designated her sister Ida Borden as beneficiary. The court gave judgment to Mrs. Borden against the Company for \$780, giving two reasons for enforcement: (1) The promise had induced Mrs. Work to remain, in reliance on the promise, in the Company's employ until her death. (2) "That is not the only consideration, as it is expressed at the outset that the Company appreciates the duration and faithful character of the services of the employee theretofore rendered." The court thought that even though the Company and Mrs. Work were both free to terminate the employment at any time, the full performance by Mrs. Work of the condition of the promise, even though it was otherwise "gratuitous," made it enforceable by the named beneficiary. The contrary decision by the trial court was reversed by the Court of Appeals, and the reversal was sustained in the Supreme Court by the unanimous vote of seven Judges.

FRIED v. FISHER et al.

Supreme Court of Pennsylvania, 1938. 328 Pa. 497, 196 A. 39, 115 A.L.R. 147.

STERN, Justice. Under date of October 6, 1932, plaintiff leased to Robert H. Fisher (appellee) and J. Edward Brill a store in Bryn Mawr, the term being for three years and eleven months from November 1, 1932. Fisher and Brill, as partners, carried on the business of florists in the demised premises. In December, 1933, Fisher desired to withdraw and go into a business of his own in another locality, but although Brill agreed to this, Fisher did not wish to enter upon the new venture, unless he could be released from the obligations of the partnership. Accordingly, he sought out plaintiff and told him of his plans, saying: "I expect to do something, go into some business, if I get out of here, * * * and I naturally want to get everything taken care of, obligations, * * * because I didn't want to go into anything else and have any obligations hanging over my head." Plaintiff answered that he "was perfectly satisfied if they [Brill and his son] assumed the balance of the lease, as far as I am concerned, just forget about it." Later Fisher spoke to him again, saying, "I want to make sure that everything regarding the lease is O.K. between you and me," and plaintiff said he was "perfectly satisfied, I am satisfied to have Mr. Brill assume the lease, and if it is going to help you any to get started in business, I release you. * * * So long as you are finished here, through here, and your responsibility is ended here, why not come up

to Wayne?" Mrs. Fisher, wife of appellee, testified that her husband told plaintiff of his intention to dissolve the partnership and that he would like to know how he stood as far as the rent was concerned, because he wanted to go into another business, and plaintiff replied that, "Your responsibilities here are ended," and on a later occasion added: "It is definitely decided now that you are going out of the business, Mr. Brill has agreed to take over the lease, why don't you come up and start a store in Wayne?" At the trial plaintiff denied these conversations, but, in view of the jury's verdict for appellee, the latter's version must be accepted as representing the facts.

Fisher dissolved his partnership with Brill and engaged in the restaurant business in Ardmore, Brill remaining in the demised premises and thereafter conducting the old business with his son under the name of "Brill Flowers, Florists," paying the rent each month by checks signed by himself and his son instead of by himself and Fisher as theretofore. This continued for about a year and a half. On August 19, 1935, plaintiff entered judgment by confession on the lease against both Fisher and Brill for rent from July 1, 1935, to the end of the lease, September 30, 1936. On petition by appellee the judgment was opened as to him. The issue was presented to a jury, resulting in a verdict for appellee which was sustained by the court below.

Although there are assignments of error to portions of the charge, the case presented on appeal to this court is confined by the statement of the question involved to plaintiff's contention that binding instructions should have been given in his favor. While, perhaps, some of the learned trial judge's charge as to the law governing consideration in contracts might be open to academic criticism, the point upon which the case really turns is whether Fisher can enforce plaintiff's promise to release him from further liability under the lease.

It is beyond the pale of argument that a promise by a creditor to release one of the partners of a debtor firm from liability for an obligation is, in the absence of qualifying facts, legally unenforceable for want of consideration. *Walstrom v. Hopkins*, 103 Pa. 118. The necessity of consideration to support a contract, though originally imported into the law merely as a technical requirement for the action of *assumpsit*, and subject of late to statutory inroads made upon it, still remains firmly entrenched as one of the fundamental principles of the common law. See opinion by Cardozo, C. J., in *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 375, 159 N.E. 173, 57 A.L.R. 980. But just as the law has consistently upheld the doctrine that, under given circumstances, a person may be estopped by his conduct, his statements, or even his silence, if another has thereby been induced to act to his detriment, so from the earliest times there was recognized, the principle that an estoppel might similarly arise from the making of a promise, even though without consideration, if it was in-

tended that the promise be relied upon and in fact it was relied upon, and a refusal to enforce it would be virtually to sanction the perpetration of fraud or result in other injustice. In his "Lectures on Legal History," Prof. Ames says (p. 143): "That equity gave relief, before 1500, to a plaintiff who had incurred detriment on the faith of the defendant's promise, is reasonably clear, although there are but three reported cases." In *Pillans v. Van Mierop*, 3 Burr. 1663, a promissory estoppel, although not so termed, was held sufficient by Lord Mansfield and his fellow judges in 1765. Kellogg, J., dissenting opinion, in *Allegheny College v. National Chautauqua County Bank*, 246 N.Y. 369, 381, 159 N.E. 173, 57 A.L.R. 980. This principle is now formulated in section 90 of the Restatement of the Law of Contracts as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise." In recent years there has been adopted the phrase "promissory estoppel," and this nomenclature is well chosen as indicating that the basis of the doctrine is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations. It is important to bear in mind that, as already pointed out, the doctrine is much older in its origin and applications than the terminology now employed to describe it.

Illustrative cases abound in the reports, especially since the more formal embodiment of the principle in section 90 of the Restatement. Its most frequent application has been to cases in which a person announces his intention of abandoning an existing right, and thereby leads another, relying thereon, to some action or forbearance. Such cases have sometimes been referred to as well-recognized exceptions to the general proposition that, in order to give rise to an estoppel, a representation must relate to an existing fact and not be merely an expression of opinion or a promise of future performance. "There is no rule more necessary to enforce good faith than that which compels a person to abstain from enforcing claims which he has induced others to suppose he would not rely on. The rule does not rest upon the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fail in carrying out what he has encouraged them to expect." *Faxton v. Faxon*, 28 Mich. 159, 161.

In Pennsylvania the doctrine has been applied under various forms. Thus in *Harris v. Brown*, 202 Pa. 16, 51 A. 586, 90 Am.St.Rep. 610, and in *Park Steel Co. v. Allegheny Valley Railway Co.*, 213 Pa. 322, 62 A. 920, a license which ordinarily would be revocable at the will of the licensee was held to become irrevocable if it was intended to induce

and did induce the expenditure of money by the licensee. In *Cameron v. Townsend*, 286 Pa. 393, 133 A. 632, it was held that where one, prior to a judicial sale, promised another that he would purchase the property for the other's benefit, and the other was led thereby to refrain from any attempt to protect his own interest, and otherwise acted on the faith of the promise, the promisor was estopped from repudiating the obligation to hold the property in trust for the promisee. In *Langer v. Superior Steel Corporation*, 105 Pa.Super. 579, 161 A. 571, where the superintendent of the defendant corporation's plant retired from active duty, and the president of the corporation promised him an annual pension for life if he remained loyal to the company and did not become employed in any competitive occupation, and, after four years, the company stopped paying the pension, it was held that the plaintiff, having been induced by the promise not to seek other employment, was entitled to enforce the promise.

The facts in the present case constitute a situation to which the doctrine of promissory estoppel peculiarly applies, because they involve the announcement by plaintiff of the intended abandonment of his right to enforce Fisher's liability for the rent, knowing that such announcement would be relied upon by him to the extent of his embarking upon a new business venture. All the safeguarding features thrown around the doctrine of promissory estoppel to prevent its too loose application—that the promise be one likely to induce action, that such action be of a definite and substantial character, that the circumstances be such that injustice can be avoided only by the enforcement of the promise—are here present. Plaintiff contends that it was not shown that Fisher suffered a loss in the restaurant business, but he did substantially change his position by entering into that business upon the faith of plaintiff's promise, and when, at the trial of the case, Fisher was questioned by his counsel on this point for the purpose of proving the consequences of his reliance upon plaintiff's promise, counsel for plaintiff objected, and his objections were—in our opinion improperly—sustained by the court. Having succeeded in ruling out this testimony, plaintiff cannot now contend that proof of the facts thus barred was vital to Fisher's defense. Plaintiff also argues that the release was conditional upon Brill's "assuming" the lease, and that there was no evidence of such assumption. It was testified, however, that plaintiff stated to Fisher that Brill had agreed to take over the lease. Moreover, the fact that after Fisher's withdrawal from the partnership the business was conducted by Brill and his son and subsequent checks for the rent were signed by them amply warrants the inference, established by the verdict, that Brill did assume such liability.

Judgment affirmed.

FRENCH v. FRENCH.

Supreme Court of Kansas, 1948. 161 Kan. 327, 167 P.2d 305.

PARKER, Justice. This was an action for recovery of \$5,000, the proceeds of United States Government Insurance (Naval Insurance), brought by Donald Lindey French against the defendant, who are his grandparents.

Material allegations of the amended petition read: Plaintiff is a minor born August 17, 1940; his parents were married November 22, 1939, but the marriage was kept a secret from naval authorities because his father desired to become a naval flight cadet and naval regulations prevented married men from being accepted; about the last week in March 1940 the defendants came to California to visit the plaintiff's father and mother; at that time his father told defendants they were to become grandparents, that he had applied to become a United States naval flight cadet and the part he hated about going into the navy was that he was obliged to keep his marriage a secret; he would be allowed to take out \$10,000 insurance but could not name his wife as beneficiary because of naval regulations; at that time plaintiff's father told the defendants he was going to take out \$10,000 in government insurance and would name them as beneficiaries but if anything happened to him they were to give the insurance to plaintiff (then unborn) and his wife in equal shares; the defendants then and there orally agreed to do so; in furtherance of the father's plan he applied for and on April 29, 1940, obtained insurance in the sum of \$10,000, naming his parents, the defendants, as beneficiaries; the insured was killed in an automobile accident on March 31, 1943, and thereafter the government paid, and the defendants received, \$5,000 each as the beneficiaries named in such policy of insurance; since the receipt of the insurance the defendants have failed and refused to pay plaintiff the \$5,000 as they agreed to do under the terms of their contract with his father.

The defendants' answer expressly disclaims that upon or during their visit with their son in California, or at any time, any agreement was made with respect to the insurance referred to in plaintiff's petition, it avers that if any such agreement was made it was void and illegal and it denies defendants became obligated to the plaintiff in any amount by reason of having collected or received the entire amount of such insurance. Otherwise the answer inferentially, if not expressly, admits all other allegations of the amended petition and in addition expressly admits that up to the date of his death the insured had not made any change in the beneficiaries of such insurance.

We pause in passing, more for informative purposes than anything else, to state reference is made in both the amended petition and

answer to the fact that prior to the insured's death he was divorced from the plaintiff's mother by decree of a Florida court which directed him to forthwith cause to be made payable to the plaintiff \$5,000 of his government insurance. The facts are the defendants were not made parties to that action and the insured met his death before complying with the requirements of the judgment rendered therein. * * *

Notwithstanding argument to the contrary there is but one issue here involved. The petition pleaded an agreement and the uncontradicted evidence established its terms to be as set forth therein. Therefore the only question in the court below was whether under such evidence and the admitted facts there existed between defendants and their deceased son a valid contract which required them to pay plaintiff \$5,000 out of the proceeds of the insurance they collected. If its conclusion of law to that effect was correct its judgment must be affirmed.

It is now well established in this jurisdiction that a third person may avail himself of a contract made by others for his benefit (West's Kansas Digest, Contracts ¶187 and Hatcher's Kansas Digest, Contracts 98) and he may maintain an action thereon notwithstanding he is not a party to such contract or had no knowledge of it when it was made (Haynes Hardware Co. v. Western Casualty Surety Co., 156 Kan. 356, 362, 133 P.2d 574; West v. Sims, 153 Kan. 248, 252, 109 P.2d 479), and this is true even though he is not specifically named therein so long as he is otherwise sufficiently described or designated. Weld v. Carey, 122 Kan. 666, 253 P. 235, and Burton v. Larkin, 36 Kan. 246, 13 P. 398, 59 Am.Rep. 541. * * *

Appellants contend there can be no recovery on the theory of contract for two reasons. They argue there was no valid consideration to support it. We do not agree. While it is true a contract without consideration is unenforceable this court has always recognized the elementary rule that a return promise bargained for and given in exchange for another is a valid consideration (Kramer v. Walters, 103 Kan. 135, 172 P. 1013; Berkey v. Smith, 138 Kan. 792, 795, 28 P.2d 763), and in addition, has held sufficient as a consideration (a) any benefit, profit or advantage to the promisor or any loss, detriment or inconvenience to the promisee (Farmers' Equity Co-op, Ass'n v. Tice, 122 Kan. 127, 251 P. 421), and (b) a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial nature and which does induce such action or forbearance if injustice can be avoided only by enforcement of the promise. Greiner v. Greiner, 131 Kan. 760, 293 P. 759.

Next they insist that there was no mutuality of obligation between the parties to the agreement. Assuming, without determining, the soundness of their argument we point out that even so the plaintiff's

father went ahead and took out the insurance. When he did so the agreement was no longer executory but fully performed. In that state of affairs this court has expressly held the rule that lack of mutuality of obligation makes a contract unenforceable is no longer applicable. *Nelson v. Schippel*, 143 Kan. 546, 56 P.2d 469; and *Kilmer v. Victory Sand & Stone Co.*, 153 Kan. 381, 110 P.2d 798.

In our opinion the agreement disclosed by the record possesses all the necessary attributes of a valid contract for the benefit of another and was enforceable as such. It follows the judgment of the trial court was correct. • • •

ALLEGHENY COLLEGE v. NATIONAL CHAUTAUQUA COUNTY
BANK OF JAMESTOWN.

Court of Appeals of New York, 1927.
246 N.Y. 369, 159 N.E. 173, 57 A.L.R. 980.

Action by Allegheny College against the National Chautauqua County Bank of Jamestown, as executor of the last will and testament of Mary Yates Johnston, deceased. From a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (219 App.Div. 852, 221 N.Y.S. 784), affirming a judgment entered upon a decision of the Trial Term of the Supreme Court in favor of the defendant a jury having been waived, plaintiff appeals. Judgments of Appellate Division and Trial Term reversed, and judgment ordered for plaintiff.

See, also, 220 App.Div. 805, 222 N.Y.S. 762.

CARDOZO, C. J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pa. In June, 1921, a "drive" was in progress to secure for it an additional endowment of \$1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston, of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

"Estate Pledge, Allegheny College Second Century Endowment.

"Jamestown, N. Y., June 15, 1921.

"In consideration of my interest in Christian education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the treasurer of Allegheny College, Meadville, Pennsylvania, the sum of five thousand dollars; \$5,000.

"This obligation shall become due thirty days after my death, and I hereby instruct my executor, or administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of ——— per cent. per annum, payable annually, from ——— till paid. The proceeds of this obligation shall be added to the Endowment of said Insti-

tution, or expended in accordance with instructions on reverse side of this pledge.

"Name: Mary Yates Johnston,
"Address: 306 East 6th Street, Jamestown, N. Y.
"Dayton E. McClain, Witness,
"T. R. Courtis, Witness,
"To authentic signature."

On the reverse side of the writing is the following indorsement:

"In loving memory this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field.

"This pledge shall be valid only on the condition that the provisions of my will, now extant, shall be first met.

"Mary Yates Johnston."

The subscription was not payable by its terms until 30 days after the death of the promisor. The sum of \$1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of 30 days following her death, this action was brought against the executor of her will to recover the unpaid balance.

The law of charitable subscriptions has been a prolific source of controversy in this state and elsewhere. We have held that a promise of that order is unenforceable like any other if made without consideration. *Hamilton College v. Stewart*, 1 N.Y. 581; *Presbyterian Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am.St. Rep. 767; *Twenty-Third St. Baptist Church v. Cornell*, 117 N.Y. 601, 23 N. E. 177, 6 L.R.A. 807. On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent. *Barnes v. Perine*, 12 N. Y. 18; *Presbyterian Soc. v. Beach*, 74 N.Y. 72; *Keuka College v. Ray*, 167 N.Y. 96, 60 N.E. 325; cf. *Eastern States League v. Vail*, 97 Vt. 495, 508, 124 A. 568, 38 A.L.R. 845, and cases cited; *Young Men's Christian Ass'n v. Estill*, 140 Ga. 291, 78 S.E. 1075, 48 L.R.A., N.S., 783, Ann.Cas. 1914D, 136; *Amherst Academy v. Cowles*, 6 Pick. (Mass.) 427, 17 Am.Dec. 387; *Ladies Collegiate Institute v. French*, 16 Gray (Mass.) 196; *Martin v. Meles*, 179 Mass. 114, 60 N.E. 397; *Robinson v. Nutt*, 185 Mass. 345, 70 N.E. 198; *University of Pennsylvania v. Coxe*, 277 Pa. 512, 121 A. 314; *Williston, Contracts*, § 116.

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise. *Hamer v. Sidway*, 124 N.Y. 538, 27 N.E. 256, 12 L.R.A. 463, 21 Am.St.Rep. 693; *Anson*,

Contracts (Corbin's Ed.) p. 116; 8 Holdsworth, *History of English Law*, 10. So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." *Wisconsin & Michigan R. Co. v. Powers*, 191 U.S. 379, 386, 24 S.Ct. 107, 108 (48 L.Ed. 229); *McGovern v. City of New York*, 234 N.Y. 377, 389, 138 N.E. 26, 25 A.L.R. 1442; *Walton Water Co. v. Village of Walton*, 238 N.Y. 46, 51, 143 N.E. 786; 1 Williston, *Contracts*, § 139; Langdell, *Summary of the Law of Contracts*, pp. 82-88. If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (page 292), separated the detriment, which is merely a consequence of the promise from the detriment, which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the contrary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel." Williston, *Contracts*, §§ 139, 116. Whether the exception has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414, 26 A.L.R. 1205, and *De Cicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807, L.R.A.1918E, 1004, Ann.Cas.1918C, 816, may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor.¹

¹ The editor of this volume has been unable to discover that there ever existed a "doctrine of consideration in all its ancient rigor." The definition adopted in Restatement, *Contracts*, § 75, is a "rigorous" one; but that a con-

sideration as there defined has been "rigorously" required for the enforcement of an informal promise is flatly contradicted by sections 85-90. The definition in section 75 is an extremely modern, not an "ancient" definition.

The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this state have recognized this exception, if exception it is thought to be. Thus, in *Barnes v. Perine*, 12 N. Y. 18, the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In *Presbyterian Society v. Beach*, 74 N.Y. 72, a situation substantially the same became the basis for a like ruling. So in *Roberts v. Cobb*, 103 N.Y. 600, 9 N.E. 500, and *Keuka College v. Ray*, 167 N.Y. 96, 60 N.E. 325, the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defenses of that character" are "breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested." W. F. Allen, J., in *Barnes v. Perine*, *supra*, p. 24; and cf. *Eastern States League v. Vail*, 97 Vt. 495, 505, 124 A. 568, 38 A.L.R. 845, and cases there cited. The result speaks for itself irrespective of the motive. Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. 8 Holdsworth, *History of English Law*, 7 et seq. The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted \$1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money and hold itself free thereafter from

personal responsibility to give effect to the condition. *Dinan v. Conneys*, 143 N.Y. 544, 547, 38 N.E. 715; *Brown v. Knapp*, 79 N.Y. 136; *Gridley v. Gridley*, 24 N.Y. 130; *Grossman v. Schenker*, 205 N.Y. 466, 469, 100 N.E. 39; 1 Williston, *Contracts*, §§ 90, 370. More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use. Cf. *Martin v. Meles*, 179 Mass. 114, 60 N.E. 397, citing *Johnson v. Otterbein University*, 41 Ohio St. 527, 531, and *Presbyterian Church v. Cooper*, 112 N.Y. 517, 20 N.E. 352, 3 L.R.A. 468, 8 Am.St.Rep. 767. The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving \$1,000 upon account of the subscription, that it would apply the money to the prescribed use, but that in its circulars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is *New Jersey Hospital v. Wright*, 95 N.J.L. 462, 464, 113 A. 144, where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber. Cf. *Board of Foreign Missions v. Smith*, 209 Pa. 361, 58 A. 689. A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. "If a person chooses to make an extravagant promise for an inadequate consideration, it is his own affair." 8 Holdsworth, *History of English Law*, p. 17. It was long ago said that "when a thing is to be done by the plaintiff be it never so small, this is a sufficient consideration to

ground an action. *Sturlyn v. Albany*, 1587, Cro.Eliz. 67, quoted by Holdsworth, *supra*; cf. *Walton Water Co. v. Village of Walton*, 238 N.Y. 46, 51, 143 N.E. 786. The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. Williston, *Contracts*, §§ 60a, 68, 90, 370; *Brown v. Knapp*, *supra*; *Grossman v. Schenker*, *supra*; *Williams College v. Danforth*, 12 Pick. (Mass.) 541, 544; *Ladies Collegiate Institute v. French*, 16 Gray (Mass.) 196, 200. There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words. Williston, *Contracts*, §§ 90, 22a; *Pettibone v. Moore*, 75 Hun, 461, 464, 27 N.Y.S. 455. We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised, since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions. Williston, *Contracts*, § 112; Page, *Contracts*, § 523. "It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration." Williston, *supra*, § 112. Such must be the meaning of this transaction unless we are prepared to hold that

the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance. *De Wolf Co. v. Harvey*, 161 Wis. 535, 154 N.W. 988; *Pullman Co. v. Meyer*, 195 Ala. 397, 401, 70 So. 763; *Braniff v. Baier*, 101 Kan. 117, 165 P. 816, L.R.A.1917E, 1036; cf. *Corbin, Offer and Acceptance*, 26 Yale L. J. 169, 177, 193; *McGovney, Irrevocable Offers*, 27 Harv.L.R. 644; *Sir Frederick Pollock*, 28 L.Q.R. 100, 101. The subscriber does not say: I hand you \$1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you \$1,000, and if you are unwilling to commemorate me, the time to speak is now.

The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry)—an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber. *Ladies Collegiate Institute v. French*, 16 Gray (Mass.) 196; *Barnes v. Perine*, 12 N.Y. 18, and cases there cited.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

KELLOGG, J. (dissenting). The Chief Judge finds in the expression, "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund," an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. Moreover, since the donor specified that the gift was made, "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient quid pro quo to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as

might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so, there was never any acceptance of the offer, and therefore no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. Williston on Contracts, § 62. Clearly, although a promise of the college to make the gift known, as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises. [The remainder of the dissenting opinion is omitted.]

QUESTIONS:

1. Did the College by "implication" make a promise to Mary Johnston at the time that it received her written subscription?
2. If Mary had not paid \$1,000 on account during her life, would her promise have been enforceable against her executor?
3. Would Mary's promise have been made enforceable if the College, in reliance on it and other similar subscriptions, had established a professorship of theology and had appointed a teacher to fill it?

NOTE

Subscriptions for a charitable purpose have been enforced in very many cases. Action toward carrying out the purpose and in reliance on the subscription is the fact that is most commonly approved as a reason for enforcement, being described by the court as a "consideration."

Some cases hold that one subscription is sufficient consideration for another, creating an enforceable right in the beneficiary. In other cases the court has found an implied promise by the trustees of the charity to execute the work contemplated, such promise operating as a consideration.

There are a few cases in England and in the United States in which enforcement of a charitable subscription was denied. Almost never is there a bargained-for equivalent given for such a subscription; but it is seldom long before action of a definite and substantial character is taken by the promisee in reasonable and expected reliance.

CHAPTER 4

CONTRACTS UNDER SEAL

DEED [Defined in TERMES DE LA LEY, 149-152]. Translated in the first American edition from the London edition of 1721.

Deed is a writing sealed and delivered, to prove and testify the agreement of the party whose deed it is to the thing contained in the deed; as a deed of feoffment is a proof of the livery of seisin, for the land passes by the livery of seisin; but when the deed and the delivery are joined together, that is a proof of the livery, and that the feoffor is contented that the feoffee shall have the land.

All deeds are either indented, whereof there are two, three, or more parts, as the case requires; of which the feoffor, grantor, or lessor hath one; the feoffee, grantee, or lessee another; and peradventure some other body a third, &c. Or else they are poll deeds, single, and but one, which the feoffee, grantee, or lessee hath, &c. And every deed consists of three principal points (without which it is no perfect deed to bind the parties), namely, writing, sealing, and delivery.

1. By writing is shewed the parties' names to the deed, their dwelling places, their degrees, the thing granted, upon what considerations, the estate limited, the time when it was granted, and whether simply, or upon condition, with other such like circumstances. But whether the parties to the deed write in the end their names, or set to their marks (as it is commonly used), it matters not at all (as I think), for that is not meant, where it is said, that every deed ought to have writing.

2. Sealing is a farther testimony of their consents to what is contained in the deed; as it appears in these words, In witness whereof, &c. or to such effect, always put in the latter end of deeds, without which words the deed is insufficient.

And because we are about sealing and signing of deeds, it shall not be much amiss here to shew you, for antiquity's sake, the manner of signing and subscribing deeds in our ancestors the Saxons' time, a fashion differing from that we use now, in this, that they to their deeds subscribed their names (commonly adding the sign of the cross), and in the end did set down a great number of witnesses, not using at that time any kind of seal; and we at this day, for more surety, both subscribe our names (though that be not very necessary), and put to our seals, and use the help of witnesses besides.

That the former fashion continued absolute until the time of the conquest by the Normans, whose manners by little and little at the length prevailed amongst us; for the first sealed charter in England, is thought to be that of king Edward the Confessor, to the abbey of Westminster, who being educated in Normandy, brought into the realm that and some other of their fashions with him. And after the coming of William the Conqueror, the Normans liking their own country custom (as naturally all nations do), rejected the manner that they found here, and retained their own, as Ingulphus the abbot of Croiland, who came in with the conquest witnesses, saying: "The Normans do change the making of writings (which were wont to be firmed in England with crosses of gold, and other holy signs) into an impression of wax, and reject also the manner of the English writing." Howbeit, this was not done all at once, but it increased and came forward by certain degrees; so that first and for a season the king only or a few other of the nobility, used to seal; then the noblemen, for the most part, and none other. Which thing a man may see in the history of Battle-Abby, where Richard Lucie, chief justice of England, in the time of king Henry II, is reported to have blamed a mean subject for that he used a private seal, whereas that pertained (as he said) to the king and nobility only.

At which time also, as J. Rosse notes it, they used to engrave in their seals their own pictures and counterfeits, covered with a long coat over their armours. But after this, the gentlemen of the better sort took up the fashion, and because they were not all warriors, they made seals engraven with their several coats or shields of arms, for difference sake, as the same author reports. At length about the time of Edward III seals became very common; so that not only such as bear arms used to seal, but other men also fashioned to themselves signets of their own devices, some taking the letters of their own names, some flowers, some knots and flourishes, some birds and beasts, and some other things, as we now yet daily see used.

Some other manners of sealings besides these have been heard of among us; as namely, that of king Edward III, by which he gave to Norman the Hunter,

The hop and the hop town,
With all the bounds upside down:
And in witness that it was sooth,
He bit the wax with his fore tooth.

The like to this was shewed me by one of my friends in a loose paper, but not very anciently written, and therefore he willed me to esteem of it as I thought good. It was as follows:

"I, William, King, give to thee Plowden Royden, my hop and hop lands, with all the bounds up and down, from heaven to earth, from earth to hell for thee and thine to dwell, from me and mine, to thee

and thine, for a bow and a broad arrow, when I come to hunt upon yarrow. In witness that this is sooth, I bite this wax with my tooth, in the presence of Magge, Maud and Margery, and my third son Henry."

Also that of Alberick de Vere, containing the donation of Hatfield, to which he affixed a short black-hafted knife like an old halfpenny whittle, instead of a seal: with divers such like.

But some peradventure will think, that these were received in common use and custom, and that they were not the devices and pleasures of a few singular persons: such are no less deceived than they that deem every charter and writing, that hath no seal annexed, to be as ancient as the conquest; whereas indeed sealing was not commonly used till the time of king Edward III, as hath been already said.

3. Delivery, though it be set last, is not the least; for after a deed is written and sealed, if it be not delivered, all the rest is to no purpose

And this delivery ought to be done by the party himself, or his sufficient warrant; and so it will bind him whosoever wrote or sealed the same: and by this last act the deed is made perfect, according to the intent and effect of it; and therefore, in deeds, the delivery is to be proved, &c.

Thus you see, writing and sealing, without delivery, is nothing to purpose: sealing and delivery, where there is no writing, work nothing: and writing and delivery without sealing, make no deed. Therefore they all ought jointly to concur to make a perfect deed.

The term "deed" is now generally used to denote a sealed and formally acknowledged document for the conveyance of title to land. It was taken, presumably, from the form of the certificate of a notary authenticating the execution of the document, by which he certifies that the grantor appeared before him and acknowledged that he executed the document "as his free act and deed."

See Restatement, Contracts, § 95, for a statement of the formalities for execution of a contract under seal. For accounts of the origin and development of seals, see 7 Wigmore, Evidence, 3d Ed., § 2161: Frederick E. Crane, "The Magic of the Private Seal," 15 Col.L.Rev. 24 (1915), also in Selected Readings in the Law of Contracts.

A RECOGNIZANCE is an acknowledgment of indebtedness or other obligation made before an official having authority. It is now generally a writing, sometimes a very informal and abbreviated one, filed in a court proceeding. In some jurisdictions at least, it may be made by oral statement in open court. See Restatement, Contracts, § 9; *Albrecht v. State*, 132 Md. 150, 103 A. 443 (1918); *State v. Chandler*,

79 Me. 172, 8 A. 553 (1887); *McNamara v. People*, 183 Ill. 164, 55 N.E. 625 (1899); *Bodine v. Commonwealth*, 24 Pa. 69 (1854); *Capital Garage Co. v. Gordon*, 99 Vt. 83, 130 A. 756 (1925).

WARREN v. LYNCH.

Supreme Court of Judicature of New York, 1810. 5 Johns. 239.

This was an action of assumpsit brought by the plaintiff, as the first endorser of a promissory note, against the defendant as maker. The note was as follows:

“Petersburg, Va., August 27, 1807.

“Four months after date I promise to pay Hopkins Robertson or order, the sum of \$719.12½ cents, witness my hand and seal. Payable in New York.

Thomas Lynch. [L. S.]”

The flourish and initials L. S. at the end of the maker's name constituted what was called his seal. The defendant pleaded non assumpsit, with notice of special matter to be given in evidence at the trial. * * *

On this evidence the judge was of opinion that the plaintiff was entitled to recover, and under his direction the jury found a verdict for the plaintiff for the amount of the note with interest.

KENT, C. J. * * * 1. The note was given in Virginia, and by the laws of that State it was a sealed instrument or deed. But it was made payable in New York, and according to a well-settled rule, it is to be tested and governed by the law of this State. *Thompson v. Ketcham*, 4 Johns. 285. Independent then of the written agreement of the parties (and on the operation of which some doubt might possibly arise), this paper must be taken to be a promissory note, without seal, as contradistinguished from a specialty. We have never adopted the usage prevailing in Virginia and in some other States, of substituting a scrawl for a seal; and what was said by Mr. Justice Livingston, in the case of *Meredith v. Hinsdale*, 2 Caines, 362, in favor of such a substitute, was his own opinion and not that of the court. A seal, according to Lord Coke (3 Inst. 169), is wax with an impression. *Sigillum est cera impressa, quia cera sine impressione non est sigillum.*

A scrawl with a pen is not a seal, and deserves no notice. The law has not indeed declared of what precise materials the wax shall consist; and whether it be a wafer or any other paste or matter sufficiently tenacious to adhere and receive an impression, is perhaps not material. But the scrawl has no one property of a seal. *Mulum abludit imago.* To adopt it as such would be at once to abolish the immemorial distinction between writings sealed and writings not sealed. Forms will frequently, and especially when they are con-

secrated by time and usage, become substance. The calling a paper a deed will not make it one if it want the requisite formalities. "Notwithstanding," says Perkins (§ 129), "that words obligatory are written on parchment or paper, and the obligor delivereth the same as his deed, yet if it be not sealed, at the time of the delivery, it is but an escrowl, though the name of the obligor be subscribed." I am aware that ingenious criticism may be indulged at the expense of this and of many of our legal usages, but we ought to require evidence of some positive and serious public inconvenience before we, at one stroke, annihilate so well-established and venerable a practice as the use of seals in the authentication of deeds. The object in requiring seals, as I humbly presume, was misapprehended both by President Pendleton and by Mr. Justice Livingston. It was not, as they seem to suppose, because the seal helped to designate the party who affixed it to his name. *Ista ratio nullius pretii* (says Vinnius, in Inst. 2, 10, 5) *nam et alieno annulo signare licet*. Seals were never introduced or tolerated in any code of law, because of any family impression or image or initials which they might contain. One person might always use another's seal, both in the English and in the Roman law.¹ The policy of the rule consists in giving ceremony and solemnity to the execution of important instruments, by means of which the attention of the parties is more certainly and effectually fixed and frauds less likely to be practised upon the unwary. President Pendleton, in the case of *Jones and Temple v. Logwood*, 1 Wash. (Va.) 42, which was cited upon the argument, said that he did not know of any adjudged case that determines that a seal must necessarily be something impressed on wax; and he seemed to think that there was nothing but Lord Coke's opinion to govern the question. He certainly could not have examined this point with his usual diligence. The ancient authorities are explicit, that a seal does, in legal contemplation, mean an impression upon wax. "It is not requisite," according to Perkins (§ 134), "that there be for every grantor who is named in the deed a several piece of wax, for one piece of wax may serve for all the grantors if every one put his seal upon the same piece of wax." And Brooke (tit. *Faits*, 30 and 17) uses the same language. In *Lightfoot and Butler's Case*, which was in the Exchequer, 29 Eliz. (2 Leon. 21) the Barons were equally explicit

¹ In accord: *Ball v. Dunsterville*, 4 T.R. 313, 100 E.R. 1038 (1791), one partner attached a seal for both in the other's presence. And where the instrument purports in its own terms to be under the hands and seals of the parties, they will all be presumed to have adopted the single seal appearing thereon. See *Restatement, Contracts*, §§ 97-99.

"Nota. that it was held by all the Justices that where the obligation upon which suit was brought read, *In cujus rei testim' sigillum apposuit*, the deed is good even though the word *meum* is omitted, because if the deed is delivered it is a good deed, whether the seal is his own seal or the seal of another." Y.B. 21 Edw. IV, 81, 30.

as to the essence of a seal, though they did not all concur upon the point, as stated in Perkins. One of them said that twenty men may seal with one seal upon one piece of wax only, and that should serve for them all, if they all laid their hands upon the seal; but the other two Barons held that though they might all seal a deed with one seal, yet it must be upon several pieces of wax. Indeed this point, that the seal was an impression upon wax, seems to be necessarily assumed and taken for granted in several other passages which might be cited from Perkins and Brooke, and also in Mr. Selden's Notes to Fortescue (*De Laud.* p. 72); and the nature of a seal is no more a matter of doubt in the old English law than it is that a deed must be written upon paper or parchment, and not upon wood or stone. Nor has the common law ever been altered in Westminster Hall upon this subject, for in the late case of *Adam v. Keer*, 1 Bos. & Puller, 360, it was made a question whether a bond executed in Jamaica, with a scrawl of the pen, according to the custom of that island, should operate as such in England, even upon the strength of that usage.

The civil law understood the distinction and solemnity of seals as well as the common law of England. Testaments were required not only to be subscribed, but to be sealed by the witnesses. *Subscriptionem testium, et ex edicto prætoris, signacula testamentis imponerentur* (Inst. 2, 10, 3). The Romans generally used a ring, but the seal was valid in law, if made with one's own or another's ring; and, according to Heineccius (*Elementa juris civilis secundum ord.*, Inst. 497), with any other instrument which would make an impression, and this, he says is the law to this day throughout Germany. And let me add that we have the highest and purest classical authority for Lord Coke's definition of a seal, *Quid si in ejusmodi cera centum sigilla hoc annulo impressero?* (Cicero. *Academ. Quæst. Lucul.* 4, 26.) * * *

Rule refused.

NOTE

What may operate as a "seal" in modern practice is defined in *Restatement, Contracts*, § 96. See *Woodbury v. U. S. Casualty Co.*, 284 Ill. 227, 120 N.E. 8 (1918), stating the "common law" rule in accord with the case above.

In many states it is provided by statute that a scroll or other device with the pen shall be sufficient. *Stimson, Am.St.Law*, §§ 1564-5. In New York it was formerly provided that the word "seal" or the letters "L. S." (*locus sigilli*), or anything affixed by an adhesive substance, might be used; but a recent statute has deprived a seal of its common law effect.

In other states the earlier common-law rule has been changed by judicial decision, following changes in local custom: *Lorah v. Nissley*, 156 Pa. 329, 27 A. 242 (1893); *Hacker's Appeal*, 121 Pa. 192, 15 A. 500, 1 L.R.A. 861 (1888). In *Alexander v. Jameson*, 5 Bin. (Pa.) 238, 244 (1812), *Brackenridge, J.*, said: "Illi robur et æs triplex. He was a bold fellow

who first in these colonies, and particularly in Pennsylvania, in time whereof the memory of man runneth not to the contrary, substituted the appearance of a seal by the circumflex of a pen, which has been sanctioned by usage and the adjudication of the courts, as equipollent with a stamp containing some effigies or inscription on stone or metal. * * * How could a jury distinguish the hieroglyphic or circumflex of a pen by one man from another? In fact the circumflex is usually made by the scrivener drawing the instrument, and the word 'seal' inscribed within it."

JACKSON v. SECURITY MUT. LIFE INS. CO.

Supreme Court of Illinois, 1908. 233 Ill. 161, 84 N.E. 198.

Action by Isabella H. Jackson against the Security Mutual Life Insurance Company. Judgment for defendant, affirmed by the Appellate Court, and plaintiff appeals. Affirmed.

This is an appeal from a judgment of the Appellate Court affirming the judgment of the circuit court of Cook county in an action in assumpsit brought by appellant to recover from appellee a balance of \$7,500 alleged to be due upon an insurance policy for \$10,000, issued November 17, 1897, upon the life of her husband, William S. Jackson. * * * Appellee pleaded, in addition to the general issue, a release by appellant, for \$2,500, of all claims under the policy; that the policy was issued in consideration of a written application by the insured, which appellee's officers, after the death of the insured, were led by certain information to believe contained divers false representations; that appellee in good faith believed it had a complete defense to all claims and entered into the agreement with appellant to compromise said claims for \$2,500, which sum was paid in full satisfaction of all claims and the policy surrendered. After both parties had introduced their evidence, the jury, under an instruction from the court, returned a verdict in favor of appellee. At the time of the settlement appellant gave a receipt to appellee's representative, H. J. McCormick, as follows:

"Chicago, Ill., Nov. 18, 1898.

"Received of the Security Mutual Life Association twenty-five hundred dollars, in full release of all claims under this policy No. 22,819 on the life of William S. Jackson.

"Isabella H. Jackson.	[Seal.]	} Beneficiary.
"Widow of William S. Jackson.	Seal.	
"	Seal.	

"Witness: Adelor J. Petit,
"H. J. McCormick."

It is admitted that the word "seal" after the name of appellant was on the receipt before she signed it, but the evidence is conflicting as

to whether the scrawl or irregular ink line about the word "seal," indicated above by brackets was also there at that time.

CARTER, J. * * * Appellant insists that the scrawl or irregular ink mark around the word "seal" after her name on the release was placed there after she signed it. McCormick testified that he put the scrawl about the word "seal" at the same time he filled in the body of the release and dated it, and that this was done before it was signed by the appellant. Even though it should be admitted that the scrawl was placed there afterwards by a representative of appellee, such fact does not render the instrument void, if the word "seal" was sufficient to constitute the instrument a sealed instrument without the necessity of a scrawl. Section 1 of chapter 29, p. 460, Hurd's Rev.St.1905, reads: "That any instrument of writing, to which the maker shall affix a scrawl by way of seal, shall be of the same effect and obligation, to all intents, as if the same were sealed." While this statute has been frequently construed, the precise question in the form here presented has never been passed upon by this court. In *Ankeny v. McMahon*, 3 Scam. 12, it was held that, where an instrument describes itself in the body as sealed, and the letters "L. S." are either written or printed opposite the signature, it is a sealed instrument, and that there is no substantial difference as to the validity or dignity of the instrument whether the party executing it writes his name opposite a scrawl previously written or printed, or actually affixes a scrawl after signing his name. In *Davis v. Burton*, 3 Scam. 41, 36 Am.Dec. 511, it was held that where a bond or sealed instrument purports, on its face, to be sealed by all the signers, and there are several seals attached, but not so many as there are names, the court will presume that each signer has adopted some one of the seals already attached. To the same effect is *Ryan v. Cooke*, 172 Ill. 302, 50 N.E. 213. See, also, *Eames v. Preston*, 20 Ill. 389. The recital of the seal is not essential. If the instrument be actually sealed, it will operate as such without the recital, and the general rule is that, if there is no seal at the end, the instrument will not be held to be a specialty, although the parties in the body of the writing make mention of a seal. 2 *Bouvier's Law Dic.* (Rawle's Rev.) p. 1020; 9 *Am. & Eng. Ency. of Law* (2d Ed.) p. 147, and cases cited.

Appellant contends that, our statute on this subject having been adopted substantially from that of Virginia, it must be presumed we adopted the construction given by the courts of that state up to the time the statute was adopted; that the courts of Virginia had held that an instrument such as this, even with a scrawl about the word "seal," but which did not term itself in the body of the instrument as a sealed instrument, was not one. *Clegg v. Lemessurier*, 15 Grat. (Va.) 108; *Parks v. Hewlett*, 9 Leigh (Va.) 511. This rule might obtain if this were a question of first impression and our courts had not construed

the statute differently from the Virginia courts. Moreover, a more recent decision of the highest court of that state has held that the word "seal" has the same force and effect as a scrawl, under a statute very like our own. *Lewis' Ex'rs v. Overby's Adm'r*, 28 Grat. (Va.) 627. Considering the evidence in the most favorable light possible to appellant, our conclusion on the whole record is that this must be held a sealed instrument. * * *

Judgment affirmed.

PARKS v. HAZLERIGG.

Supreme Court of Indiana, 1845. 7 Blackf. 536, 43 Am.Dec. 106.

SULLIVAN, J. This was an action of debt on an appeal-bond. The plaintiff declared against Hazlerigg, Kizer, Russell, and Dugan; for that the defendants, on, etc., at, etc., by their certain writing obligatory sealed with their seals, etc., acknowledged themselves to be held and firmly bound, etc. On oyer it appeared that the above defendants were named in the bond as obligors. There were four seals affixed to the bond, but it was signed only by Hazlerigg, Russell, and Dugan. Opposite to the fourth seal there was no signature. Demurrer to the declaration and judgment for the defendants.

This case presents the simple question, whether it is necessary to the validity of a bond, which has been sealed by the obligor, that it be signed by him also.

At common law signing was not necessary to the validity of a deed. 2 Blacks.Comm. 305-306; *Cromwell v. Grunsden*, 2 Salk. 462. To this point it is not necessary to multiply authorities. It has been intimated that since the Statute of Frauds and Perjuries, signing, as well as sealing, is necessary, 2 Blacks. Comm., supra; but the better opinion seems to be, that the statute has made no alteration in this respect, since it applies only to mere agreements and not to deeds. 1 Shepp.Touch. by Preston, 56, note 24; *Hurlstone on Bonds*, 8. "Signing," says Gresley, in his *Equity Evidence*, p. 121, in speaking of the execution of a deed, "is not ordinarily essential, but it is always as well to prove it as a regular part of the transaction. Besides, it assists the other parts of the proof of execution, for the circumstance that the party has written his name opposite to the seal, on an instrument bearing on its face a declaration that it was sealed by him, is prima facie evidence of sealing and delivery." The common law, therefore, remains unchanged, and signing was not essential to the validity of the bond declared on in this case. If the plaintiff can prove that Kizer, with the other defendants, sealed the bond, the proof will support the declaration, which is in the usual form. The Court erred in sustaining the demurrer.

The judgment is reversed, with costs. Cause remanded.

TRINITY TERM, 1537. DYER, 19a.

An obligation was thus: "for the well and faithful payment of which I bind myself by these presents, dated, etc." and not said "sealed with my seal" nor "in witness whereof"; wherefore it was asked of the court if such an obligation be good, or not. And it seemed to SHELLEY and FITZHERBERT that the obligation is well enough, if a seal be put to the deed, etc.

NOTE

While a written promise actually sealed and delivered would probably be held operative in those jurisdictions where seals have not been abolished, the fact that the instrument is not signed also would tend to corroborate the promisor if he testifies that he never executed it.

The rule stated above in Dyer's report is supported by Restatement, Contracts, § 100.

It is usual and desirable for the instrument to contain a testimonium clause, "In witness whereof I have hereunto set my hand and seal," but by the great weight of authority it is not necessary. A few states require it in certain cases. Some do not require it in the case of a common-law seal but do in the case of a pen scroll seal.

MICHELL v. STOCKWITH AND ANDREWS.

1588. Gouldsbrough, 83.

Thomas Michell brought debt upon an obligation against Stockwith and Andrews, and the jury found a special verdict, viz. that after the issue joyned, and before the nisi prius, the seal of Andrews was fallen off & si, &c.

WINDHAM. A case hath been adjudged here, that where a bond was delivered to the *custos brevium* to be kept, and the mise broke the seal, and the Court adjudged that the plaintiff should be at no prejudice thereby. And here insomuch that no fault was in the plaintiff, the Court awarded that he should recover, and judgment was entered accordingly.

Y. B., 1 HENRY VI, 4, pl. 14.

Note, that COTT said, that if I make and deliver a release to you bearing a certain date, and you make an obligation to me bearing date a week earlier, and you deliver the obligation to me after the release was delivered to you, etc., in an action of debt upon this obligation it is a good plea to say that I have given a release, and it is a good rep-

lication for me to say that you have delivered the obligation to me at a time since the delivery of the release. And this was so adjudged before CHIRN and HULL, etc.

CHAMBERLAIN v. STAUNTON.

In the Common Pleas, 1588. 1 Leon. 140.

Chamberlain brought debt upon an obligation against Staunton, and upon non est factum, the jury found this special matter, that the defendant subscribed and sealed the said obligation, and cast it upon a certain table, and the plaintiff took it without any other delivery or any other thing amounting to a delivery. And the Court was clear of opinion, that upon that matter the jury had found against the plaintiff, and it is not like the case which was here lately adjudged, that the obligor subscribed and sealed the obligation, and cast it upon a table, saying these words, this will serve, the same was held to be a good delivery, for here is a circumstance, the speaking of these words, by which the will of the obligor appeareth, that it shall be his deed.

ANONYMOUS.

1596. 2 Anderson, 41 No. XXVII.

An instrument poll (unindented) was made in which J. S. covenanted with R. C., and in the very same instrument R. C. covenanted with J. S., and the covenants were both in express terms in the instrument. The said R. C. first delivered the instrument ensealed to the said J. S. as his deed, and afterwards the said J. S. delivered it as his deed ensealed by him to the said R. C. The question was whether this was the deed of J. S. or of R. C. or of both. It was adjudged by the COURT that this was the deed of both the one and the other, and that he who had possession of it could maintain an action of covenant against the other, irrespective of whether he held by the first or the second delivery, for both parties are equally bound.

XENOS v. WICKHAM.

In the House of Lords, 1867. L.R. 2 H.L. 296.

The plaintiffs were owners of the ship Leonidas, and the defendant is the representative of the Victoria Insurance Company. The declaration alleged, in the usual form, that the plaintiffs caused their vessel to be insured by this company for the space of twelve months, from

the 25th of April, 1861, to the 24th of April, 1862, on a policy valued at £1,000, upon a ship valued at £13,000, and the loss was alleged to have occurred by perils of the sea. The defendant denied the insurance as alleged.

It appeared on the trial that the plaintiffs employed Mr. Lascaridi, an insurance broker, to secure a policy on the *Leonidas* for £1,000. He called at the defendant's office and they agreed upon the issuance of such a policy at a definite premium. The Company gave credit to Lascaridi, charging him personally with the premium, and Lascaridi collected the premium from the plaintiffs. A policy in the usual form was drawn up in accordance with Lascaridi's instructions, duly signed and sealed, but was held by the company's clerks until the following month when Lascaridi was requested to make payment. He did not pay, and the policy remained with the company.

Several months later, the *Leonidas* was lost, and suit was brought for the insurance. The Lord Chief Justice directed a verdict for the defendant, his decision being later affirmed by the Exchequer Chamber. On appeal to the House of Lords, the Judges were summoned, the following attending: POLLOCK, C. B., PIGOTT, B., and BLACKBURN, WILLES, MELLOR, and SMITH, JJ. The following question was put to the Judges:

"Whether, on the facts stated in the special case, the Victoria Fire & Marine Insurance Company was, when the ship *Leonidas* was lost, liable as insurer to the plaintiffs on the policy, or alleged policy, in the pleadings mentioned?"

Mr. Justice BLACKBURN. I answer your Lordships' question in the affirmative. Two questions are involved in your Lordships' question. First, whether the policy before the 8th of June was so executed as to bind the defendant's company to the plaintiffs. * * *

As to the other branch, I should wish to call your Lordships' attention to what I think are the real points in controversy. They are, I think, two; one of fact, the other of law.

The question of fact is, I think, this: Was the policy really in fact intended by both sides to be finally executed and binding from the time when the directors of the defendant's company affixed their seals to it, and left it in their office; or was it, in fact, intended that the assured or their brokers should exercise a subsequent discretion as to whether they would accept it or not.

If I thought that the parties did not in fact intend it to be then finally binding, I do not think there would be any magic in the law to make it binding contrary to their intention; but I submit to your Lordships that the statements in the case as to what is stated to be "always" the practice, and the statements there as to what was done in this particular case, shew that the intention of both parties was, that the policy,

when drawn up by the company in conformity with the instructions in the advice slip sent in by the broker, should be finally binding as soon as executed by the officers of the company. It was not intended by either side that anything more should be done, but that the policy from that time should be binding, and should lie in the company's office as the property of the assured till sent for by them, and then be handed over to their messenger.

It seems that some of the Judges take a different view of the fact, and think it really was intended that the policy should not be finally binding till something more was done by the assured. Your Lordships will decide which is the true view of the facts.

Then, assuming that the intention really was that the policy should be binding as soon as executed, and should be kept by the company as a bailee for the assured, the question of law arises, whether the policy could in law be operative until the company parted with the physical possession of the deed.

I can, on this part of the case, do little more than state to your Lordships my opinion, that no particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it. The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to be executed as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over, saying: "I deliver this as my deed;" but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well. And it is clear on the authorities, as well as the reason of the thing, that the deed is binding on the obligor before it comes into the custody of the obligee, nay, before he even knows of it; though, of course, if he has not previously assented to the making of the deed, the obligee may refuse it. In *Butler and Baker's Case* (3 Co. Rep. 26), it is said: "If A. make an obligation to B., and deliver it to C. to the use of B., this is the deed of A. presently; but if C. offers it to B., there B. may refuse it in pais, and thereby the obligation will lose its force." I cannot perceive how it can be said that the delivery of the policy to the clerks of the defendant, to keep till the assured sent for it, and then to hand it to their messenger, was not a delivery to the defendant to the use of the assured. There is neither authority nor principle for qualifying the statement in *Butler and Baker's Case*, by saying that C. must not be a servant of A., though, of course, that is very material in determining the question whether it was "delivered to C. to B.'s use," which I consider it to be, in other words, whether it was shewn that it was intended to be finally executed as binding the obligor at once, and to be thenceforth the property of B. In the present case, the assured could not have refused the deed in pais, for it was drawn up in strict pursuance of the authority given by them in the slip

set out in the case; and I think a prior authority is at least as good as a subsequent assent. That question, however, does not arise, as they did not refuse it in pais.

No authority, I think, has been cited which supports the position that there is a technical necessity for some one who is agent of the assured taking corporal possession of a policy under seal before it can be binding, though intended by both parties to be so. I think it would be very inconvenient, and would work great injustice, if such were the law. I must leave it to your Lordships to determine whether it is so or not.

The House decided in harmony with Blackburn's opinion. Judgment reversed; and judgment given for the plaintiffs.

UNITED STATES FIDELITY & GUARANTY CO. v.
RIEFLER et al.

Supreme Court of the United States, 1915.
239 U.S. 17, 36 S.Ct. 12, 60 L.Ed. 121.

On a certificate from the United States Circuit Court of Appeals for the Seventh Circuit presenting questions as to whether a certain instrument was a completed contract of indemnity or guaranty. Answered in the affirmative.

Mr. Justice HOLMES delivered the opinion of the court:

The facts certified are simple. One Dooling, being required to give an official bond, applied in Springfield, Illinois, to an agent of the plaintiff in error, a bonding company having its home office in Baltimore, Maryland, was informed that the company would become his surety only on condition that he furnish indemnity, and was handed a printed form of indemnity bond. The defendants in error, at Dooling's request, signed and sealed this bond for the purposes therein expressed, and authorized Dooling to deliver it to the company through its Springfield agent, which Dooling did. The agent, who is not shown to have had authority to execute bonds, forwarded it for acceptance. The company, relying upon it, became surety for Dooling. One of the recitals of the bond was that the company "has become or is about to become surety, at the request of the said Frank E. Dooling, on a certain bond in the sum of Five Thousand Two Hundred Dollars, wherein Frank E. Dooling is principal, as Recorder of Springfield District Court No. 25, Court of Honor, located at Springfield, Illinois, a copy of which bond is hereto attached No. 52012-5, which bond is made a part hereof." The condition was that Dooling should keep the company indemnified for all loss by reason of its suretyship. A copy of the company's bond was not attached and at the date of the indemnity bond had not

been executed. Dooling was not a party to the indemnity bond. The defendants in error received no pecuniary consideration for their act and were not notified of the acceptance of their bond or of the execution of the other by the company. The questions propounded are: "(1) Was the instrument which was signed by Riefler and Hall, and relied on by the company, a completed contract of indemnity or guaranty? (2) Or was it merely an offer to become indemnitors or guarantors, requiring notice of acceptance by the company, in accordance with *Davis v. Wells, F. & Co.*, 104 U.S. 159, 26 L.Ed. 686, and *Davis Sewing Mach. Co. v. Richards*, 115 U.S. 524, 29 L.Ed. 480, 6 S.Ct. 173? (3) And, if in substance the instrument was merely an offer, does the fact that it was in the form of a bond under seal take it out of the rule of those authorities?"

If the bond in suit had been delivered directly to the company and had been pronounced satisfactory there would have been no need to notify Riefler and Hall of the company's subsequently executing the Dooling bond. Riefler and Hall assumed an obligation in present words to indemnify the company against an exactly identified suretyship that the company had gone or was about to go into, as they stated. The company was about to go into it and went into it. If Riefler and Hall had made only a parol offer in the same terms, the company, by becoming surety, would have furnished the consideration that would have converted the offer into a contract; but notice is held necessary in *Davis Sewing Mach. Co. v. Richards*. If it had been a covenant, the company's act would have satisfied the condition upon which the covenant applied. *O'Brien v. Boland*, 166 Mass. 481, 483, 44 N.E. 602. As it was a bond, the company's entering into its undertaking in like manner furnished the subject-matter to which the obligation by its terms applied. In the case of either covenant or bond there was no need for notice that an event had happened that the defendants' contract contemplated as sure to happen, if it had not already come to pass.

The only ground for hesitation is that seemingly the bond in suit might have been rejected by the company as unsatisfactory, and that therefore it may be argued that Riefler and Hall were entitled to notice that it had been accepted. But we are of opinion that, in the circumstances of this case, it is reasonable to understand that they took the risk. They are chargeable with notice that by their act their bond had come to the hands of the company. The bond on its face contemplated that the company would accept it and act upon it at once, and disclosed the precise extent of the obligation assumed. It seems to us that when such a bond, carrying, as a specialty does, its complete obligation with the paper, is put by the obligors into the hands of the obligee, and in fact is accepted by it, notice is not necessary that a condition subsequent to the delivery, by which the obligee might have made it ineffectual, has not been fulfilled. The contract is complete

without the notice (*Butler's Case*, 3 Coke, 25, 26b; *Xenos v. Wickham*, L.R. 2 H.L. 296; *Pollock, Contr.* [8th Ed.] 7, 8), and we see no commercial reason why the principles ordinarily governing contracts under seal should not be applied (*Bird v. Washburn*, 10 Pick. [Mass.] 223). In *Davis v. Wells, F. & Co.* the guaranty was an open, continuing one up to \$10,000, but it was under seal, and was held binding, although additional reasons were advanced.

We answer the first question: Yes.

Mr. Justice MCKENNA dissents.

NOTE ON "DELIVERY"

From time immemorial the usual act by which a transfer of property is made, whether as a gift or otherwise, is the act of manual delivery. In the case of land the thing handed over was once the symbolical twig or turf. Such a manual delivery is also the usual act by which a sealed document is given legal operation, whether in the case of deeds of conveyance or of bonds and other promises under seal. Promissory notes and other unsealed written contracts may also be given their last operative fillip by manual delivery; but the parties are likely to regard the act of signing as final. Since the manual delivery of a document may be for many other purposes than to give it legal operation, such as mere inspection or safe keeping, the operative delivery requires that the manual act shall be accompanied by such words or by such other conduct as to express an intention to make the document immediately operative.

In the course of time men acquire more varied methods of expressing their intention, especially by language. As is indicated in *Xenos v. Wickham*, the manual act of delivery by the obligor to the obligee in person or to his appointed representative ceases to be an invariable requirement. "Delivery" continues to be stated as the final act that gives the sealed instrument its legal operation, such effect dating from the "delivery" and not from the date written on the paper; but the meaning of "delivery" is expanded to include almost any clear expression of intention by the obligor. "Delivery may be effected by words without acts, or by acts without words, or by both acts and words." *Ruckman v. Ruckman*, 32 N.J.Eq. 259, 261 (1880); *Thoroughgood's Case*, 9 Co.Rep. 136b (1612). The validity of the delivery of any written instrument is determined in the same manner, whether it is under seal or not. See *Sarasohn v. Kamaiky*, 193 N.Y. 203, 86 N.E. 20 (1908), delivery of a certified copy, or counterpart, of a written contract.

If the contract under seal is unilateral, containing a promise by one party only, the required "delivery" is by that party only. If it is bi-

lateral, with reciprocal promises, each party must make "delivery". Such a bilateral instrument was formerly executed in two duplicate parts on a single paper, the two parts then being cut apart with a serrated (indented) edge, so that the two might be identified later by fitting them together. Formal instruments sometimes still begin with the words "This Indenture witnesseth," although there is no serrated edge and the instrument is one that once would have been called a "deed poll" (having straight edges).

It has often been held in the United States that "delivery" is not complete until an expression of assent (acceptance) by the grantee or his representative. *Meigs v. Dexter*, 172 Mass. 217, 52 N.E. 75 (1898). The distinction between unilateral and bilateral contracts was not considered. Of course, if both parties make promises, both must express an intention to make the instrument operative; and the obligation of the one making the first "delivery" is constructively conditional on a binding expression of intention by the other party. The other's assent by attaching his own signature may be such an expression. See *Diebold Safe & Lock Co. v. Morse*, 226 Mass. 342, 115 N.E. 431 (1917). "While acceptance will often be presumed where the deed is beneficial to the grantee, yet where the deed imposes obligations, and without remuneration, it is absolutely essential that the grantee shall accept it." *Sellers v. Rike*, 292 Ill. 468, 127 N.E. 24 (1920). Delivery of a unilateral instrument may be made to a third person for the obligee's benefit; but on coming to the latter's knowledge he has power to make the instrument inoperative by disclaimer. These matters are covered by Restatement, Contracts, §§ 104-107.

An instrument should not be delivered while it is incomplete. It has often been held that the filling of material blanks after delivery of the deed invalidated the whole, a new "delivery" by the obligor being required. However, the doctrine of estoppel is often invoked, to sustain such instruments in the hands of an innocent holder for value. See *Butler v. U. S.*, 83 U.S. 272, 21 Wall. 272 (1874); *White v. Duggan*, 140 Mass. 18, 2 N.E. 110 (1885).

CONDITIONAL DELIVERY—DELIVERY IN ESCROW*

For some centuries it has been a common practice for a grantor to deliver his deed of conveyance to a trusted third party, not the grantee, with instructions to hold it "in escrow" and to deliver it to the

* Lack of space prevents the printing of the cases necessary to the full development of this subject; and the editor must content himself with a statement of conclusions that he has drawn from the cases, making reference to authorities whose analysis may be thought to disagree with his. The student must constantly observe the difference between a legal duty of im-

grantee in the future on the happening of some event (condition). Frequently this event is the payment of the balance of the price by a purchaser. During the time of the Year Books (between 1250 and 1550 A.D.) a document so delivered was thought not to operate as the grantor's "deed" and that it could not so operate until the happening of the event constituting the condition and the making of a second delivery to the grantee. Until then the document was a mere writing, variously described in the mixed language of the time as an "escrowl," "escrowe", or "escrit," such terms being derived it may be from the Latin *scriptum*, later turning into such words as scrawl and scroll. The legal effect of such a "conditional" delivery, "as an escrow," was not analyzed, the only perceived alternatives being all or nothing. And yet by their own decisions the courts gave to these "escrows" an intermediate legal operation, not "all" of the effects that delivery to the grantee would have had, and yet such important effects as to be far from "nothing."

It has been equally common to make a similar conditional delivery "in escrow" of sealed bonds and other written contracts, both sealed and unsealed, giving rise to similar problems as to their legal operation. See *In re Estate of Soper*, noted in Chapter 5.

The instructions to the holder of the "escrow" are not contained in the words of the document itself. Usually they are in a separate writing; but sometimes they are given by mere word of mouth, and even though so given are provable in evidence and legally effective. The legal effects of the delivery in escrow are dependent on the terms of the instructions to the holder. The party who executes the document may merely hand it to his wife or to his lawyer to keep it until tomorrow, subject to the party's own further orders. Such a delivery is a mere "bailment" of the writing, creating no legal relations with the grantee or obligee named in it. In the United States this is not called a delivery "in escrow."³

mediate performance and a legal duty of rendering performance in the future and only on the happening of some event, an event that may be some performance to be rendered by the other party, an act of a third person, or any other event in nature. Parties may bargain for and receive conditional promises as well as unconditional ones. In most contracts, the rights of one and the duties of the other are future and conditional. This is developed in more detail in Chapter 6.

³In some English cases, in which the party executing a document gave it to his own agent or attorney, still sub-

ject to his own further orders, the statement can be found that the document was delivered "as an escrow." See *Pattle v. Hornibrook* [1897] 1 Ch. 25. This may accord with the very earliest usage of the term; but it easily leads to confusion and to erroneous decision. It must be sharply distinguished from an irrevocable delivery to a third person to hold for the benefit of both parties, and to become more fully operative in the future on some performance by the obligee or the occurrence of some other event as a condition precedent to this fuller operation.

The ordinary function of an escrow, or conditional delivery of a document, is to give security to both parties to a transaction, the party to whom it is delivered holding it as the trusted representative of them both. Thus, a deed of conveyance may be delivered by a vendor to a bank with instructions to hold it for the benefit of the purchaser as well as the vendor and to deliver it over to the purchaser on payment by the latter of an agreed amount. A sealed bond or other written contract may be delivered on similar terms. If the condition is performed the grantor or obligor gets the money and the other party gets the document. If the condition is not performed, the document is returned to the grantor or obligor and the other party has his money. Whether either party has a remedy against the other depends on the terms of the agreement, if any, that they have made with each other.

Suppose that an owner of land executes a document in which he promises under seal (or for a consideration or in reliance on which the promisee substantially changes his position) to convey the land to B at the price of \$5,000, and delivers the document to a bank as holder for the benefit of himself and B with instructions to deliver it to B on his payment within 30 days of a first instalment of \$1,000. By these acts, the owner creates in B an irrevocable power for 30 days. There is a unilateral contract under seal (or for an executed consideration, if one is given).⁴ The acts of the owner are legally operative; and no further assent or action *by him* is contemplated as necessary in order that his promise shall become immediately enforceable.⁵

⁴ See Restatement, Contracts, § 46, entitled "Offers Which Are Themselves Contracts." This illustration is given: "A promises B under seal * * * that A will sell B 100 shares of stock in a specified corporation for \$5,000 at any time within 30 days that B selects. The offer is irrevocable." To the same effect see section 24 and Illustration 2.

For the sealed promise of A to have such effect, it must have been "delivered" by him; but delivery may be either to B himself or to a third party "in escrow" for the benefit of both A and B.

Compare Restatement, Contracts, §§ 101 and 103, where the language is inconsistent with the present Note. But these two sections do not deny the legal operation of the promisor's delivery and instructions to the holder of the document.

⁵ Wigmore, Evidence, 3d Ed. §§ 2408, 2410 (1940), makes use of the term "jural act" in making his analysis of the

legal operation of delivery in escrow and other conditional deliveries. Until the happening of the condition the "jural act" is said to be "incomplete;" "the act is not an act until the final moment appointed, and that moment may by the parties be made to depend upon some future event, which thus becomes a condition precedent to the jural existence of the act." The term "act" is here made to do double duty. When is an act not an "act"? The action of the obligor who makes delivery is "complete" long before the happening of the "condition precedent." His action already has its "jural existence;" and it is already legally operative. The "condition" is merely another legally operative factor, not in any respect a part of the obligor's "act." It is necessary to state what was the legal operation of the obligor's action (execution of the document, delivery, and accompanying instructions if any) at the time that it occurred, and also the legal

It is agreed that such a delivery in escrow as the foregoing is irrevocable from the time it is made;⁶ but promises contained in the instrument are not enforceable prior to performance of the condition. The rights and powers of the obligee are not affected by the intervening death or disability of the grantor or obligor.⁷ On due performance of the condition the document becomes completely and unconditionally operative and its promises become enforceable without the necessity of a further delivery to the obligee.⁸

For further discussion, see Anson on Contracts (Corbin's ed. 1930) § 346; "Conditions in the Law of Contract," 28 Yale L.J. 764-768 (1919); "Conditional Delivery of Written Contracts," 36 Yale L.J. 443 (1927).

BELLEWE, 111.

WADHAM. In debt on contract the plaintiff must show in his count for what cause the defendant became his debtor. Otherwise in debt on obligation, for the obligation is contract in itself.

NOTE

That promises under seal were enforceable by reason of their form and required no "consideration," see Restatement, Contracts, § 110.

"Specialties—Those formal common-law contracts under seal—were

operation of the "condition" when it occurs.

See *Pym v. Campbell and Atlas Petroleum Co. v. Cocklin*, in Chapter 6, Section 1.

⁶ See *Moore v. Downing*, 289 Ill. 612, 124 N.E. 557 (1919); *Exchange Realty Co. v. Bines*, 302 Mass. 93, 18 N.E.2d 425 (1939); *Naylor v. Stene*, 96 Minn. 57, 109 N.W. 685 (1905); *Baum's Appeal*, 113 Pa. 58, 4 A. 461 (1886); *Graham v. Graham*, 1 Ves.Jr. 272 (1791, Exch.); *Wigmore, Evidence*, 3d Ed., § 2408 (1940).

⁷ *Jackson v. Jackson*, 67 Or. 44, 135 P. 201 (1913); *Graham v. Graham*, supra; *Perryman's Case*, 5 Co.Rep. 84 (1599, C.P.); *Y.B. 27 Hen. VI, f. 7, pl. 3*; *Kent, Comm.* 447, 454 (1st Ed., 1830).

⁸ *Couch v. Meeker*, 2 Conn. 302 (1817); *Gardiner v. Gardiner*, 36 Idaho 664, 214 P. 219 (1923); *Regan v. Howe*, 121 Mass. 424 (1877); *State Bank v. Evans*, 15 N.J.L. 155 (1835). See *Jaquith v. Hud-*

son, 5 Mich. 123 (1858), where the parties signed a written agreement in duplicate, in which one promised to transfer his business and not to compete under forfeiture of \$1,000, and the other promised to execute a bond of indemnity and a note for the agreed price. The two copies were then given to Edwards to hold. The testimony as to his oral instructions was conflicting. The jury was told that if these instructions were that the agreement was to be null until the papers were subsequently delivered by Edwards on the joint request of both parties, then without such a delivery no contract existed, but that if Edwards was instructed to hold the documents until execution of the bond and note by Hudson, the agreement became fully operative as soon as the bond and note were duly executed, without any new delivery by Edwards. These instructions were sustained as correct.

enforced in the absence of an allegation of consideration, not because it was conclusively presumed that they were founded on a consideration, but because consideration was not an essential element to such contracts. Contracts under seal were enforceable at common law because of the formality of their execution, and such contracts were fully recognized and enforced long before the doctrine of consideration appeared in the law." *Lacey v. Hutchinson*, 5 Ga.App. 865, 64 S.E. 105 (1909), holding, however, that the rule is not applicable to a sealed instrument of a sort unknown to early common law.

In *Walker v. Walker*, 13 Ired. (35 N.C.) 335 (1852), it is said: "A voluntary bond for money, executed to a stranger, and professing on its face to be without consideration, and for mere friendship, is binding."

ALLER v. ALLER.

Court of Errors and Appeals of New Jersey, 1878. 40 N.J.L. 446.

The action was brought on the following instrument, viz.: "One day after date, I promise to pay my daughter, Angeline H. Aller, the sum of three hundred and twelve dollars and sixty-one cents, for value received, with lawful interest from date, without defalcation or discount, as witness my hand and seal this fourth day of September, one thousand eight hundred and seventy-three. \$312.61. This note is given in lieu of one-half of the balance due the estate of Mary A. Aller, deceased, for a note given for one thousand dollars to said deceased by me. Peter H. Aller. [L. S.] Witnesses present, John J. Smith, John F. Grandin."

Both subscribing witnesses were examined at the trial, and it appeared that there was a note for \$1000, dated May 1st, 1858, given by said Peter H. Aller to Mary Ann Aller, upon which there were endorsements of payments—April 1st, 1863, \$50; April 1st, 1866, \$46; April 1st, 1867, \$278.78.

Mary Ann Aller, the wife, died, and on the day after her burial, Peter H. Aller told his daughter, the plaintiff, to get the note, which he said was among her mother's papers. She brought it, read the note; he said there was more money endorsed on it than he thought; requested the witness John F. Grandin to add up the endorsements and subtract them from the principal, to divide the balance by two, and draw a note to each of her daughters, Leonora and Angeline, for one-half. After they were drawn by the witness, Peter H. Aller said: "Now here, girls, is a nice present for you," and gave them the notes. Angeline was directed to put the old note back among her mother's papers. Grandin was afterwards appointed administrator of Mary A. Aller, and as such, he says, he destroyed the old note. * * *

The verdict was for the plaintiff, and a rule to show cause was allowed at the Circuit.

The opinion of the court was delivered by

SCUDDER, J. * * * But it is said that the act of April 6th, 1875 (Revision 1877, p. 387, § 52), opens it to the defence of want of sufficient consideration, as if it were a simple contract, and, that being shown, the contract becomes inoperative.

The statute reads—"that in every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed," &c.

Suppose the presumption that the seal carries with it, that there is a sufficient consideration, is rebutted, and overcome by evidence showing there was no such consideration, the question still remains, whether an instrument under seal, without sufficient consideration, is not a good promise, and enforceable at law. It is manifest that here the parties intended and understood that there should be no consideration. The old man said: "Now here, girls, is a nice present for each of you," and so it was received by them. The mischief which the above-quoted law was designed to remedy, was that where the parties intended there should be a consideration, they were prevented by the common law from showing none, if the contract was under seal. But it would be going too far to say that the statute was intended to abrogate all voluntary contracts, and to abolish all distinction between specialties and simple contracts.

It will not do to hold that every conveyance of land, or of chattels, is void by showing that no sufficient consideration passed when creditors are not affected. Nor can it be shown by authority that an executory contract, entered into intentionally and deliberately, and attested in solemn form by a seal, cannot be enforced. Both by the civil and the common law, persons were guarded against haste and imprudence in entering into voluntary agreements. The distinction between "nudum pactum" and "pactum vestitum," by the civil law, was in the formality of execution and not in the fact that in one case there was a consideration, and in the other none, though the former term, as adopted in the common law, has the signification of a contract without consideration. The latter was enforced without reference to the consideration, because of the formality of its ratification. 1 Parsons on Cont. (6th Ed.) *427.

The opinion of Justice Wilmot, in *Pillans v. Van Mierop*, 3 Burr. 1663, is instructive on this point.

The early case of *Sharington v. Strotton*, Plow. 308, gives the same cause for the adoption of the sealing and delivery of a deed. It says, among other things, "because words are oftentimes spoken by men

unadvisedly and without deliberation, the law has provided that a contract by words shall not bind without consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation, &c. So that there is great deliberation used in the making of deeds, for which reason they are received as a lien final to the party, and are adjudged to bind the party without examining upon what cause or consideration they were made. And therefore in the case put in 17 Ed. IV, if I by deed promise to give you £20 to make your sale de novo, here you shall have an action of debt upon the deed, and the consideration is not examinable, for in the deed there is sufficient consideration, viz., the will of the party that made the deed." It would seem by this old law, that in case of a deed the saying might be applied, *stat pro ratione voluntas*.

In Smith on Contracts, the learned author, after stating the strictness of the rules of law, that there must be a consideration to support a simple contract to guard persons against the consequences of their own imprudence, says: "The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed."

This subject of the derivation of terms and formalities from the civil law, and of the rule adopted in the common law, is fully described in Fonb.Eq. 335, note a. The author concludes by saying: "If, however, an agreement be evidenced, by bond or other instrument, under seal, it would certainly be seriously mischievous to allow its consideration to be disputed, the common law not having pointed out any other means by which an agreement can be more solemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be said to be *nudum pactum*." See, also, 1 Chitty on Cont. (11th Ed.) 6; Morly v. Boothby, 3 Bing. 107; Rann v. Hughes, 7 T.R. 350, note a.

These statements of the law have been thus particularly given in the words of others, because the significance of writings under seal, and their importance in our common-law system, seem in danger of being overlooked in some of our later legislation. If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality? But because deeds have been used to cover fraud and illegality in the consideration, and just defences have been often shut out by the conclusive character of the formality of sealing, we have enacted in our state the two recent statutes above quoted. The one allows fraud in the consideration of instruments under seal to be set up as defence, the other takes away the conclusive evidence of a sufficient consideration heretofore accorded to a sealed writing, and makes it only presumptive evi-

dence. This does not reach the case of a voluntary agreement, where there was no consideration, and none intended by the parties. The statute establishes a new rule of evidence, by which the consideration of sealed instruments may be shown, but does not take from them the effect of establishing a contract expressing the intention of the parties, made with the most solemn authentication, which is not shown to be fraudulent or illegal. It could not have been in the mind of the legislature to make it impossible for parties to enter into such promises; and without a clear expression of the legislative will, not only as to the admissibility, but the effect of such evidence, such construction should not be given to this law. Even if it should be held that a consideration is required to uphold a deed, yet it might still be implied where its purpose is not within the mischief which the statute was intended to remedy. It was certainly not the intention of the legislature to abolish all distinction between simple contracts and specialties, for in the last clause of the section they say that all instruments executed with a scroll, or other device by way of scroll, shall be deemed sealed instruments. It is evident that they were to be continued with their former legal effect, except so far as they might be controlled by evidence affecting their intended consideration. * * *

The rule for a new trial should be discharged.

NOTE

By a later statute (P.L. 1900, p. 366) it was further provided that in actions upon sealed instruments the defendant may plead want or failure of consideration, the same as if the instrument were not sealed. See *United & Globe Rubber Mfg. Co. v. Conard*, 80 N.J.L. 286, 78 A. 203, *Ann. Cas.*1912A, 412 (1910).

STATUTES AFFECTING CONTRACTS UNDER SEAL

The ceremony of attaching a seal has long since lost its solemnity and magical quality. A melted blob of wax impressed with a device of some kind was largely displaced by a gummed wafer or by a pen scrawl. The typist may put the word "seal" at the end of the dotted line prepared for the signature; or the printer of blank forms may put a pair of brackets inclosing the letters "L.S." at the end of the signature line, these being the initial letters of the words "*locus sigilli*" indicating where the wax was to be attached. In most, if not all, of the states, statutory law has modified or displaced the common law both as to what constitutes a seal and as to its legal operation. Local custom and the local statutes must be known before executing sealed instruments or advising as to their effect.

Statutes similar to the one that is considered in *Aller v. Aller*, *supra*, have been passed in many states, declaring that a seal shall be only

"presumptive evidence of a sufficient consideration" subject to rebuttal by other testimony. This statute was no doubt adopted by legislatures whose lawyer members had been taught that at common law a seal "imports a consideration" or is "conclusive evidence of a consideration." To them, as to others, formality had lost its charm; and the doctrine of consideration acquired a sort of moral sanction as the one desirable test of enforceability of promises. The purpose behind these statutes was to lessen the effect of a seal, the assumption being that if the existence of a consideration is disproved the promise under seal would be unenforceable. Judges who knew more accurately the history of seals at common law held, as in *Aller v. Aller*, that since sealed promises required no consideration they remained legally enforceable in spite of convincing proof that no consideration had been given. The New York Court of Appeals so held only a few years ago. *Cochran v. Taylor*, 273 N.Y. 172, 7 N.E.2d 89 (1937).

The New York legislature has, after much travail, followed the lead of about half of the other states and has made seals almost wholly inoperative. N.Y.Civil Practice Act, § 342, now provides: "Except as otherwise expressly provided by statute, the presence or absence of a seal upon a written instrument hereafter executed shall be without legal effect." Corporate seals may still be used for purpose of authentication.

With respect to sealed promises, as with unsealed ones, "absence of consideration" must be distinguished from "failure of consideration." The first phrase is used to indicate that in exchange for a promise nothing is given (neither a return promise nor a return performance). The second is used to indicate that in exchange for a promise a reciprocal promise was made but has not been performed. For a discussion of this distinction see *In re Conrad's Estate*, 333 Pa. 561, 3 A.2d 697 (1939). For a long time it was held that the failure of one party to keep his promise did not relieve the other party from the legal duty of performing his return promise. [This problem is dealt with in Chapter 6.] The common law courts continued to apply this rule to bilateral contracts under seal, even after they were abandoning it in the case of informal contracts. One having executed a sealed contract could not defend in an action for its breach by proving "failure of consideration," or even by proving that he was induced to execute the contract by fraud. See *Dorr v. Munsell*, 13 Johns. (N.Y.) 430 (1816); *Vrooman v. Phelps*, 2 Johns. (N.Y.) 177 (1807). Such defenses were made effective in equity, however; and eventually equitable defenses became effective in all cases. If parties have made a bilateral contract for an agreed exchange of the promised performances, the fact that the contract is under seal does not prevent the promises from being mutually dependent. Where two parties have mutually promised, under seal, to exchange a motor car for \$1,000, in an action by the

seller to compel payment the buyer can defend successfully by proving the seller's refusal or inability to deliver the car. By such proof he shows "failure of consideration."

In most of the states that have abolished the distinction between sealed and unsealed instruments, there is a further provision that the existence of a sufficient consideration shall be presumed in the case of any written contract, subject to rebuttal by other evidence. See *Patterson v. Chapman*, 179 Cal. 203, 176 P. 37, 2 A.L.R. 1467 (1918). Such a statute does not make an informal written promise enforceable without consideration. It merely relieves the promisee of the necessity of alleging the consideration in his pleading and of going forward with the evidence to prove it.

To a man wishing to make a binding promise without consideration and as a gift, the common law afforded an effective method for doing so. The statutory abolition of seals deprives him of this method. As a substitute the "Uniform Written Obligations Act" has been proposed. It has been adopted in Pennsylvania and Utah; but its desirability and its form are still matters of debate. As adopted in Pennsylvania (33 P.S. § 6) it reads: "A written release or promise, hereafter made and signed by the person releasing or promising, shall not be invalid or unenforceable for lack of consideration, if the writing also contains an additional express statement, in any form of language, that the signer intends to be legally bound."

CHAPTER 5

INTERPRETATION OF CONTRACTS

INTRODUCTORY NOTE

The art of expression and the art and science of interpretation are known by all to be difficult. The present chapter makes no effort at formal instruction in either one. It presents no set of formal rules of interpretation; and the materials here printed are not expected to result in the drafting of such rules. These materials include a few court opinions in which the principal problem dealt with is one of interpretation and in which the court may state its own tentative working rules. The process of interpretation may indeed be observed in operation in most of the reported cases in this volume, the chief emphasis however being on the determination of the legal effects of the words and acts of the parties rather than on their interpretation. Also included in this chapter are excerpts from the writings of various jurists, indicating their attitudes and opinions, particularly with respect to the interpretation of language. They may arouse the curiosity, and perhaps even the combativeness, of the student. They should at least emphasize the perils that a lawyer encounters in his efforts to induce others to understand and to adopt the meanings of words and other symbols that he himself holds and desires to make legally effective.

Restatement, Contracts, §§ 226-236, offers a set of rules respecting interpretation. They are as useful as any other set prepared by other jurists. The editor of this volume admits having an adviser's share of responsibility for these rules; but further reflection and writing since their publication tend toward minor omissions and amendments. No generalization in the field of law (or elsewhere) ever remains unaffected by the flowing stream of life.

"Interpretation" is thus defined in Restatement, § 226: "Interpretation of words and other manifestations of intention forming an agreement, or having reference to the formation of an agreement, is the ascertainment of the meaning to be given to such words and manifestations." This applies to all communications in the course of a bargaining transaction, whether the symbols of expression are written, oral, or in other forms of human conduct, and whether or not they result in either agreement or contract. It applies to contracts both unilateral and bilateral, including those reduced to documentary form, called "integrated" agreements (Wigmore's word), and defined as those in which the parties "adopt a writing or writings as the final and complete expression of the agreement."

The problem is "the ascertainment of the meaning to be given." Whose meaning? An effort is made in other sections of the Restatement to answer this question. This is done by describing various "standards" of interpretation with rules as to which one shall be adopted, one rule for "integrations" (section 230) and another for other cases (section 233). There is difference of opinion as to the justification of this distinction; and the suggested use of the specified "standards" may induce a view of the process that is too mechanical. A critical study of the Restatement, §§ 226-236, should be made after completing the discussion of the materials in this chapter.

Words and other symbols do not have any absolute or "objective" meaning; there is no single meaning that is the "true" or "correct" one. They have very different meanings when used or heard by different persons, or when used by a single person under different circumstances (or even twice in the same paragraph). Each of these meanings may be relevant and provable for certain purposes. With respect to some issues, however, most of them may be wholly irrelevant, and evidence to present them may be inadmissible. In each case the court should decide whose meaning it is that justice requires shall be made legally effective and then admit and weigh evidence that is relevant to the determination of what that meaning was. On such an issue it may be relevant to know (1) what meanings are given in the Oxford dictionary; (2) what meaning or meanings are most commonly given in certain geographical areas—the United States, California, Brooklyn, the Ozarks; (3) what meanings are given by "intelligent" men, by college professors, by farmers, by electrical engineers, by plumbers in Boston, by commercial users of the Western Union code. But usage in the Ozarks might be wholly irrelevant if the meaning to be made legally effective is that given by the late George Apley of Beacon street.

"Interpretation is not a determination of the legal effect of language. When properly interpreted it may have no legal effect. * * *" Restatement, § 226, Comment c. Courts often speak of the "construction of a contract," by which they may mean both interpretation and the determination of its legal operation. The two processes are distinct, although they may be carried on together. The "construction" of a contract, using the term to include determination of legal effects, will vary in accordance with events long subsequent to the making of the contract and not foreseen by the parties. Interpretation does not so vary; although it may be admitted that legal effects have a reaction backwards on interpretations. Finding that one interpretation of language will be followed by certain legal effects, a court may back hastily away from that interpretation and substitute another that will lead to a more desirable result. The judicial process may begin with the interpretation of the specific words of a document; thence it pro-

ceeds to discover "implied promises" and "implied conditions" by factual inference or "implication"; next it determines legal effects on the basis of notions of justice and social policy, sometimes using the language of "implication," sometimes openly admitting that the process is "constructive," or wholly independent of the expressions used by the parties. The boundary lines separating these three processes are blurred and indistinct.

HURST v. W. J. LAKE & CO.

Supreme Court of Oregon, 1932. 141 Or. 306, 16 P.2d 627.

Action by Roscoe P. Hurst against W. J. Lake & Co., Inc., in the nature of assumpsit to recover an alleged balance of \$5 per ton on 140 tons of horse meat scraps purchased by defendant from plaintiff pursuant to a written contract. From a judgment for defendant allowing defendant's motion for judgment on the pleadings after the complaint, answer, and reply had been filed, plaintiff appeals.

Reversed.

ROSSMAN, J. From the portion of the pleadings which we are required to deem true, it appears that March 20, 1930, the plaintiff and the defendant entered into an agreement in writing, a copy of which follows:

"March 20, 1930.

"Messrs. Roscoe P. Hurst, Yeon Building, Portland, Oregon.

"Dear Sirs: We confirm our purchase from you today as follows:

Buyer:	W. J. Lake & Co., Inc. Seattle, Washington.
Commodity:	Horse meat scraps.
Quantity:	350 tons of 2000 lbs. each.
Price:	\$50.00 per ton f. o. b. cars Portland.
Terms of Payment:	Net cash in Portland on delivery with analysis certificate.
Time of Shipment:	Prior to April 20th, 1930.
Route:	As directed by buyer.
Specifications:	Minimum 50% protein, ground and sacked in 100 lb. net each.
	Additional specifications on supplementary page.

"Yours truly,

"W. J. Lake & Company, Inc.

"By L. E. Branchflower.

"Accepted by:

"Roscoe P. Hurst.

"March 20, 1930.

"Mr. Roscoe P. Hurst, Yeon Building, Portland, Oregon.

"Dear Sir: In case any of the Horse Meat Scraps, covered by our purchase order No. 1352 analyzes less than 50% of protein, it is understood that W. J. Lake & Company, Inc., the buyers, are to receive a discount of \$5.00 per ton.

"It is further understood that in case the buyer does not take delivery of the entire lot by April 20th, 1930, the seller agrees to carry the stock one (1) month more for 50c per ton additional.

"The Northwest Testing Laboratories are to instruct the warehouse in the loading and are to furnish analysis certificates, at the buyer's expense. In case of an analysis dispute findings of a referee chemist, who shall be mutually agreed upon, shall be final.

"Yours very truly,

"W. J. Lake & Co., Inc.,

"[Signed] L. E. Branchflower.

"Accepted by:

"[Signed] Roscoe P. Hurst."

Pursuant to the contract, the plaintiff delivered to the defendant 349.25 tons of horse meat scraps which contained the following percentages of protein, and for which the defendant paid the following sums of money: 180 tons contained an excess of 50 per cent. protein, and the defendant paid for it \$50 per ton; 29.25 tons contained 48.66 per cent. protein, and the defendant paid therefor \$45 per ton; 140 tons contained protein varying from 49.53 per cent. to 49.96 per cent., for which the defendant paid \$45 per ton. The following allegation of the complaint we are required to deem true:

"That at the time the written contract heretofore referred to for the sale of horse meat scraps was entered into on or about the 20th day of March, 1930, both plaintiff and defendant then were, and for some time prior thereto had been, engaged in the business of buying and selling horse meat scraps; that at the time said contract was entered into there was a custom and usage of trade in said business well known to both plaintiff and defendant as to the meaning of the terms 'minimum 50% protein' and 'less than 50% protein' used in the agreement between plaintiff and defendant. That by virtue of said custom so prevailing in said business of buying and selling horse meat scraps it was well known and understood among all members of the trade, including both plaintiff and defendant, that the terms 'minimum 50% protein' and 'less than 50% protein' when used in a contract for the sale of horse meat scraps with reference to a test of its protein content, meant that a protein content of not less than 49.5% was equal to and the same as a content of 50% protein. That it was further a part of said custom that where said terms 'minimum 50% protein' and 'less than 50% protein' should be used in a contract of sale it was and is the duty of the buyer to accept all horse meat scraps and pay for the same at the rate provided for a product which would test a minimum of 50% even

though the chemical analysis of the product should show that the horse meat scraps actually should test as low as 49.5% protein content. That said custom in all its particulars was well known to both plaintiff and defendant and entered into and formed a part of the contract between plaintiff and defendant.

"That the said terms 'minimum 50% protein' and 'less than 50% protein' as used in said contract between plaintiff and defendant were known, understood and used in said contract by both plaintiff and defendant to have the meaning and significance given to said terms by the custom and usage heretofore alleged; that it was the intention of both the plaintiff and defendant that the said terms as used in said contract should mean that the defendant was and should be required to pay the plaintiff at the 50% protein content rate for all meat scraps delivered by plaintiff to defendant which should test as low as 49.5% protein content."

Based upon the contention that the above quoted portion of the complaint, admitted as true by the defendant, shows that the 140 tons with a protein content of 49.53 per cent. to 49.96 per cent. should have been regarded as within the 50 per cent. protein classification, the plaintiff argues that the circuit court erred when it sustained the defendant's motion for judgment on the pleadings.

It will be observed from the foregoing (1) that there is a group of dealers who trade in the commodity known as horse meat scraps; (2) that both plaintiff and defendant are members of that group; (3) that the terms "minimum 50% protein" and "less than 50% protein" are trade terms to which the group has attached meanings different from their common ones; (4) that this usage, prevalent among this group, demanded that, whenever those terms appeared in a contract for the sale of horse meat scraps, it became the duty of the buyer to accept all scraps containing 49.5 per cent. protein or more, and to pay for them at the rate provided for scraps containing full 50 per cent. protein; and (5) that the defendant was aware of all of the foregoing when it attached its signature to the aforementioned contract.

The flexibility of or multiplicity in the meaning of words is the principal source of difficulty in the interpretation of language. Words are the conduits by which thoughts are communicated, yet scarcely any of them have such a fixed and single meaning that they are incapable of denoting more than one thought. In addition to the multiplicity in meaning of words set forth in the dictionaries, there are the meanings imparted to them by trade customs, local uses, dialects, telegraphic codes, etc. One meaning crowds a word full of significance, while another almost empties the utterance of any import. The various groups above indicated are constantly amplifying our language; in fact, they are developing what may be called languages of their own. Thus one is justified in saying that the language of the dictionaries is not the only

language spoken in America. For instance, the word "thousand" as commonly used has a very specific meaning; it denotes ten hundreds or fifty scores, but the language of the various trades and localities has assigned to it meanings quite different from that just mentioned. Thus in the bricklaying trade a contract which fixes the bricklayer's compensation at "\$5.25 a thousand" does not contemplate that he need lay actually 1,000 bricks in order to earn \$5.25, but that he should build a wall of a certain size. *Brunold v. Glasser*, 25 Misc. 285, 52 N.Y.S. 1021; *Walker v. Syms*, 118 Mich. 183, 76 N.W. 320. In the lumber industry a contract requiring the delivery of 4,000 shingles will be fulfilled by the delivery of only 2,500 when it appears that by trade custom two packs of a certain size are regarded as 1,000 shingles, and that hence the delivery of eight packs fulfills the contract, even though they contain only 2,500 shingles by actual count. *Soutier v. Kellerman*, 18 Mo. 509. And, where the custom of a locality considers 100 dozen as constituting a thousand, one who has 19,200 rabbits upon a warren under an agreement for their sale at the price of 60 pounds for each thousand rabbits will be paid for only 16,000 rabbits. *Smith v. Wilson*, 3 Barn. & Adol. 728. Numerous other instances could readily be cited showing the manner in which the meaning of words has been contracted, expanded, or otherwise altered by local usage, trade custom, dialect influence, code agreement, etc. In fact, it is no novelty to find legislative enactments preceded by glossaries or brief dictionaries defining the meaning of the words employed in the act. Technical treatises dealing with aeronautics, the radio, engineering etc., generally contain similar glossaries defining the meaning of many of the words employed by the craft. A glance at these glossaries readily shows that the different sciences and trades, in addition to coining words of their own, appropriate common words and assign to them new meanings. Thus it must be evident that one cannot understand accurately the language of such sciences and trades without knowing the peculiar meaning attached to the words which they use. It is said that a court in construing the language of the parties must put itself into the shoes of the parties. That alone would not suffice; it must also adopt their vernacular.

Wigmore on Evidence (2d) § 2460, points out that the interpretation of language may be thus approached: "The standard of the community, or popular standard, meaning the common and normal sense of words; the local standard including the special usages of a religious sect, a body of traders, an alien population or a local dialect; the mutual standard covering those meanings which are peculiar to both or all the parties to a transaction but shared in common by them; and the individual standard of one party to an act, as differing from that of the other party or parties, if any."

After Dean Wigmore has reviewed at length the overthrow of what he calls the traditional rule which insists that the meaning of all words

is rigid and inflexible, and the development of what he terms the liberal rule which recognizes, to some extent at least, the four aforementioned standards of interpretation, he continues (section 2463): "The liberal rule, on the other hand, is today conceded practically everywhere, to permit resort in any case to the usage of a trade or locality, no matter how plain the apparent sense of the word to the ordinary reader; and some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words and the injustice of attempting to enforce a supposed rigid standard." * * *

The defendant cites numerous cases in many of which the courts held that, when a contract is expressed in language which is not ambiguous upon its face the court will receive no evidence of usage, but will place upon the words of the parties their common meaning; in other words, in those decisions the courts ran the words of the parties through a judicial sieve whose meshes were incapable of retaining anything but the common meaning of the words, and which permitted the meaning which the parties had placed upon them to run away as waste material. Surely those courts did not believe that words are always used in their orthodox sense. The rulings must have been persuaded by other considerations. The rule which rejects evidence of custom has the advantage of simplicity; it protects the writing from attack by some occasional individual who will seek to employ perjured testimony in proof of alleged custom; and, if one can believe that the parol evidence rule is violated when common meaning is rejected in favor of special meaning, then the above rule serves the purpose of the parol evidence rule. Without setting forth the manner in which we came to our conclusion, we state that none of these reasons appeals to us as sufficient to exclude evidence of custom and assign to the words their common meaning only, even though the instrument is nonambiguous upon its face. The defendant argues that this court has held that custom or usage cannot be resorted to in the interpretation of the meaning of an instrument where no ambiguity appears upon its face, and cites in support of his contention [8 Oregon cases]. It must be admitted that language can be found in some of these decisions which lends weight to his argument. But a reading of these cases will disclose that in all of them, with the exception of *Abraham v. Oregon & California R. R. Co.*, 37 Or. 495, 60 P. 899, the party was not resorting to custom for the purpose of interpreting the language of the instrument, but for the purpose of annexing or engrafting on to the contract an additional term; in other words, he sought to prove that the written instrument did not embody the entire agreement. Such a contention invoked a principle quite different from the one with which we are now concerned. For comment see *Wigmore on Evidence* (2d) § 2440. In *Abraham v. Oregon & California R. R. Co.*, the decision does not mention custom. The appellant in that case sought to prove that he and the party with whom

he dealt had placed upon one of the terms of the instrument a mutual meaning distinct from its normal one. * * *

Without setting forth herein our review of the many authorities cited in the briefs, all of which we have read with care, we state our conclusion that members of a trade or business group who have employed in their contracts trade terms are entitled to prove that fact in their litigation, and show the meaning of those terms to assist the court in the interpretation of their language.

Finally, it is suggested that the employment of the terms "minimum 50% protein" and "less than 50% of protein" indicates that the parties rejected the mercantile custom in effecting their contract. It will be recalled that under the state of the record we are compelled to regard these two terms as trade terms possessed of a special significance. We believe that it is safe to assume, in the absence of evidence to the contrary, that, when tradesmen employ trade terms, they attach to them their trade significance. If, when they write their trade terms into their contracts, they mean to strip the terms of their special significance and demote them to their common import, it would seem reasonable to believe that they would so state in their agreement. Otherwise they would refrain from using the trade term and express themselves in other language. We quote from *Nicoll v. Pittsvein Coal Co.* (C.C.A.) 269 F. 968, 971: "Indeed when tradesmen say or write anything, they are perhaps without present thought on the subject, writing on top of a mass of habits or usages which they take as matter of course. So (with Prof. Williston) we think that any one contracting with knowledge of a usage will naturally say nothing about the matter unless desirous of excluding its operation; if he does wish to exclude, he will say so in express terms. Williston, *Contracts*, § 653." Nothing in the contract repels the meaning assigned by the trade to the two above terms unless the terms themselves reject it. But, if these terms repel the meaning which usage has attached to them, then every trade term would deny its own meaning. We reject this contention as being without merit. We have considered all other contentions presented by the respondent, but have found no merit in them.

It follows that, in our opinion, the circuit court erred when it sustained the defendant's motion for judgment on the pleadings.

Reversed.

QUESTIONS:

1. Was this contract "integrated", and does the court's process of interpretation accord with Restatement, *Contracts*, §§ 228, 230?
2. Were any or all of the "standards of interpretation" listed in Restatement, *Contracts*, § 227, applicable in this case?

3. Would the decision have been the same if the defendant had alleged in his answer that when making the contract he knew nothing of the "usage of trade" asserted by the plaintiff, as the latter was then well aware? See Restatement, Contracts, § 247.
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OUTLET EMBROIDERY CO., Inc., v. DERWENT MILLS, Limited.

Court of Appeals of New York, 1930. 254 N.Y. 179, 172 N.E. 462.

CARDOZO, C. J. The question to be determined is whether a complaint is sufficient, and this depends upon the question whether documents made part of it contain the essentials of a contract.

The defendant, by Brucks & Peyser, its agents, wrote the plaintiff as follows:

"June 15, 1929.

"Outlet Embroidery Co., 412 6th Avenue, New York City.

"Gentlemen: Enclosed please find copy of your order placed with us today, terms on same 3/10 days, delivery as soon as possible.

"We have cabled this order today to England as these goods will be made up special for you.

"Please send us your confirmation of same by return mail.

"Also note that the price of \$3.10 per box on your Fil D'Angora brand which we are to ship to you is subject to change pending tariff revision.

"Yours very truly

"Brucks & Peyser

"Morell Peyser.

"All Prices Subject to Change Pending Tariff Revision."

Accompanying this letter was an order specifying quantities and colors, and repeating the statement that the price was to be \$3.10 per box. The plaintiff, on receipt of the letter and its inclosure, made answer as follows:

"June 17, 1929.

"Brucks & Peyser, 100 Fifth Avenue, New York, N. Y.

"Gentlemen: Received your letter dated June 15, 1929, enclosing copy of my order.

"We confirm the same as requested.

"We hope you will deliver the merchandise as soon as possible and avoid last seasons delays.

"Very truly yours,

"Outlet Emby. Supply Co., Inc.

"Per: A. Dratler."

Three days later (June 20, 1929) the defendant canceled its acceptance, and notified the plaintiff that it would refuse to make delivery.

The plaintiff sues for the damages resulting from the refusal. The defendant insists that since the price was subject to change pending revision of the tariff, the agreement, though in other respects complete, was inchoate and abortive. *United Press v. New York Press Co.*, 164 N.Y. 406, 58 N.E. 527, 53 L.R.A. 288; *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.*, 235 N.Y. 338, 139 N.E. 470.

The letters between plaintiff and defendant were from one merchant to another. They are to be read as business men would read them, and only as a last resort are to be thrown out altogether as meaningless futilities. *Cohen & Sons, Inc., v. M. Lurie Woolen Co.*, 232 N.Y. 112, 114, 133 N.E. 370; *Solter v. Leedom & Worrell Co.* (C.C.A.) 252 F. 133. Read the privilege of change with inflexible adherence to its form, and one turns it into nonsense. If the change of price, to be valid, must be declared while revision is still pending, no change may be permitted after the revision is accomplished, which is the very time of all when a change will be essential. To read the reservation thus is to rob it of its efficacy as an implement to be used in furtherance of a business purpose. In the transactions of business life, sanity of end and aim is at least a presumption, albeit subject to be rebutted. The defendant like the plaintiff supposed that in signing these documents it was doing something understood to be significant and serious. It not only accepted the plaintiff's order, but it asked the plaintiff to confirm the terms of the acceptance, and followed this with a cable of the order to its manufacturer abroad. Was it all sound and fury, signifying nothing?

If literalness is sheer absurdity, we are to seek some other meaning whereby reason will be instilled and absurdity avoided. In June, 1929, Congress was debating a new tariff, and the debate continued for a year. Of this we take judicial notice. During the period of suspense, an importer could not be sure whether goods previously ordered from abroad would arrive in the United States before the change or after. If they did not arrive till after, the prices would be inadequate to the extent of the new duties. In the setting of these notorious facts the reservation now in question was written and accepted.

"All prices subject to change pending tariff revision." We think there is mere fatuity in a construction of the writing that would turn this reservation into a privilege of arbitrary change, at any time or for any reason, with change of tariff or without. No seller, drafting such a writing, would expect the customer receiving it to understand it in that way. *Moran v. Standard Oil Co.*, 211 N.Y. 187, 196, 105 N.E. 217; *American Law Institute, Restatement of Law of Contracts*, §§ 223, 232, [probably 233 and 242 as finally numbered.] No buyer would so read it. He would paraphrase the writing thus: "A change of price there may have to be if the tariff is revised. 'Pending such revision,' the buyer will have to take the risk that the price may be increased by the measure of the duty added." In the setting of the occasion, no other

interpretation was possible for any reasonable mind. This being so, the court may fix the meaning as if the inference were one of law. Williston, *Contracts*, vol. 2, § 616, p. 1194.

We find it needless to determine whether the buyer would have been at liberty, if a revision of the tariff had been followed by a change of price, to declare the bargain off, or would be deemed to have assented by implication to the payment of another price, the one theretofore named but augmented by the duty. If the second be the true construction, a known and established standard has fixed the price payable in every possible contingency. *Franklin Sugar Refining Co. v. Lipowicz*, 247 N.Y. 465, 160 N.E. 916, 59 A.L.R. 1414. If the first construction be preferred, there is still no failure of a contract, for revision did not follow until long after the time when performance became due. In that view of the meaning, there was a valid and perfected contract, though subject to a privilege of cancellation in a specified contingency. *Cohen & Sons, Inc., v. M. Lurie Woolen Co.*, 232 N.Y. 112, 133 N.E. 370; Williston, *Sales*, vol. 1, § 8. No doubt there would be a risk in closing on such terms, yet a risk, after all, not inordinate or incredible. Buyer and seller may have had faith in their ability to come together as to terms if the seller was insistent that because of tariff changes the price should be increased. The increase would not be possible unless the change was an accomplished fact. Whatever loophole was left, whatever chance that the buyer might use the privilege of cancellation harshly, was of the seller's own creation, since the form of the agreement had been drafted by its agents. Theirs, and not the buyer's is the blame, if there was improvidence or folly.

The complaint might better have stated more precisely the pleader's construction of writings so confusing. Even if this be granted, the construction urged by the defendant is so plainly unreasonable as to justify us in holding that it is to be rejected altogether. Alternative shades of meaning may remain. There is still a true contract, whichever shade shall be accepted.

QUESTIONS:

1. Was the contract "integrated" as defined in *Restatement, Contracts*, § 228? In how many documents?
2. Was the letter of June 15, signed by Peyser, a valid "acceptance" of an offer to buy made by Outlet, so that a contract was consummated before Outlet's letter of confirmation was mailed?
3. If in an oral conversation between Peyser and Dratler, prior to June 15, Peyser had said to Dratler, "Any price we make must be subject to change in our own discretion, in case there is a change in tariff rates before arrival of the goods in New York," would this have been admissible in evidence for the purpose of interpretation of the contract? See *Restatement, Contracts*, §§ 230, 231, 238.

BULLOWA v. THERMOID CO.

Court of Errors and Appeals of New Jersey, 1935. 114 N.J.L. 205, 176 A. 596.

Action by Ralph J. M. Bullowa against the Thermoid Company. The complaint was struck on defendant's motion (173 A. 925, 12 N.J. Misc. 608), and, from the consequent judgment, plaintiff appeals.

Reversed and remanded.

HEHER, Justice. Plaintiff sued to recover the principal of two five-year sinking fund gold notes, each in the sum of \$1,000, issued by the defendant corporation on February 1, 1929, payable on February 1, 1934, with interest at 6 per cent. in semiannual installments, and now held by him. These notes were issued under an indenture of trust, bearing even date, made by the obligor to the National Bank of Commerce in New York (now merged in the Guaranty Trust Company of New York) as trustee. The total authorized issue was \$3,000,000, and the actual issue \$2,847,500—all maturing on the day mentioned.

The complaint was struck out on the ground that plaintiff did not, under the provisions of the trust indenture, have a right of action enforceable directly against the obligor, and from the consequent judgment this appeal was taken.

The primary inquiry is whether the noteholder is vested, upon the normal maturity of the obligation, with a right of action at law thereon, unless and until the trustee shall refuse or neglect, as provided in section 8 of the trust indenture, to institute appropriate proceedings, by way of remedy, within a reasonable time after request made by the holders of 25 per centum in principal amount of the notes then outstanding.

It is suggested by appellant, in limine, that the notes express on their face an absolute and unconditional promise to pay the principal sum thereof to the holder at maturity, and that the holder is not bound by provisions of the indenture imposing a restriction upon his right to enforce the obligation on the day of maturity so expressed therein, unless notice thereof, in reasonably clear language, is contained therein. The principle that any inconsistency between the note and the indenture must be resolved in favor of the noteholder is invoked. * * *

Here, it would seem, the note explicitly incorporated, by reference, the provisions of the indenture into the obligation. Aside from references to specific provisions of the indenture, relating to taxes imposed upon the holder of the note, as such, the sinking fund thereby created for the noteholders, the terms upon which the notes are callable, and the rights of the noteholders in event of a default in the performance of the contractual obligation, each note contained the declaration that

it was one of an authorized issue of notes of the obligor, under the trust indenture referred to, "to which indenture reference is hereby made for the terms and conditions on and under which the notes have been or are to be issued and the nature and extent of the rights of the holders of the notes, of the company and of the trustee." Thus the holder of the obligation was clearly put upon notice that the indenture itself declares the "nature and extent of the rights" of the noteholders, the obligor, and the trustee. But it is unnecessary to pursue this inquiry. Assuming that the terms and provisions of the indenture are binding upon the noteholders, they do not restrict the right of individual action upon the obligation at the normal, as distinguished from an accelerated, maturity thereof.

The promise to pay the principal sum on February 1, 1934, contained in the note, is absolute and unconditional, and the covenantor must, of necessity, respect that obligation, unless it is modified by the terms of the indenture. Defendant asserts such modification by virtue of the provisions of section 8 thereof. It is in the language following:

"Section 8. In order to promote and protect the equal and ratable rights of every holder of the notes and to avoid multiplicity of suits, all the notes shall be subject to the condition that all rights of action thereon, or in respect thereof, or on or in respect of the coupons there-to appertaining, are vested exclusively in the Trustee, and that no holder of any of the notes or coupons appertaining thereto shall have any right to institute any action, at law or in equity, upon the notes or any of the appurtenant coupons, or growing out of any provision thereof, or of this indenture, or for the enforcement of this indenture, unless and until the Trustee shall refuse or neglect to institute proper proceedings by way of remedy within a reasonable time after request of the holders of twenty-five per cent in principal amount of notes then outstanding, filed with the Trustee, with an offer of satisfactory indemnity; * * * provided, however, that nothing herein or elsewhere in this indenture or in the notes or in the coupons shall affect or impair the obligation of the Company, which is unconditional and absolute, to pay at the date of maturity therein expressed the principal of the notes and the interest thereon to the respective holders of the notes and coupons at the time and place in the notes and coupons expressed, or affect or impair the right of action, which is also absolute and unconditional, of such holders to enforce such payment or shall affect or impair the right of the owner of any warrant to enforce the provisions thereof as provided by the terms of Section 10 of Article II hereof." * * * The essential question, therefore, is to determine the scope and effect of this proviso.

In this inquiry we are guided by well-established rules of interpretation. The ascertainment and effectuation of the intention of the par-

ties, as manifested by the language employed and the objects to be accomplished, are the ends to be served in the interpretation of written agreements. The standard of interpretation of an integrated agreement, such as this, is, with certain qualifications not here pertinent, the meaning that would be attached to the integration by a reasonably intelligent person. *Corn Exchange National Bank & Trust Co. v. Taubel*, 113 N.J.L. 605, 607, 175 A. 55. The general purpose of the contract, as expressed by the words and other manifestations of intention employed, when read and considered as a whole, is the thing sought. Effect, if possible, will be given to all parts of the instrument, and a construction which gives a reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable; and, if this is impossible, a construction which gives effect to the main apparent purpose of the contract will be favored. The freedom of construction permissible is, however, necessarily limited by the principle that unexpressed intention is of no legal effect. Where there is a repugnancy between the general clauses and specific ones, the latter will govern; and, even if there is no actual repugnancy, taking the words of the contract literally, and from the whole instrument it appears that the purpose of the parties was solely directed to the particular matter to which the special clause or words relate, the general words will be restrained. *Williston on Contracts*, § 619; 13 C.J. 535. A construction that will void a clause of the contract for repugnancy, or the entire instrument for uncertainty, is to be avoided, if possible. Where the provision does not destroy the original covenant, but leaves a portion of it remaining, it is not void for repugnancy. *Williams v. Hathaway*, 6 Ch.D. 545, 549.

Applying these principles, we have no difficulty in determining the general plan and purpose contemplated and expressed in this instrument. A right of action is vested in the trustee. In the event of an intermediate default, the right of action, in the first instance, is vested exclusively in the trustee. These "events of default" are expressly declared by the indenture to be: (1) A default in the payment of any installment of interest on any of the notes, and a continuance thereof for thirty days; (2) a default in the payment of the principal of, or premium due upon, any of the notes, whether "at maturity, by call for redemption, by declaration or otherwise"; (3) default in the payment of any installment of the sinking fund thereby granted, and a continuance thereof for sixty days; (4) default in the observance or performance of any other of the covenants, conditions, and agreements, and a continuance thereof for sixty days after written notice thereof shall have been given to the company by the trustee or by the holders of 10 per cent. in principal amount of the notes then outstanding; and (5) in the event of bankruptcy or insolvency of the obligor, under certain prescribed conditions, or the recovery of a judgment

against the obligor, or the fastening of a lien upon any of its property, and failure to discharge the same within a specified time.

If the maturity shall have been accelerated by one of the prescribed "events of default," the trustee may, in its discretion, fail to institute proceedings to enforce the obligations, and the right of the noteholders so to do, by direct action against the covenantor, does not accrue, by the express provision of section 8, until the trustee shall refuse or neglect to take action within a reasonable time after request so to do, made by the holders of notes in the requisite aggregate principal sum. But no such limitation is imposed upon the noteholders at the normal maturity of the obligation. The provision in question is explicitly limited and qualified by the reservation of the proviso that nothing therein contained shall affect or impair the unconditional and absolute obligation of the company to pay the principal of the notes and the interest thereon to the respective holders at the date of maturity therein expressed, or the correlative absolute and unconditional right of the noteholder to enforce the obligation at such maturity. It is axiomatic that a right of action dependent upon the failure of the trustee to act, when petitioned so to do by the holders of 25 per cent. in principal amount of the notes outstanding, is not an absolute and unconditional one. That would be a contradiction in terms. Therefore, to give effect to the proviso, it must of necessity be construed as limiting and modifying the provision of the prior clause vesting the right of action exclusively in the trustee. At the time of the institution of this action, 80 per cent. of the noteholders had given assent to a plan to fund the debt. It was clearly not within the contemplation of the parties that, upon default in the payment of the note at the date of maturity expressed therein, a noteholder would be remediless because the trustee refused to proceed to enforce collection, and the holders of notes in the requisite principal amount did not, as in the instant case, join in demanding action by the trustee. Such a purpose will not be implied; it must be explicitly declared.

It may well be that, if the obligor, after the normal maturity of the obligations, paid to the trustee, in accordance with a demand made under section 3(b), the moneys necessary to satisfy the note obligations, or the trustee, pursuant to the authority conferred by section 4, instituted appropriate proceedings to compel the covenantor to discharge its obligation in the premises, the noteholder would not have an enforceable individual right of action directly against the company. But the moneys necessary to discharge the obligations were not paid by the company, nor was any action taken by the trustee, and, in that situation, the right of individual action, explicitly, reserved to the noteholders by the proviso annexed to section 8, cannot be denied. Otherwise the proviso would serve no purpose. The interpretation urged by the respondent corporation would render this provision

meaningless and useless, and it is therefore one to be avoided, if possible. This clause should, if practicable, be given a utility consistent with the general scheme and purpose of the contract. Moreover, a construction that will deprive the holder of such an obligation of all remedy to enforce payment thereof at the date of maturity therein expressed, unless the holders of 25 per cent. in principal amount of the outstanding obligations join in requesting the trustee to act, is likewise to be avoided. Such a purpose is inconsistent with the expressed unconditional and absolute promise of the obligation, and the contract will not be so construed unless that common intention is expressed in clear and unambiguous language. Compare *Mack v. American Electric Tel. Co.*, 79 N.J.L. 109, 74 A. 263. Clauses of this character, restrictive of the common-law right of a creditor, who holds a plain obligation of his debtor, are not favored in law, and must be strictly construed. * * *

It is suggested by counsel for respondent that the "intention of the proviso may well have been to assure the negotiability of the notes." But, if that were the purpose, its effectuation of necessity requires a construction that would vest in the holder thereof the absolute and unconditional right of enforcement of the covenant at the normal maturity thereof. In one of our federal jurisdictions it has been held that a similar proviso "was certainly intended to insure the negotiability of the bonds, and for that reason, as well as because of its terms, must be deemed imperative," although it apparently contradicted a prior provision requiring the obligor to pay to the trustee, in the event of a default in the payment of the principal of the obligation, the whole amount which shall then have become due and payable. * * *

Counsel also maintains that this "interference" with the funding program by a "few creditors" of the obligor is contrary to the present policy of our federal and state governments, and that the effect of the adoption of appellant's construction of the contract "will be nothing short of permitting the few lines covered by the proviso completely to destroy the whole of Section 8 and the previous sections of Article VI," and that, "if there be any doubt about the intended effect of this proviso, it should be construed fairly and reasonably, 'but leaning, if need be, in any case of ambiguity, in favor of the debtor.'" * * *

But the first phase of this argument is manifestly addressed to legislative policy—the exercise of legislative power in times of emergency—rather than to a justifiable rule of interpretation. And as to the second, as hereinbefore pointed out, if there be doubt as to the sense in which the parties employed the language in question, and it is fairly susceptible of two interpretations, the one more favorable to the noteholder will, under well-settled rules of construction, be adopted. Another familiar principle of interpretation here comes into play. A secondary rule of construction, in aid of the application of the fore-

going standard of interpretation, is that, where words or other manifestations of intention bear more than one reasonable meaning, they will be read most strongly *contra proferentem*, unless their use by him is prescribed by law. Restatement, Contracts, § 236. * * *

The underlying reason for this rule is that a person is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will give them a different sense more to his advantage. *Fowkes v. Manchester, etc., L. Assur., etc., Ass'n*, 3 B. & S. 917, 113 E.C.L. 917, 122 Reprint, 343. The instant case aptly illustrates the underlying considerations and the justice and wisdom of the rule.

It results that appellant, at the time of the institution of this action, was vested with a right of action upon the notes in question, and that the order striking the complaint and the consequent judgment are erroneous.

Judgment reversed.

QUESTIONS:

1. How many documents in this case constituted the "integrated" contract?
2. Does the court's interpretation arrive at "the meaning that would be attached to the integration by a reasonably intelligent person" who had never studied law or read any rules of interpretation?
3. Is there any internal evidence in the opinion that the court made use of the rules in Restatement, Contracts, §§ 230, 233, 235(c), 236?

SYLVAN CREST SAND & GRAVEL CO. v. UNITED STATES.

Circuit Court of Appeals of the United States, Second Circuit, 1943.
150 F.2d 642.

SWAN, Circuit Judge. This is an action for damages for breach of four alleged contracts under each of which the plaintiff was to deliver trap rock to an airport project "as required" and in accordance with delivery instructions to be given by the defendant. The breach alleged was the defendant's refusal to request or accept delivery within a reasonable time after the date of the contracts, thereby depriving the plaintiff of profits it would have made in the amount of \$10,000. The action was commenced in the District Court, federal jurisdiction resting on 28 U.S.C.A. § 41(20). Upon the pleadings, consisting of complaint, answer and reply, the defendant moved to dismiss the action for failure of the complaint to state a claim or, in the

alternative, to grant summary judgment for the defendant on the ground that no genuine issue exists as to any material fact. The contracts in suit were introduced as exhibits at the hearing on the motion. Summary judgment for the defendant was granted on the theory that the defendant's reservation of an unrestricted power of cancellation caused the alleged contracts to be wholly illusory as binding obligations. The plaintiff has appealed.

The plaintiff owned and operated a trap rock quarry in Trumbull, Conn. Through the Treasury Department, acting by its State Procurement Office in Connecticut, the United States invited bids on trap rock needed for the Mollison Airport, Bridgeport, Conn. The plaintiff submitted four bids for different sized screenings of trap rock and each bid was accepted by the Assistant State Procurement Officer on June 29, 1937. The four documents are substantially alike and it will suffice to describe one of them. It is a printed government form, with the blank spaces filled in in typewriting, consisting of a single sheet bearing the heading:

"Invitation, Bid, and Acceptance
"(Short Form Contract)"

Below the heading, under the subheadings, follow in order the "Invitation," the "Bid," and the "Acceptance by the Government." The Invitation, signed by a State Procurement Officer, states that "Sealed bids in triplicate, subject to the conditions on the reverse hereof, will be received at this office * * * for furnishing supplies * * * for delivery at WP 2752—Mollison Airport, Bridgeport, Ct." Then come typed provisions which, so far as material, are as follows: "Item No. 1. ½" Trap Rock to pass the following screening test * * * approx. 4000 tons, unit price \$2.00 amount \$8000. To be delivered to project as required. Delivery to start immediately. Communicate with W. J. Scott, Supt. W.P.A. Branch Office, 147 Canon Street, Bridgeport, Ct., for definite delivery instructions. Cancellation by the Procurement Division may be effected at any time."

The Bid signed by the plaintiff, provides that

"In compliance with the above invitation for bids, and subject to all of the conditions thereof, the undersigned offers, and agrees, if this bid be accepted * * * to furnish any or all of the items upon which prices are quoted, at the prices set opposite each item, delivered at the point (s) as specified, * * *."

The Acceptance, besides its date and the signature of an Assistant State Procurement Officer, contains only the words "Accepted as to items numbered 1." The printing on the reverse side of the sheet under the heading "Conditions" and "Instructions to Contracting Officers" clearly indicates that the parties supposed they were entering into an enforceable contract. For example, Condition 3 states that

"in case of default of the contractor" the government may procure the articles from other sources and hold the contractor liable for any excess in cost; and Condition 4 provides that "if the contractor refuses or fails to make deliveries * * * within the time specified * * * the Government may by written notice terminate the right of the contractor to proceed with deliveries * * * ." The Instructions to Contracting Officers also presupposes the making of a valid contract; No. 2 reads:

"Although this form meets the requirements of a formal contract (R.S. 3744), if the execution of a formal contract with bond is contemplated, U. S. Standard Forms 31 and 32 should be used."

No one can read the document as a whole without concluding that the parties intended a contract to result from the Bid and the Government's Acceptance. If the United States did not so intend, it certainly set a skilful trap for unwary bidders. No such purpose should be attributed to the government. See *United States v. Purcell Envelope Co.*, 249 U.S. 313, 318, 39 S.Ct. 300, 63 L.Ed. 620. In construing the document the presumption should be indulged that both parties were acting in good faith.

Although the Acceptance contains no promissory words, it is conceded that a promise by the defendant to pay the stated price for rock delivered is to be implied. Since no precise time for delivery was specified, the implication is that delivery within a reasonable time was contemplated. *Allegheny Valley Brick Co. v. C. W. Raymond Co.*, 2 Cir., 219 F. 477, 480; *Frankfurt-Barnett v. William Prym Co.*, 2 Cir., 237 F. 21, 25. This is corroborated by the express provision that the rock was "to be delivered to the project as required. Delivery to start immediately." There is also to be implied a promise to give delivery instructions; nothing in the language of the contracts indicates that performance by the plaintiff was to be conditional upon the exercise of the defendant's discretion in giving such instructions. A more reasonable interpretation is that the defendant was placed under an obligation to give instructions for delivery from time to time when trap rock was required at the project. Such were the duties of the defendant, unless the cancellation clause precludes such a construction of the document.

Beyond question the plaintiff made a promise to deliver rock at a stated price; and if the United States were suing for its breach the question would be whether the "acceptance" by the United States operated as a sufficient consideration to make the plaintiff's promise binding. Since the United States is the defendant the question is whether it made any promise that has been broken. Its "acceptance" should be interpreted as a reasonable business man would have understood it. Surely it would not have been understood thus: "We accept your offer and bind you to your promise to deliver, but we do not promise either to take the rock or pay the price." The reserva-

tion of a power to effect cancellation at any time meant something different from this. We believe that the reasonable interpretation of the document is as follows: "We accept your offer to deliver within a reasonable time, and we promise to take the rock and pay the price unless we give you notice of cancellation within a reasonable time." Only on such an interpretation is the United States justified in expecting the plaintiff to prepare for performance and to remain ready and willing to deliver. Even so, the bidder is taking a great risk and the United States has an advantage. It is not "good faith" for the United States to insist upon more than this. It is certain that the United States intended to bind the bidder to a "contract," and that the bidder thought that the "acceptance" of his bid made a "contract". A reasonable interpretation of the language used gives effect to their mutual intention. Consequently we cannot accept the contention that the defendant's power of cancellation was unrestricted and could be exercised merely by failure to give delivery orders. The words "cancellation may be effected at any time" imply affirmative action, namely, the giving of notice of intent to cancel. The defendant itself so construed the clause by giving notice of cancellation on July 11, 1939, as alleged in its answer. While the phrase "at any time" should be liberally construed, it means much less than "forever." If taken literally, it would mean that after the defendant had given instructions for delivery and the plaintiff had tendered delivery in accordance therewith, or even after delivery had actually been made, the defendant could refuse to accept and when sued for the price give notice of cancellation of the contract. Such an interpretation would be not only unjust and unreasonable, but would make nugatory the entire contract, contrary to the intention of the parties, if it be assumed that the United States was acting in good faith in accepting the plaintiff's bid. The words should be so construed as to support the contract and not render illusory the promises of both parties. This can be accomplished by interpolating the word "reasonable", as is often done with respect to indefinite time clauses. See *Starkweather v. Gleason*, 221 Mass. 552, 109 N.E. 635. Hence the agreement obligated the defendant to give delivery instructions or notice of cancellation within a reasonable time after the date of its "acceptance." This constituted consideration for the plaintiff's promise to deliver in accordance with delivery instructions, and made the agreement a valid contract.

It must be conceded that the cases dealing with agreements in which one party has reserved to himself an option to cancel are not entirely harmonious. Where the option is completely unrestricted some courts say that the party having the option has promised nothing and the contract is void for lack of mutuality. *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 5 Cir., 296 F. 693; *Oakland*

Motor Car Co. v. Indiana Automobile Co., 7 Cir., 201 F. 499. These cases have been criticized by competent text writers and the latter case cited by this court "with distinct lack of warmth", as Judge Clark noted in *Bushwick-Decatur Motors v. Ford Motor Co.*, 2 Cir., 116 F.2d 675, 678. But where, as in the case at bar, the option to cancel "does not wholly defeat consideration", the agreement is not nudum pactum. Corbin, *The Effect of Options on Consideration*, 34 Yale L.J. 571, 585; see *Hunt v. Stimson*, 6 Cir., 23 F.2d 447; *Gurfein v. Werbelovsky*, 97 Conn. 703, 118 A. 32. A promise is not made illusory by the fact that the promissor has an option between two alternatives, if each alternative would be sufficient consideration if it alone were bargained for. A.L.I. Contracts, § 79. As we have construed the agreement the United States promised by implication to take and pay for the trap rock or give notice of cancellation within a reasonable time. The alternative of giving notice was not difficult of performance, but it was a sufficient consideration to support the contract.

The judgment is reversed and the cause remanded for trial.

QUESTIONS:

1. Was the contract in this case "integrated"?
2. Is the use of the "implication" process justifiable in the interpretation of an "integrated" contract?

NOTE

This case illustrates interpretation of a contract by the process known as "implication." It should be compared with the cases dealing with "illusory" promises and options to cancel in the Chapter on Consideration. *Wood v. Lucy*, is another good illustration of finding a promise by implication. Cases holding that an express promise is conditional by implication are included in the succeeding Chapter.

A canal company promised to transport at named rates all the coal that a coal producer might offer for shipment, not exceeding 400,000 tons, the latter promising to induce the building of a railroad from mine to canal. Lower rates having become available for shipment wholly by rail, was the producer bound to continue to ship by canal? Was the canal company privileged to raise its rates? *Hudson Canal Co. v. Penn. Coal Co.*, 75 U.S. 276, (1878). Compare *Great Lakes & St. L. Tr. Co. v. Scranton Coal Co.*, 239 F. 603 (1917, C.C.A.).

If an owner puts property in the hands of an agent to find a buyer, making an express promise to pay a specified commission "subject to contract" being consummated, and the agent then produces a buyer ready and willing to buy on the terms specified by the owner, is the owner bound to accept the buyer's offer and to pay the commission? Has the owner tacitly promised that he will not himself sell to others? *Luxor v. Cooper* [1941] A.C. 108 (opinions cover 50 pages).

If an agent, without having been employed by the owner, finds a purchaser for the latter's property at a price that the owner accepts, does the agent have a right to a commission? *Massachusetts M.L. Ins. Co. v. George*, 148 F.2d 42 (1945, C.C.A.); *Weinhouse v. Cronin*, 68 Conn. 250, 36 A. 45 (1896).

A expressly promised B to pay a commission of ten per cent for finding a purchaser of A's secret remedy at a price of a million dollars. B could not find such a purchaser; but he induced a party to make an offer of a profitable licensing and royalty agreement. The offer was accepted by A. Does B have a right to a commission? *Benedict v. Pfunder*, 183 Minn. 396, 237 N.W. 2 (1931).

See the discussion and questions based on *Mntual Life Ins. Co. v. Johnson*, page 708, in the chapter dealing with Excuse of Conditions.

ZELL v. AMERICAN SEATING CO.

Circuit Court of Appeals of the United States, Second Circuit, 1943.
138 F.2d 641.

Before L. HAND, SWAN, and FRANK, Circuit Judges.

FRANK, Circuit Judge. On defendant's motion for summary judgment, the trial court, after considering the pleadings and affidavits, entered judgment dismissing the action. From that judgment, plaintiff appeals.

On a motion for summary judgment, where the facts are in dispute, a judgment can properly be entered against the plaintiff only if, on the undisputed facts, he has no valid claim; if, then, any fact asserted by the plaintiff is contradicted by the defendant, the facts as stated by the plaintiff must, on such a motion, be taken as true. Accordingly for the purpose of our decision here, we take the facts as follows:

Plaintiff, by a letter addressed to defendant company dated October 17, 1941, offered to make efforts to procure for defendant contracts for manufacturing products for national defense or war purposes, in consideration of defendant's agreement to pay him \$1,000 per month for a three months' period if he were unsuccessful in his efforts, but, if he were successful, to pay him a further sum in an amount not to be less than 3% nor more than 8% of the "purchase price of said contracts." On October 31, 1941, at a meeting in Grand Rapids, Michigan, between plaintiff and defendant's President, the latter, on behalf of his company, orally made an agreement with plaintiff substantially on the terms set forth in plaintiff's letter, one of the terms being that mentioned in plaintiff's letter as to commissions; it was orally agreed that the exact amount within the two percentages was to be later determined by the parties. After this agreement was made, the parties executed, in Grand Rapids, a written instrument dated October 31,

1941, appearing on its face to embody a complete agreement between them; but that writing omitted the provision of their agreement that plaintiff, if successful, was to receive a bonus varying from three to eight per cent; instead, there was inserted in the writing a clause that the \$1,000 per month "will be full compensation, but the company may, if it desires, pay you something in the nature of a bonus." However, at the time when they executed this writing, the parties orally agreed that the previous oral agreement was still their actual contract, that the writing was deliberately erroneous with respect to plaintiff's commissions, and that the misstatement in that writing was made solely in order to "avoid any possible stigma which might result" from putting such a provision "in writing," the defendant's President stating that "his fears were based upon the criticism of contingent fee contracts." Nothing in the record discloses whose criticism the defendant feared; but plaintiff, in his brief, says that defendant was apprehensive because adverse comments had been made in Congress of such contingent-fee arrangements in connection with war contracts. The parties subsequently executed further writings extending, for two three-month periods, their "agreement under date of October 31, 1941." Through plaintiff's efforts and expenditures of large sums for traveling expenses, defendant, within this extended period, procured contracts between it and companies supplying aircraft to the government for war purposes, the aggregate purchase price named in said contracts being \$5,950,000. The defendant has refused to pay the plaintiff commissions thereon in the agreed amount (i.e., not less than three percent) but has paid him merely \$8,950 (at the rate of \$1,000 a month) and has offered him, by way of settlement, an additional sum of \$9,000 which he has refused to accept as full payment.

Defendant argues that the summary judgment was proper on the ground that, under the parol evidence rule, the court could not properly consider as relevant anything except the writing of October 31, 1941, which appears on its face to set forth a complete and unambiguous agreement between the parties. If defendant on this point is in error, then, if the plaintiff at a trial proves the facts as alleged by him, and no other defenses are successfully interposed, he will be entitled to a sum equal to 3% of \$5,950,000. * * *

[NOTE.—Since this chapter deals with Interpretation and not with the "Parol Evidence Rule," only some short excerpts from Judge FRANK's learned and critical opinion will be given below, excerpts leading to a consideration of the so-called "objective theory" of interpretation.]

It is not surprising that confusion results from a rule called "the parol evidence rule" which is not a rule of evidence, which relates to extrinsic proof whether written or parol, and which has been said to be virtually no rule at all. As Thayer said of it, "Few things are darker

than this, or fuller of subtle difficulties." The rule is often loosely and confusingly stated as if, once the evidence establishes that the parties executed a writing containing what appears to be a complete and unambiguous agreement, then no evidence may be received of previous or contemporaneous oral understandings which contradict or vary its terms. But, under the parol evidence rule correctly stated, such a writing does not acquire that dominating position if it has been proved by extrinsic evidence that the parties did not intend it to be an exclusive authoritative memorial of their agreement. If they did intend it to occupy that position, their secret mutual intentions as to the terms of the contract or its meaning are usually irrelevant, so that parties who exchange promises may be bound, at least "at law" as distinguished from "equity," in a way which neither intended, since their so-called "objective" intent governs. When, however, they have previously agreed that their written promises are not to bind them, that agreement controls and no legal obligations flow from the writing. It has been held virtually everywhere, when the question has arisen that (certainly in the absence of any fraudulent or illegal purpose) a purported written agreement, which the parties designed as a mere sham, lacks legal efficacy, and that extrinsic parol or other extrinsic evidence will always be received on that issue. So the highest court of Michigan has several times held. It has gone further: In *Woodard v. Walker*, 192 Mich. 188, 158 N.W. 846, that court specifically enforced against the seller an oral agreement for the sale of land which had been followed by a sham written agreement, for sale of the same land at a higher price, intended to deceive the seller's children who were jealous of the buyer. * * *

The plaintiff's affidavit, if accepted as true and liberally construed, makes it plain that the parties deliberately intended the October 31 writing to be a misleading, untrue, statement of their real agreement.

We thus construe the record because we do not share defendant's belief that the rule is so beneficent, so promotive of the administration of justice, and so necessary to business stability, that it should be given the widest possible application. The truth is that the rule does but little to achieve the ends it supposedly serves. * * *

The parol evidence rule is lauded as an important aid in the judicial quest for "objectivity," a quest which aims to avoid that problem the solution of which was judicially said in the latter part of the fifteenth century to be beyond even the powers of Satan—the discovery of the inner thoughts of man. The policy of stern refusal to consider subjective intention, prevalent in the centralized common law courts of that period, later gave way; in the latter part of the 18th and the early part of the 19th century, the recession from that policy went far, and there was much talk of the "meeting of the minds" in the formation of contracts, of giving effect to the actual "will" of the

contracting parties. The obstacles to learning that actual intention have, more recently, induced a partial reversion to the older view. Today a court generally restricts its attention to the outward behavior of the parties: the meaning of their acts is not what either party or both parties intended but the meaning which a "reasonable man" puts on those acts; the expression of mutual assent, not the assent itself, is usually the essential element. We now speak of "externality," insisting on judicial consideration of only those manifestations of intention which are public ("open to the scrutiny and knowledge of the community") and not private ("secreted in the heart" of a person). This objective approach is of great value, for a legal system can be more effectively administered if legal rights and obligations ordinarily attach only to overt conduct. Moreover, to call the standard "objective" and candidly to confess that the actual intention is not the guiding factor serves desirably to high-light the fact that much of the "law of contracts" has nothing whatever to do with what the parties contemplated but consists of rules—founded on considerations of public policy—by which the courts impose on the contracting parties obligations of which the parties were often unaware; this "objective" perspective discloses that the voluntary act of entering into a contract creates a jural "relation" or "status" much in the same way as does being married or holding a public office.

But we should not demand too much of this concept of "objectivity"; like all useful concepts it becomes a thought-muddler if its limitations are disregarded. We can largely rid ourselves of concern with the subjective reactions of the parties; when, however, we test their public behavior by inquiring how it appears to the "reasonable man," we must recognize, unless we wish to fool ourselves, that although one area of subjectivity has been conquered, another remains unsubdued. For instance, under the parol evidence rule, the standard of interpretation of a written contract is usually "the meaning that would be attached to" it "by a *reasonably intelligent person* acquainted with all operative usages and knowing all the circumstances prior to, and contemporaneous with, the making" of the contract, "other than oral statements by the parties of what they intended it to mean." We say that "the objective viewpoint of a third person is used." But where do we find that "objective" third person? We ask judges or juries to discover that "objective viewpoint"—through their own subjective processes. Being but human, their beliefs cannot be objectified, in the sense of being standardized. Doubtless, there is some moderate approximation to objectivity, that is, to uniformity of beliefs, among judges—men with substantially similar training—although less than is sometimes supposed. But no one can seriously maintain that such uniformity exists among the multitude of jurymen, men with the greatest conceivable variety of training and background. When juries try

cases, objectivity is largely a mirage; most of the objectivity inheres in the words of the "reasonable man" standard which the judges, often futilely, admonish juries to apply to the evidence. Certain aspects of subjectivity common to all men seem to have been successfully eliminated in the field of science through the "relativity theory"—which might better be called the "anti-relativity" or "absolute" theory. But equal success has not attended the anti-relativity or objective theory in the legal field. Perhaps nine-tenths of legal uncertainty is caused by uncertainty as to what courts will find, on conflicting evidence, to be the facts of cases. Early in the history of our legal institutions, litigants strongly objected to a determination of the facts by mere fallible human beings. A man, they felt, ought to be allowed to demonstrate the facts "by supernatural means, by some such process as the ordeal or the judicial combat; God may be for him, though his neighbors be against him." We have accepted the "rational" method of trial based on evidence but the longing persists for some means of counter-acting the fallibility of the triers of the facts. Mechanical devices, like the parol evidence rule, are symptoms of that longing, a longing particularly strong when juries participate in trials. But a mechanical device like the parol evidence rule cannot satisfy that longing, especially because the injustice of applying the rule rigidly has led to its being riddled with exceptions. * * *

[The judgment of the District Court was reversed, the three Circuit Judges being unanimous in holding that the "parol evidence rule" did not exclude proof of the alleged oral agreement, and that if the plaintiff could prove that agreement he had a good cause of action for his commission.]

The decision of the Circuit Court of Appeals was reversed by the Supreme Court. *AMERICAN SEATING CO. v. ZELL*, 322 U.S. 709, 64 S.Ct. 1053, 88 L.Ed. 1057 (1944). The following is the report: "PER CURIAM. In this case two members of the court think that the Circuit Court of Appeals should be affirmed. Seven are of the opinion that the judgment should be reversed and the judgment of the District Court affirmed—four because proof of the contract alleged in respondent's affidavits on the motion for summary judgment is precluded by the applicable state parol evidence rule, and three because the contract is contrary to public policy and void."

Two cases are cited on the latter point, none on the first. Each of the two points is affirmatively supported by less than a majority of the nine Justices. It is believed that a convincing opinion could have been written on neither point.

QUESTIONS:

Was the contract in this case "integrated," so as to make applicable the "objective theory of interpretation" and the rule stated in Restatement, Contracts, § 230?

NOTE

When the terms of a contract have been reduced to writing, both parties having expressed assent thereto "as the final and complete expression of the agreement," the issue of fact as to the words actually used by the parties is separated from the issue as to the meaning to be given to them. There is a much repeated rule of law, commonly known as "the parol evidence rule," stating that when a written document has been executed and assented to as above, testimony of previous or contemporaneous oral expressions is not admissible to vary or contradict its terms. The history of this rule, with its applications and misapplications, can not be given here. It is no longer generally regarded as a rule of "evidence;" and no one doubts that testimony of previous or contemporaneous oral expressions is admissible for many purposes. The reason that such testimony is not admissible "to vary or contradict" the terms of the writing is that the writing has been assented to "as the final and complete expression of the agreement." If antecedent expressions are different from the newly adopted written ones, the latter have contradicted and eliminated the former. The clock does not turn backward. What the parties said yesterday can not undo what they have said and done today. This is just as true of antecedent writings as it is of antecedent oral expressions; and the rule could be described as "the written evidence rule" with no greater degree of inaccuracy than when described as "the parol evidence rule."

This substantive rule of contract law does not leap into operation the very instant that a written document that looks like a contract is produced in court. No written document, whatever its looks, can prove its own execution. It can not itself establish the fact that either party signed it, or delivered it, or assented to it as "the final and complete expression of agreement." Its form and the handwriting may indeed tend to corroborate a plaintiff's testimony that it was signed, delivered, and assented to by the defendant; but no rule of law or of evidence prevents the defendant from contradicting the plaintiff's testimony. The defendant may prove that the signature is a forgery; or that, even though signed by him, it was stolen from his desk or was handed over only for inspection; or, that for any other reason it was never assented to as "the final and complete expression of agreement." He can show that the writing was executed as a "frolic and banter," or that by a scrivener's error the writing makes him appear to promise the wrong performance at the wrong price.

If testimony of antecedent communications, oral or otherwise, is offered for the purpose of interpretation of the "integrated" contract, the "parol evidence rule" does not purport to exclude the testimony. Until the interpretation of the language is complete and its meaning determined, the court can not know what it is that must not be "varied or contradicted."

For statements of the Parol Evidence Rule, its application and limitations, see Restatement, Contracts, §§ 237-244; Corbin, "The Parol Evi-

dence Rule," 53 Yale L.Jour. 603 (1944); Wigmore, *Evidence*, §§ 2400-2478; Chadbourn and McCormick, "The Parol Evidence Rule in North Carolina," 9 N.C.L.Rev. 151 (1931).

Ridder v. Blethen, 24 Wash.2d 552, 166 P.2d 834 (1946), printed herein in Chapter 10, presents an interesting example of the process of Interpretation in order to determine whether the plaintiff was a person for whose benefit the contracting parties intended the contract to operate, and also of the fact that the "parol evidence rule" does not exclude parol evidence in aid of Interpretation.

"OBJECTIVE" AND "SUBJECTIVE" THEORIES OF INTERPRETATION

Legal philosophers of the 18th century had much to say about the "will theory" of contract. A contract is made by the voluntary agreement of men and not by the state or its representatives; a man is not bound by a contractual duty unless he willed it so. Out of some theory like this came such terms as "meeting of the minds," or the equivalent Latin phrases *aggregatio mentium* and *consensus ad idem*. It led jurists in the 19th century to insist that "an irrevocable offer is a legal impossibility." When these phrases, and the "will theory" on which they are based, applied with logical severity, produce a result that does not square with business mores and prevailing ideas of justice, they are now disregarded as inapplicable and untrue. Nevertheless, we can not altogether throw them aside. According to this theory, the expressions of each of the parties should be interpreted and given legal effect in accordance with the meaning that he intended them to symbolize—that is, his "subjective" meaning.

The court decisions have demonstrated plainly enough that a person may be held bound by his contract in accordance with his expressions as they are understood by others, even though his own intention and meaning were different. See such cases as *Embry v. Hargadine-McKittrick Dry Goods Co.* and *Hobbs v. Massasoit Whip Co.* in the first chapter herein. It can be demonstrated also that the expressions of one party do not necessarily bind him in accordance with the meaning that is in fact given to them by the other party. And when the terms of a contract are reduced to writing and made specific, so that the verbal symbols are the expression of both parties alike, the statements just made remain applicable; the meaning given to their expressions when interpreted by the court may not be identical with the one that was held subjectively by either one of the parties. This has led courts and writers to adopt the so-called "objective" theory of interpretation, and to say that men are bound by what they say and not by what they think, or even to say that they are bound in accordance with the meaning that reasonable third parties give to their ex-

pressions without regard to the meaning given by either of the parties themselves. It is agreement in expression that is required, not agreement in intention. The decisions do not justify statements that go so far. See the discussion by Judge Frank in *Zell v. American Seating Co.* *supra*, and also in *Ricketts v. Pennsylvania R. Co.*, 153 F.2d 757 (1946, C.C.A.).

No word or other symbol of expression has an "objective" meaning, independent of time, place, or circumstance, regardless of user, hearer, or reader. There is no "rule of language or of law" that requires the adoption of any meaning of any symbol of expression used in making a contract. The actual and proved intent and meaning of either of the parties should not be disregarded, unless he knowingly or negligently has misled another person to his injury. If no other person has been so misled, it should make no difference what expression would have been chosen by reasonable or intelligent users of language or what meaning the expressions actually used would have conveyed to such third persons. The actual intent of the one party and the actual understanding of the other may be difficult of proof, although their communicated expressions and overt conduct would be admissible for the purpose; in the process of making this proof the expressions that would be used and the meanings that would be given by other men may be decisive.

If one party has knowingly or negligently misled the other by his use of words and other symbols, he can not escape responsibility by proving his own meaning and intention. Even in such a case, however, that meaning and intention are not wholly immaterial; for they are considered along with other circumstances in determining the remedy that justice requires. Many factors must be considered. These include the nature of the mistake, the promptness with which notice of the mistake is given, and the extent of the change of position or injury.

As in the case of all other similar notes by the editor, the above statements must be critically checked by every student, on the basis of court decisions and the opinions of others.

MILLER v. FICHTHORN

Supreme Court of Pennsylvania, 1858. 31 Pa. 252.

The following excerpts are from the opinion of LOWRIE, C. J.:

"This ignorance of the usual forms of doing a given business may often lead persons into difficulties; yet, when they are not strictly bound by them, and the form is free, the courts ought to endeavor to understand their transactions, whatever may be their form, and to execute their true intention. Even in the practice of the law, directed

as it is by usages, rules, and statutes, irregularities are inevitable, and very often the courts are constrained to overlook them, in order to get at the very spirit and merits of the cause.

"In the effort to prevent the intention of the parties from being lost, in the informal and deformed methods taken to express it, many decisions necessarily take place which are very difficult of generalization so as to be placed under a rule. The very variety that naturally exists, where there is no law or custom that imperatively prescribes the form, makes all generalization a very slow and insecure process. In the law and in other social affairs, such generalizations are simply inductions from our experience, and are therefore necessarily subject to modification and correction according to our more enlarged experience, and to the changes that are constantly taking place in our customs and institutions. * * *

"General rules on this subject, beyond the instances where statutes require a writing, are of very difficult induction, because they have no foundation except the customs of the country and the presumptions growing out of the ordinary modes of doing business; and this is essentially a shifting one. Yet the desire to generalize such transactions is natural to every mind that is in the habit of considering them. Custom is itself but a form of generalization, and legal presumptions mostly result from it. Imperfect as our legal generalizations are, they often furnish us with rules of great working value, even when they cannot be used without some study of their fitness.

"And there is no class of society that so much needs to keep itself free, within the bounds of a technical training, as those who are concerned with the administration of judicial affairs; for they have to deal with and manage the ever changing matters of a whole community, consisting of all degrees of intelligence, and of all classes of occupations, doing their business in all sorts of ways. It is the right of a free people so to deal; and those who participate in judging their acts are to find out and apply the pattern by which they act, and not to furnish it. Thorough training can best accommodate itself to the practical affairs of society by respecting the fact that others, of less or different training, must have liberty to act according to the training that they have, within the recognized limits of social morality, and must be judged accordingly. In constructing, as well as in following, generalizations of social action, we may move freely along the highway of juridical experience, without being bound to keep in the ruts worn in it by those who have gone before us. * * *

"As a preliminary to every question of interpretation of a writing, it must be proved or assumed that it is genuine and authentic; that it is free from fraud in its creation; that the makers of it were competent; that the subject matter of it is lawful, and that it is executed according to law; and for these purposes parol evidence is proper,

in order to put the instrument into the hands of the judge for interpretation and construction.

"Now, it is essential to all language that it should have objects, material, spiritual, or ideal, to which it applies; and, as it cannot apply itself to its objects, it is essential that some mind should be sufficiently informed to make the application; else the writing is senseless. Like the index board at the cross-roads, the word without its pointer is nothing. Hence it follows, that: In the very nature of things, the judge must receive, by admissions or by testimony, all the information that is necessary in order to put him into a position to interpret and construe the writing with intelligence; that is, to apply it to persons, things and events, according to the intention under which it was written.

"This proposition is applied to every kind of writing, ancient and modern, legal and moral, historical and scientific, and is often expressed in some such terms as these: The interpreter must as far as possible place himself intellectually in the same circumstances of time and place, as the author of the writing was in when he wrote it; in order to enter into sympathy with him, and be able to reveal the thought, which ignorance of those circumstances must render indistinct and doubtful. * * *

"In order to put the judge into position for interpreting a writing, he must know the language in which it is written, or must have the instrument translated by an expert into one that he does know; if it contains expressions that are peculiar to some special business, or to some special custom of some class or place, he must have them explained in the same way; if it names or describes persons and things unknown to him, he must be informed of them by admissions or testimony; if some expressions are of doubtful meaning in themselves, he may need to be informed of very many circumstances of time and place, under which the instrument was written. From this it would seem that the evidence that may be received, in order to put the judge into a position proper for intelligent interpretation, may be very extensive; yet in actual practice it is usually very small, for the matter in dispute defines the extent of the proof; and most of writings furnish no reasonable ground of dispute. * * *

"It is not always easy to determine that the parties have or have not put the whole transaction in writing. Arrangements made after the completion of the writing cannot, in the nature of things be presumed to be excluded by it. Nor can matters that go in satisfaction and discharge of the writing; for it cannot declare its own fulfillment. Many writings are, in their ordinary purpose, only a part of a transaction; and, instead of showing what the transaction was, are only means of performing one side of it. Thus, promissory notes, bills of exchange, bonds and mortgages, are often only means of satisfying contracts for the sale of lands or goods, of which conveyances

and bills of parcels, with receipts, are the counterpart. Yet many writings, such as agreements for the sale of land or erection of houses or other improvements, or for partnerships, or for establishing other important or permanent relations, are generally designed to express the whole intention of the parties."

In this case that is quoted above, the plaintiff had conveyed land by deed to the defendant, and the latter had executed his bond and mortgage for \$293 for the balance of the purchase price. Parol evidence was held admissible to prove that the defendant had agreed to assume and pay a previously existing mortgage on the land, although neither the deed of conveyance nor the bond said anything about it.

NOTE ON IN RE ESTATE OF SOPER (ALIAS YOUNG),
196 Minn. 60, 264 N.W. 427 (1935)

A man named Soper deserted his wife Adeline in 1921, leaving carefully prepared and convincing evidence that he had drowned himself. After some wandering he settled in Minnesota, using the name John W. Young. There he started a fuel business, forming a corporation in which he and K. were equal owners of stock. In 1927 he married Gertrude, with whom he lived happily until his death. He and K. agreed upon a "stock insurance plan" whereby each was to insure his life for \$5,000, all premiums to be paid out of the corporate business, with the further agreement that on the death of either one the shares owned by him should belong to the survivor and the \$5,000 insurance money should be paid as the deceased might direct. A policy for \$5,000 was taken out in the name of each man payable to a Trust Company. The policies and all stock certificates were deposited with this company along with an "integrated" escrow agreement, in which the Trust Company was directed on the death of either one to deliver his stock to the survivor and to collect and pay over the \$5,000 insurance on the life of the deceased "to the wife of the deceased Depositor." Soper (alias Young) died in 1932. Adeline discovered the situation and brought suit against the Trust Company and Gertrude for the \$5,000 insurance money.

Did the word "wife" as used in the "integrated" escrow agreement have so "plain and definite" a meaning that the law will permit no other to be attributed to it? It is certain that Adeline was Soper's lawful wife and that Gertrude was not; but the court held that the money belonged to Gertrude.

Whose meaning of the word "wife" should be given legal effect? There were three parties to the escrow agreement: Soper, K., and the Trust Company. Of these three, the latter two had no interest to be protected; they had in no way changed their position in reliance on

a meaning given by them to the word "wife." Soper had given the consideration for the Trust Company's promise to pay money as Soper directed. Soper is the only person whose meaning is relevant. He alone had power to determine the beneficiary of his donation. The identity of that beneficiary can be determined only by oral testimony, whether she is Adeline or Gertrude. It is dependent solely on Soper's intention and his own "subjective" meaning. As to that, he is dead and can not testify; but there was ample evidence, mainly circumstantial but all proved by oral testimony, to convince the court that Soper's personal meaning of "wife" as used in the contract was Gertrude.

In holding that the word "wife" did not have such a "plain meaning" that the law required its adoption without regard to Soper's subjective meaning, the court said: "The agreement points to no one else than Gertrude as Young's 'wife'. To hold otherwise is to give [make] the word 'wife' 'a fixed symbol,' as 'something inherent and objective, not subjective and personal.' Dean Wigmore, Evidence, sec. 2462, has this to say: 'The ordinary standard, or plain meaning, is simply the meaning of the people who did *not* write the document. The fallacy consists in assuming that there is or ever can be *some one real* or absolute meaning. In truth, there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document. * * * The truth is that whatever virtue and strength lies in the argument for the antique rule [that the plain and clear meaning must be adopted] leads not to a fixed rule of law, but only to a general maxim of prudent discretion. In the felicitous alliteration of that great judge, Lord Justice Bowen, it is not so much a canon of construction as a counsel of caution.'"

One Judge dissented. He thought that the court should not "make a new contract for the parties" or "substitute a new beneficiary." He said "A man can have only one wife." Was it the court or the dissenter who would "make a new contract for the parties"?

It should be observed that the statement of Wigmore quoted above that the "person whose meaning the law is seeking is the writer of the document" is properly applicable in the interpretation of a will, but is very often not applicable in interpretation of a contract. In the above case, Soper probably did not write the escrow document; and he is not the one who promised to pay money to the "wife." But he bought and paid for that promise and he is the only party to the transaction who had an interest in determining the meaning of the word and identifying the donee. In ordinary bargains the interests of both parties are affected by the meaning to be given. In determining the one whose meaning shall be made legally effective, if it appears that they gave different meanings, many circumstances must be considered, including the character of the conduct of the parties.

HOLMES, "THEORY OF LEGAL INTERPRETATION," 12 Harv. L.Rev. 417 (1899): "It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collocation of words has one meaning and no other."

THAYER, PRELIMINARY TREATISE ON EVIDENCE, 428: "The Chief Justice [Holt] here retires into that lawyer's Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fulness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair, inspect the text, and answer all questions without raising his eyes. * * * But the fatal necessity of looking outside the text in order to identify persons and things tends steadily to destroy such illusions and to reveal the essential imperfection of language, whether spoken or written."

LEARNED HAND, J., in EUSTIS MINING CO. v. BEER, SONDEHEIMER & CO., 239 F. 976, 984 (1917, D. C.): "It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else and it would not make a particle of difference in his obligation."

Does "the law" impose a meaning upon the words of a promise without regard to the intention of the promisor or to the meaning actually given to them by the promisee? By what process does "the law" arrive at the meaning that it "imposes"? Would Judge Hand have been equally unmoved if by the testimony of only one Bishop the promisor convinced him that the words were used with a very unusual and peculiar meaning and that the promisee knew it? Of course, the quotation should be read in the setting that the Judge gave it in the opinion of the court.

BARON BRAMWELL in BROWN v. HARE, 3 H. & N. *484, *495: "If a man intends to buy, and says so to the intended seller, and he intends to sell, and says so to the intended buyer, there is a contract of sale; *and so there would be if neither had the intention.*" After a "mock marriage" are the parties husband and wife?

Suppose that in a contract for the conveyance of a tract of land certain words of description are used, that by those words the seller meant Blackacre but the buyer understood Whiteacre, and that this is now admitted by both parties. If those words are such that they

would be understood to describe Greenacre by a reasonable man, by a college professor, by a normal user of English, and even by the court, should the court decree that the seller must convey Greenacre and the buyer must accept and pay the agreed price if either party so insists? The answer to this appears to be yes, if we accept the decision in Restatement, Contracts, § 230, Illustration 1; but the Restatement might justify a decree of rescission of the contract.

HOLMES, "THEORY OF LEGAL INTERPRETATION," 12 Harv. L.Rev. 417 (1899): "I do not suppose that you could prove, for purposes of construction as distinguished from avoidance, an oral declaration or even an agreement that words in a dispositive instrument making sense as they stand should have a different meaning from the common one; for instance, that the parties to a contract orally agreed that when they wrote 500 feet it should mean 100 inches, or that Bunker Hill Monument should signify Old South Church."

In MORRISON v. WILSON, 30 Cal. 344 (1866), the court said: "If they see fit to agree that mile shall stand for league, or grant bargain and sell for quit claim, or even black for white, however we might marvel at the caprice, we could not question the power." See also Mitchell v. Henry, 15 Ch.D. 181 (1880), reversing Sir George Jessel who had declared that "nobody could convince *him* that black was white."

INMAN MFG. CO. v. AMERICAN CEREAL CO., 133 Iowa 71, 110 N.W. 287 (1907). An interpretation given to a contract by the trial court and jury was held to be erroneous by the Supreme Court and the case remanded for a new trial. The same verdict and judgment for the plaintiff were rendered at the second trial, followed by a new reversal and remanding. The third trial court and jury agreed with the first two. Thereupon, the Supreme Court refused to remand the case for a fourth trial and rendered final judgment for the defendant. It said: "If a party may introduce parol proof of his understanding that the language of a formal written instrument assented to by him is different from that which in law can be attributed to it, and that the other party had reason to believe that he thus misunderstood it, then the way is open to attack any written instrument by parol evidence." The court so held, even though the evidence that convinced three trial courts was given to show that the words were used by the parties with the meaning that would be given to them by the courts of the state where the contract was made.

The decision might be sustained on the ground that the dispute was really as to the legal operation of the words used and not as to the meaning of those words as used by the parties—a question of “construction” rather than of “interpretation;” but the court did not so treat it.

Do words ever have a meaning so “plain and clear” that it is the only one “which in law can be attributed to it”?

Can “one thousand” ever mean “twelve hundred”? See *Smith v. Wilson*, 3 B. & Ad. 728 (1832).

Does “day” mean 24 hours and nothing more or less? How about 8 hours, in a contract of employment?

Can words such as “cornfield” and “the deep blue sea” be used in accordance with a private code to mean “New York City” and the “Blue Sky Law”?

In a negotiable note made in a Southern state in 1864, there was a promise to pay ten thousand “dollars.” Is oral evidence admissible to show whether this “meant” Mexican dollars, Spanish milled dollars, gold dollars, paper dollars, sand dollars, or Confederate dollars? See *Thorington v. Smith*, 75 U.S. (8 Wall.) 1 (1868). Also *Liebeskind v. Mexican Lt. & P. Co.*, 116 F.2d 971 (1941), Canadian dollars.

In *WISCONSIN MARINE & FIRE INS. CO. BANK v. WILKIN*, 95 Wis. 111, 69 N.W. 354 (1896), the court held that “Whatever was the intention of the parties as shown by their acts preceding the signing” they must be held to have promised jointly and severally to pay the whole amount, not merely to pay each his specified share thereof. “The language of the contract does not admit of any other reasonable construction without violating both the rules of language and of law.”

What “rule of language” is it that the “law” requires a contractor to observe?

BOWEN, L. J., said in *RE JODRELL*, 44 Ch.D. 590 (1890), with respect to statements directed against admitting evidence to disturb the “plain meaning” of an instrument: “It seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution, to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion.”

Once, when counsel was citing case after case to establish the meaning of a will made by an old woman, LORD MANSFIELD is reported to have interrupted: "Sir, do you think that this old lady ever read those cases or would understand them if she had?" Holliday, *Hist. of Eng. Law*, 127.

Proof of circumstances is admitted to interpret the words of agreement, not to eliminate them. "After interpretation has called to its help all those facts which make up the setting in which words are used, the words themselves remain the most important evidence of intention; to put them altogether aside may at times be necessary but it always somewhat savors of usurpation." L. HAND, J., in *NATIONAL CITY BANK v. GOESS*, 130 F.2d 376 (1942, C.C.A.).

HOLMES, "THEORY OF LEGAL INTERPRETATION," 12 Harv. L.R. 417 (1899): "By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing in every case. But under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words."

Is there only one "theory of language"? Which is the more important, "theory" or "practice" (usage)?

Who is "John Smith"? Which ship was the "Peerless"?

Was there a "true George Washington"?

Can a word have a "meaning" without either a speaker or a hearer?

Does every word have "a dictionary meaning"?

Why does the Oxford Dictionary devote 14 long columns of fine print to elucidate the meanings of the word "mean"?

See the "meanings" of the word "meaning" in the writings of forty philosophers as presented by OGDEN AND RICHARDS, *THE MEANING OF MEANING*.

"The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." COOK, "The LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS," 159 (1942).

CHAPTER 6

CONDITIONS OF CONTRACTUAL DUTY OF IMMEDIATE PERFORMANCE

INTRODUCTORY NOTE

In the preceding chapters we have dealt with the operative facts that constitute what we call a contract, creating legally enforceable rights and duties: promises made as part of a bargaining exchange, promises in a sealed writing, promises caused by various antecedent transactions and in recognition of some sort of moral obligation, and promises that have caused substantial action in reliance; what is a promise and what makes it binding and irrevocable. The central problem of the present chapter is to determine when and under what conditions a promise becomes immediately enforceable. The term "contract" indicates legally enforceable duty, but not necessarily one that requires immediate performance so that for failure of performance some judicial remedy is immediately available. Most promises are for a performance in the future: a debt for money lent on time is ordinarily collectible only at maturity. Also, many, if not most, promises are for a performance to be rendered only on the happening of some conditioning event, concurrently with or subsequently to that event: the price of goods is promised payable on delivery; wages are promised payable after services rendered; an insurer promises money only after a fire (that generally never occurs) and proofs of the amount of loss. In most contracts the legal right of a promisee is a "conditional right" to a future performance; the correlative duty of the promisor is a "conditional duty."

A contract transaction has a history, often a long history; there is a chronological series of events, some of them (the "operative" ones) having some effect on the time or manner of judicial enforcement. In a bargaining transaction there is preliminary negotiation: questions, invitations, offers, counter-offers. Next there is an expression of assent to offered terms—an "acceptance." At this point in the succession of events we say that a "contract" has been made. But if in that contract a promise is a "conditional" promise, we await the happening of the condition or conditions, the event or events on or after which performance is due. When all of these have occurred (or their occurrence in some way excused), then and not until then the promisee's right becomes a right to immediate performance, the promisor's duty

becomes an unconditional duty of immediate performance, and failure of performance constitutes a "breach of contract" and an immediate "cause of action" at law.

We are now to deal, not with whether a contract has been made, but with whether there has been a "breach"? Was performance immediately due? Were there conditioning events and have they occurred? What are these events and why are they "conditions" of enforceable right and duty? Did the parties expressly agree that the event (very often a performance by the promisee) should be a "condition", or is it reasonably to be "implied" from what they said and did, or is it a "condition" because prevailing notions of justice so require even though the parties had no express or implied intention with respect to it. After a contract is made many events occur that the parties did not foresee: fires, earthquakes, deaths, wars, and rumors of wars. When will these prevent failure of performance from being a "breach" of contractual duty? When is their non-occurrence a condition of the promisor's duty of immediate performance?

In dealing with these questions we are indeed plunging into a vast field of human affairs. Not only are there innumerable events the occurrence or absence of which may condition a promisor's duty, there are many kinds of contractual transactions with important differences among them. Among the more important of these classes we may list the following: Sales of Land, Sales of Goods, Money Loans, Service Contracts, Building Contracts, Insurance, Suretyship, Instalment Contracts, Aleatory Contracts, Leases, Charterparties. Each of these is a specialized field of study and practice, involving huge volumes and separate law school courses. The present casebook does not compete with these volumes and courses; and yet it is from all these classes of transactions that its materials must be drawn. Some "working rules" are useful in all of these fields; that is, in all contract transactions. Some of these have respect to the "conditions" of a promisor's enforceable duty, what they are and what makes them so. Therefore, samples will here be found, taken from all or most of the special fields, with the reservation that they are only samples, supporting or illustrating the more general working rules as to conditional rights and duties, but not purporting to develop any one of the fields in its specialized aspects.

The following definitions and classification of conditions have been found useful, especially for reference back as cases in the chapter are studied.

1. What is a condition? A condition is an operative fact, the occurrence of which will create some new legal relation (or extinguish an existing legal relation). It is generally not a promise, although the

performance of an act promised is often a condition. A not uncommon use of the word is to denote almost any term or provision in a contract (i. e., a group of words). This use should be avoided. A group of words may determine that some fact shall operate as a condition, but the group of words are not themselves the condition.

2. When will a fact operate as a condition? It will so operate when the parties to a contract agree that it shall and express this agreement either by words or by conduct from which it may reasonably be inferred (or implied). It will likewise so operate when the court believes that justice requires it, even though the parties neither had nor expressed any intention regarding it.¹ Conditions may therefore be classified as express, implied, and constructive.

3. What are conditions precedent and subsequent? A condition may be regarded with reference to the legal relations that it extinguishes or those that it helps to create. As to the former, it is subsequent; as to the latter, it is precedent. The particular legal relation with respect to which a condition is to be judged varies with the case, but it is usually the legal duty of instant performance for breach of which an action lies. When the creation of a particular legal duty requires the existence of four facts, all four are conditions precedent; if three of them already exist, the fourth is a condition precedent. The term "conditional duty" is commonly used to indicate that three (or some) of the necessary facts exist or have occurred and that the enforceable duty awaits only the occurrence of the fourth (or others). See Restatement, Contracts, §§ 250, 254, 259.

In the sense as herein defined, a condition is never "concurrent." It precedes the legal relation that it creates, and it is subsequent to the relation that it extinguishes. But two mutual promises may require concurrent performances. In such cases a tender of performance by either one may be a condition precedent to an instant and enforceable duty in the other. See Restatement, Contracts, § 251.

¹ "You can always imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement and therefore not capable of founding exact logical conclusions." Justice O. W. Holmes, "The Path of the Law," 10 Harv. L. Rev. 466. See, also, *Leonard v. Dyer*, 26 Conn. 172, 178, 68 Am. Dec. 382

(1857); *Banks, L. J.*, in *Grove v. Webb*, 114 L.T. 1082, 1089 (1916).

"Though it has been constantly said by high authority that the explanation of the rule [that frustration of purpose operates as a discharge] is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term." Lord Wright in *Denny, Mott & Dickson v. Fraser* [1944] A.C. 265, herein at p. 964.

4. Are offer, acceptance, consideration, delivery, legality of object, and the like, conditions? They might be so called, because in their absence no new contractual relation will exist; but it is not customary to describe them as conditions, and it is convenient to restrict the term condition to apply to an operative fact subsequent to acceptance and prior to discharge. The legal relations created by acceptance are called "contract" or primary obligation (primary relations). The question of conditions usually involves an inquiry as to breach of contract and the existence of new legal relations called secondary obligations. See Restatement, Contracts, § 250, Comment a.

5. What is a dependent promise? It is one that creates no instant duty, but instead a duty conditional upon the performance (or tender thereof) by the promisee of a return promise made by him. An independent promise is one that is not thus conditional.

6. What sorts of facts customarily operate as conditions? They are many, and the question must be answered by a study of the cases. They may be classified according to a number of different principles, each having a certain usefulness and convenience.

I. Express; implied; constructive. (See 2, *supra*.)

II. Precedent; subsequent. (See 3, *supra*.)

III. (a) Acts or events not in themselves the agreed exchange for the performance of the promise sued on. These are usually express; e. g., architect's certificate.

(b) Facts constituting the agreed exchange and equivalent, being generally acts of the promisee (he sometimes having promised to perform them and sometimes not). These are more often not express.

IV. (a) Acts or events that are certain to occur at a definite time; e. g., the arrival of a future date.

(b) Those certain to occur, but at an uncertain time; e. g., the death of X.

(c) Those not certain to occur at all; e. g., the arrival of a ship, or the construction of a building.

V. (a) Conditions not within the volitional control of any person; e. g., a fair wind, as in *Constable v. Cloberry*.

(b) Those within the volitional control of a third person; e. g., architect's certificate, or the king's return to London.

(c) Those within the volitional control of the promisor. See *Scott v. Moragues Lumber Co.* (1918) 202 Ala. 312, 80 So. 394, *infra*, 499.

(d) Those within the volitional control of the promisee; e. g., ordinary option contracts.

VI. By the Louisiana Code, conditions precedent and subsequent are called suspensive and resolutory, each of these being

again subdivided into casual and potestative. See discussion and application of these code provisions in *New Orleans v. Texas & Pac. R. Co.* (1897) 171 U.S. 312, 332, 18 S.Ct. 875, 43 L.Ed. 178.

No doubt still other classifications are useful, and no classification is indispensable. The cases present facts in many combinations and they are not easily classified. In some degree, the cases herein are arranged according to I and II, *supra*; but the chief purpose underlying the arrangement was to make the cases most readily teachable.

See Anson on Contracts (Corbin's 5th Am.Ed.1930) c. XIII; "Conditions in the Law of Contract," 28 Yale L. Jour. 739 (1919), also in *Selected Readings on Contracts*, 871.

The definitions and analysis of the American Law Institute are in harmony with this introductory note. See *Restatement, Contracts*, §§ 250-257. As to the difference between express and constructive conditions, see also *Id.* § 274, Comment a-e.

SECTION 1.—EXPRESS CONDITIONS PRECEDENT

(Conditions Distinguished from Promises and Covenants, and Express Conditions Illustrated)

INTRODUCTORY NOTE

Several cases are here printed as illustrations of different sorts of Express Conditions. The facts and events that are conditions of a promisor's duty for the reason that the parties have in words so provided may be of infinite variety. The forms of language appropriate for such a purpose must be considered, as a preparation for the drafting of contracts to suit the needs and desires of men and also for the interpretation of contracts that other men (often inexpert) have drawn.

Just as there is no distinct boundary line between express and implied promises, so also there is none between express and implied conditions. The intention of men is expressed with varying degrees of clearness and accuracy; and the process called "Implication" is a necessary phase of the process of Interpretation. In subsequent sections dealing with Implied Conditions there will be many instances in which the condition may also be properly described as "express."

CONSTABLE v. CLOBERY.

In the King's Bench, 1626. Latch, 49.

Action of covenant. The plaintiff alleged that he had hired his ship to the defendant and that by charter party indented he had covenanted with the defendant and one A. that the ship should sail with the next wind on a voyage to Cadiz. The defendant and A. jointly and severally covenanted with the plaintiff that if the ship went the intended voyage and returned to the Downs the plaintiff should receive a certain sum as freight, but if it should go on to Amsterdam they would pay to the plaintiff so much more. The plaintiff further alleged that the ship went to Cadiz and returned to the Downs, and that the defendant had not paid the sum agreed upon for freight, primage, etc. The defendant pleaded a special plea and denied particularly that the ship had sailed with the next wind. The plaintiff demurred to this plea, raising the question whether it set up a good defense. STONE argued that it did not, because the substance of the covenant is that the ship should sail and not that it should sail with the next wind, inasmuch as the wind may change and vary with the passing hour. And he said that this was proved by the covenant itself, which is to give so much as freight, that is to say, for going the voyage, and not for sailing with the next wind (citing Ughtred's Case, 7 Co.Rep. 9). The COURT held that the plea was bad. But JONES J., said that if the defendant had covenanted that if the ship should sail for Cadiz with the next wind he would pay the agreed sum, then the plaintiff ought to allege that he had sailed with the next wind. DODERIDGE, J., gave as his reason that the wind is uncertain, and therefore is not the substance of the covenant. [Not all of the report is here translated. The case is also reported in Palmer, 397, and Popham, 161.]

QUESTIONS:

1. Did the plaintiff promise to sail with the next wind?
2. Did the plaintiff commit a breach of contract?
3. Can one who has himself committed a breach ever maintain an action for breach by the other party?
4. What ensemble of facts and events constituted an express condition precedent to the defendant's duty to pay freight?
5. How could the defendant have made "sailing with the next wind" a condition precedent?
6. Should not the decision have been otherwise on general reasons of justice?
7. Did the plaintiff promise to reach Cadiz with the defendant's goods?

HAMMOND v. NIAGARA FIRE INS. CO.

Supreme Court of Kansas, 1914. 92 Kan. 851, 142 P. 936, L.R.A.1915F, 759.

Action by W. A. Hammond against the Niagara Fire Insurance Company. From judgment for defendant, plaintiff appeals. Affirmed.

JOHNSTON, C. J. The question involved in this proceeding is: Does the failure to keep and produce certain records of a commercial business, as required by the terms of a fire insurance policy, bar recovery in case of loss? W. A. Hammond, the appellant, brought this action to recover against the Niagara Fire Insurance Company, the appellee, on a policy of insurance issued by that company upon a stock of merchandise and store fixtures owned by him and located at Towanda, Kan. On July 17, 1911, the appellee, by its agent, G. W. Moore, issued to appellant the policy of insurance upon his stock of merchandise to the amount of \$3,300, and upon the fixtures to the amount of \$200, and a few days thereafter the appellant paid therefor the premium of \$45.50. The policy was standard in form, and in it was a provision which required, among other things, that the insured would keep a set of books, which would present a record of the business transacted and keep the books and inventories in a fireproof safe at night, or at some place not exposed to fire, and to produce them in case of loss, and it also provided that a failure to keep and produce the books and inventories would avoid the policy. About 3 o'clock in the morning of May 9, 1912, a fire occurred, and the books of account, which, it appears, appellant had been keeping upon the top of a trunk in his sleeping room over the storeroom, and the last inventory, which he kept in the trunk, were destroyed. Appellee's agent was notified of the fire, and an adjuster came and interviewed appellant, but he refused to recommend payment of the loss on account of appellant's inability to produce the books of account and the last inventory. He, however, suggested that appellant make proofs of loss to the appellee, and also inform it as to the books and inventory. This appellant did about May 17, 1912.

The loss was not paid, and on July 25, 1912, appellant brought this action asking for a reformation of the policy of insurance striking out that portion requiring the books and inventory to be kept in a fireproof safe, and also for judgment for the amount of the policy. In the proofs of loss made by appellant the value of the merchandise and fixtures was placed at \$4,800, and on the trial evidence was introduced tending to show that the last inventory, taken in January, 1912, showed the value of the stock to be about \$4,200, and the fixtures about \$300. Evidence was also introduced tending to show that appellant did not know that the fireproof safe clause was in the policy.

A demurrer of appellee to appellant's evidence, on the ground that it failed to show a cause of action, was overruled, but after the introduction of additional testimony by appellant to the effect that the safe clause in the policy was put in by the agent without mentioning the fact to appellant the court modified its ruling and sustained the demurrer as to the merchandise, but overruled it as to the fixtures. The court directed the jury to return a verdict in favor of appellant for \$224, for the loss of the fixtures, and, overruling appellant's motion for a new trial, judgment was accordingly rendered. He appeals, and here insists that the ruling of the trial court on the demurrer to the evidence as to the keeping and production of the books and inventory is error.

The contention is that, under the terms of the policy, the failure to produce the books and inventories does not, of itself, avoid the policy nor forfeit the right to recover the insurance. It is insisted that contracts of insurance are to be construed most strongly against the insurer, and most favorably to the insured; that forfeitures are not to be enforced unless definitely provided for in the contract; and that, as only one of two contingencies upon which a forfeiture depends in this contract has transpired, the policy cannot be forfeited. Under the conditions of the policy, appellant was to keep and produce books and inventories, and he contends that he observed the requirement to keep these, and only failed as to their production. Among the conditions [provisions] of the contract the insured was required to take an itemized inventory of the stock at certain times during the life of the policy. The second condition [provision] was: "The assured will keep a set of books, which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales, and shipments of said stock, both for cash and credit, from the date of the inventory or inventories provided for in the first section of this clause, and during the continuance of this policy."

In the third condition [provision] it was provided that: "The assured will keep such books and last inventory, and also the last preceding inventory, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy, or the portion thereof containing the stock described therein, is not actually open for business; or, failing in this, the assured will keep such books and inventories at night, and at all such times in some place not exposed to a fire which would ignite or destroy the aforesaid building; and in case of loss, the assured specifically warrants, agrees, and covenants to produce such books and inventories for the inspection of said company. In the event of failure on the part of assured to keep and produce such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon."

Appellant did keep a set of books, which, he says, was a complete record of all his business, and he did take an inventory as required by the terms of the policy, and he insists that he only failed as to the production of these. He argues that the policy is to be void only for the failure to do both, and that no penalty attaches for the failure to perform one of the conditions. What is meant by the expression "to keep and produce"? The word "keep" is a general term which is variously applied, and is often used in more than one sense in the same instrument or writing. It may mean to make or enter or to retain and preserve. It is plain that the meaning of the words "keep a set of books," as used in the second condition of the warranty, is that the insured shall make and enter in books a record of the business transacted by him. As there used, the words have no reference to the preservation and safety of the books when they are made.

In the third paragraph of the warranty the word has a definite signification. There it means to hold, care for, or preserve, which is the primary meaning of the word. It implies that the books when made and the inventories when taken shall be preserved as against destruction or loss, and to that end it is provided that they shall be placed or kept securely locked in a fireproof safe at night and when the store is not open for business, or, in the event that this is not done, that they shall be kept in a place not exposed to fire which would ignite or destroy the store building. The coupling of inventories with books in the third paragraph tends to strengthen the view that the word "keep" implies preservation, because the keeping of an inventory does not convey the idea of taking or making one, but rather the preserving of it from destruction. The keeping provided for in the third paragraph requires that the books and inventories shall be cared for and preserved so that they can be produced and, in case of loss, furnish some evidence as to the extent of the loss sustained by the insured and of the liability of the insurer.

Some comment is made on the action of the agent in including this clause in the policy without the knowledge of the insured. It is not contended that there was any fraud or deception practiced by the agent. The clause is one common in policies insuring merchandise, and it is conceded that it serves a useful purpose. In speaking of this clause it was said in *Insurance Co. v. Knerr*, 72 Kan. 385, 387, 83 P. 611, 612:

"It is not an unreasonable precaution; it is one with which the insured might very easily have complied. In any event, the parties making the contract agreed that it should be performed by the insured, and, since it is a part of the contract, it cannot be ignored or arbitrarily set aside. It is generally held that neglect on the part of the insured substantially to comply with a clause in an insurance policy to keep the books used in conducting the insured's business in an iron safe, or in some place where they will not be destroyed in case the

place in which the insured stock is kept is consumed by fire, will avoid the policy." • • •

We think the trial court correctly interpreted the contract of insurance, and that the insured failed to keep and produce the books as he had agreed to do, and, further, that compliance with this requirement was essential to a recovery under the policy.

We find nothing in the testimony that would have warranted the court in reforming the contract by striking out the clause in question.

The judgment of the district court will be affirmed. All the Justices concurring.

QUESTIONS:

1. Did the insured, by the words quoted from the policy, promise to keep and produce books and inventories, so that the insurance company could have maintained a suit for damages for his failure to keep the promise?
2. What was the "fact" that the court held to be a condition precedent to the company's duty to pay?
3. If the plaintiff had kept books and inventories in a fireproof safe, exactly as specified, but had failed to produce them because the safe itself was carried off by burglars who also fired the building, would the insurance company have to pay? See *Liverpool & London & Globe Ins. Co. v. Kearney*, 180 U.S. 132, 21 S.Ct. 326, 45 L.Ed. 460 (1901).
4. Which would be more advantageous to the insurance company, to have the insured expressly promise to keep books and inventories in a safe, or to make its own duty to pay expressly conditional on his so keeping them?

NOTE

Confusion of expression is both a cause and a result of confusion of mind. This is illustrated by opinions and treatises that fail to maintain a clear distinction between "promise" and "condition." Such a failure makes interpretation of the terms of the contract difficult, increasing in equal degree the difficulty of determining the legal operation of the facts that are described by those terms.

An express provision, or "term", of a contract is a group of words therein. It may be a "promise" by which one party undertakes a duty. Also, by an express provision, the parties may make some performance by one party a condition of the other party's promissory duty, a performance that the first party may (or may not) promise to render. The latter sort of provision (group of words) is neither a "promise" nor the "condition" of a promisor's duty; it is the *performance that it prescribes* that constitutes such a condition.

Courts have often struggled, as in the above case, to determine whether a specified performance is promised by one party, or is merely a condition

of the other party's duty to render a reciprocal performance, or is both promised by one and a condition of the duty of the other. The language used by the court in this struggle may only increase the reader's confusion, even though the actual decision may be reasonable and just.

Restatement, Contracts, § 260, is helpful in distinguishing "promise" from "condition".

NEW ENGLAND CONCRETE CONST. CO. v. SHEPARD
& MORSE LUMBER CO.

Supreme Judicial Court of Massachusetts, 1915. 220 Mass. 207, 107 N.E. 917.

Action by the New England Concrete Construction Company against the Shepard & Morse Lumber Company. To certain rulings at the trial, plaintiff excepts. Exceptions overruled.

CROSBY, J. The contract upon which this action is brought arises from certain letters and an "order slip" delivered to the plaintiff by the defendant. By the terms of the contract the defendant agreed to manufacture and furnish the plaintiff 58,000 feet of No. 1 maple flooring, in accordance with certain specifications, for the sum of \$37.50 per thousand, delivered at Salem, Massachusetts.

The defendant, in its letter to the plaintiff dated January 14, 1913, states: "We will forward the order to our Burlington, Vermont, mill and will make preparations to have it filled as requested."

The fair inference from this evidence is that the flooring so to be furnished by the defendant was to be manufactured by it at its mill in Burlington, Vermont; at least the presiding judge before whom the case was tried without a jury could have so found.

The contract contained a further provision that: "All contracts are contingent upon strikes, fires, breakage of machinery and other causes beyond our control."

The evidence shows that on February 19, 1913, and before any of the flooring had been manufactured or delivered to the plaintiff the defendant's mill at Burlington was destroyed by fire; that the defendant duly notified the plaintiff by letter of that fact and of its inability for that reason to carry out the contract.

The agreement is not an absolute contract by which the defendant agreed to furnish the flooring to the plaintiff, but was subject to certain conditions, including the condition that the contract was contingent upon fires; that is to say, the defendant was excused from performance in the event of the happening of any of the contingencies set forth in the contract. *Davis v. Columbia Coal Mining Co.*, 170 Mass. 391, 49 N.E. 629.

The effect of this clause was not to extend the time of performance beyond the time limit, but wholly to relieve the defendant from the obligation to furnish the flooring called for by the contract. *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 462, 89 N.E. 115.

The plaintiff contends that the word "fires" in the clause in question is to be construed in connection with the phrase "and other causes beyond our control," and that the last clause qualifies the other causes enumerated so that the word "fires" means "fires beyond the control of the defendant," and that the burden of proof was upon the defendant to show that the fire which occurred was beyond its control. We do not agree with this construction of the fire and strike clause. The language used is clear and free from ambiguity, and interpreting the words according to their natural and ordinary meaning, we are of opinion that the contingency of fires is independent of and distinct from all other causes enumerated, and cannot be construed as "fires beyond the control of the defendant."

The mill having been destroyed by fire, the defendant is wholly relieved from performance; at least, in the absence of evidence to show that the fire was the result of its willful and intentional wrong, or of that of its servants or agents.

The case at bar is to be distinguished from such cases as *Oakman v. Boyce*, 100 Mass. 477, *Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co.*, 199 Mass. 22, 84 N.E. 1020, and *Metropolitan Coal Co. v. Billings*, 202 Mass. 457, 89 N.E. 115, all of which cases involved the construction of strike clauses in contracts for the sale and delivery of coal, but where the contracts, properly construed, did not excuse performance absolutely, and where it was held that coal companies were required to make reasonable efforts to fulfill the contracts notwithstanding strikes.

There was evidence to show that the defendant was a lessee of its mill in Burlington which its lessor was under no legal obligation to rebuild after the fire; that the defendant had no other mill where the flooring could have been manufactured, and that it could not have been furnished to the defendant, had the mill been rebuilt, until the latter part of June, 1913.

Whether the contract is to be construed as requiring the defendant to deliver the flooring about June first, or "as required about June first," we are of opinion that upon all the evidence it could have been found that time was an essential part of the contract and was so contemplated by the parties; and the judge was warranted in finding that by reason of the destruction of the mill by fire it was impossible for the defendant to perform the contract according to its terms. *Pickering v. Greenwood*, 114 Mass. 479.

We perceive no error in the manner in which the presiding judge dealt with the requests for rulings, and are of opinion that the finding was warranted.

Exceptions overruled.

QUESTIONS:

1. Would the decision be the same even if there were no "strike clause" in the contract?
2. Would a strike by 10 per cent. of the defendant's workmen have excused him from performance?
3. Would a strike by all his workmen that lasted only 24 hours?
4. Under the decision and reasoning in this case, will the plaintiff have to pay the agreed price to the defendant in case of no delivery or of delayed delivery? See *Bradley Lumber & Mfg. Co. v. Cutler*, 253 Mass. 37, 148 N.E. 101 (1925).
5. Does the "strike clause" affect in any way the plaintiff's duty to pay?

NOTE

Such clauses as the one above, the purpose of which is to make a contractor's duty conditional on the absence of certain possible future events that make performance expensive and difficult, are found in great variety. Often they raise questions of interpretation that are not easy to answer. In contracts involving over-seas commerce, the term "force majeure" is often included. Sometimes the clause is so worded as to cause the happening of a specified event to discharge the contractor from further duty; in other cases it merely justifies delay.

AUDETTE v. L'UNION ST. JOSEPH.

Supreme Judicial Court of Massachusetts, 1901. 178 Mass. 113, 59 N.E. 668.

Action by Malvina Audette, administratrix of the estate of Louis Audette, deceased, against L'Union St. Joseph. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

A by-law of the defendant association provided that no sick member should receive any benefits before producing a sworn certificate of a physician. The physician who attended plaintiff's intestate in his last sickness refused to give a sworn certificate because of conscientious scruples against making an oath.

LORING, J. This case comes within the rule that where one engages for the act of a stranger he must procure the act to be done, and the refusal of the stranger, without the interference of the other party, is no excuse. That rule has been applied in this commonwealth to the obligation of a person, insured under a fire insurance policy, to

furnish to the fire insurance company a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and believes that the assured has, without fraud, sustained loss on the property insured to the amount certified. *Johnson v. Insurance Co.*, 112 Mass. 49. In that case it was held that the plaintiff was not excused from producing such certificate by showing that he applied to two magistrates for such a certificate in vain, and used his best efforts to procure it, accompanied by proof of the facts which were to be certified to. * * *

This action, therefore, was prematurely brought; but the plaintiff, on producing a sworn certificate, unless there is some objection to it not now disclosed, can bring a new writ, and recover the sick benefits now sued for.

Judgment for the defendant affirmed.

QUESTIONS:

1. Did Louis Audette "engage for the act of a stranger" so that his failure to produce the certificate was a breach of promise?
2. Does this case illustrate the difference between promissory words of the insured and words that create a condition precedent to the duty of the insurer?

LAPLEAU v. SUCCESSION OF LAPLEAU.

Supreme Court of Louisiana, 1919. 144 La. 988, 81 S. 597.

Suit by Philip Lapleau against the succession of Louis Victor Lapleau. From a judgment for defendant on exception to the petition, plaintiff appeals. Affirmed.

PROVOSTY, J. The petition in this case alleges that plaintiff made advances to his son to enable him to study civil engineering, and that this was done under an agreement that the advances were to be repaid by the son when he should "have secured such a start in the pursuit of his profession of civil engineering as to be in a position, financially, to repay said advances; that thereafter he commenced the practice of his profession of civil engineering, but died before being able to acquire such a position financially as to enable him to repay any part of said advances." The suit is against the succession of the son, and we assume that the property of his succession consists in his inheritance from his mother, who died after the time at which the advances in question are alleged to have been made.

The petition was excepted to, as showing no cause of action, because there is no allegation that the son had attained his majority and was

capable of contracting at the time the advances were made; and because, even if he was a major, the father was under obligation to support him; and, finally, because by the terms of the contract he was to repay these advances only when he should have secured such a start in his profession of civil engineering as to be in a position, financially, to repay these advances, and that he died before this time had arrived.

On this last ground, if not, also, on the others, the exception was properly sustained.

Judgment affirmed.

QUESTIONS:

1. Did Louis Lapleau promise to pay?
2. Did he promise to acquire the ability to pay by pursuit of his profession?
3. Did he promise to become a civil engineer?

SCOTT v. MORAGUES LUMBER CO.

Supreme Court of Alabama, 1918. 202 Ala. 312, 80 So. 394.

Suit by the Moragues Lumber Company, a corporation, against J. M. Scott, for damages for breach of an agreement of charter party. Judgment for plaintiff, and defendant appeals. Affirmed.

Count 2 of the complaint as amended is as follows:

"The plaintiff claims of the defendant \$13,000 as damages from breach of an agreement entered into between the plaintiff and the defendant on the 27th day of June, 1917, consisting of an offer by the defendant that, subject to his buying a certain American vessel, 15 years old, which he was then figuring on and which was of about 1,050 tons and then due in Chile, he would charter said vessel to the plaintiff for the transportation of a cargo of lumber from any port in the Gulf of Mexico to Montevideo or Buenos Aires, for the freight of \$65 per thousand feet of lumber, freight to be prepaid, free of discount and of insurance, and the vessel to be furnished to the plaintiff within a reasonable time after its purchase by the defendant, which said offer was accepted by the plaintiff, and the plaintiff avers that although the defendant purchased said vessel, and although the plaintiff was at all times ready, willing, and able to comply with all the provisions of said contract on its part, the defendant without notifying the plaintiff of said purchase, and before said vessel was delivered to him, chartered said vessel to a third person, and thereby rendered himself unable to comply with the said contract." * * *

SAYRE, J. * * * It is said, in the first place, that the alleged contract between the parties was conditioned upon the will of appellant, defendant, and was therefore void for want of consideration or mutuality of obligation. A valid contract may be conditioned upon the happening of an event, even though the event may depend upon the will of the party, who afterwards seeks to avoid its obligation. This principle is illustrated in *McIntyre Lumber Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 So. 767, 138 Am.St.Rep. 66. Appellant was not bound to purchase the vessel; but, when he did, the offer—or the contract, if the offer had been accepted—thereafter remained as if this condition had never been stipulated, its mutuality or other necessary incidents of obligation depending upon its other provisions and the action of the parties thereunder. *Davis v. Williams*, 121 Ala. 546, 25 So. 704; 3 Page on Contracts, § 1358. * * *

The effect of appellee's acceptance, if communicated while the offer was yet open, was to convert it into a binding contract. 6 R.C.L. p. 605, § 27. In substance, it is alleged in the complaint that appellant's offer was accepted; that appellant purchased the vessel; that appellee was able, ready, and willing to perform the contract on its part; but that appellant disabled himself, or failed and refused to perform on his part. From the order in which the facts are alleged it is to be inferred that appellee accepted appellant's offer before the latter purchased the vessel, and there is no ground of demurrer questioning the sufficiency of the complaint to that effect. Thereupon the offer was converted into a binding contract to be performed, if not otherwise stipulated, within a reasonable time; the promise on either hand constituting the consideration of the promise on the other. Appellant's purchase of the vessel was a condition precedent to the existence of a binding contract, it is true; but that was alleged, as it was necessary that it should be. 13 C.J. p. 724, § 847, citing *McCormick v. Badham*, 191 Ala. 339, 67 So. 609; *Long v. Addix*, 184 Ala. 236, 63 So. 982; *Flouss v. Eureka Co.*, 80 Ala. 30. And so with respect to appellee's acceptance of the offer. It was necessary that appellee communicate its acceptance to appellant. 1 Page, § 43. But this communication was a part of the acceptance and was covered by the general allegation of acceptance. * * *

Affirmed.

QUESTIONS:

1. What was the condition precedent to Scott's duty to charter the vessel to the plaintiff?
2. Was there any condition precedent, express or constructive, to the plaintiff's duty to receive and pay for the use of the vessel?

3. Did Scott's option not to buy the vessel prevent his promise from being a sufficient consideration for the lumber company's promise? See Restatement, Contracts, §§ 79, 84(f).
4. Did the lumber company have the power to revoke prior to purchase of the vessel by Scott?
5. Can a promisor make his legal duty expressly conditional on an act of his own and remain legally privileged not to perform the act?

ATLAS PETROLEUM CO. v. COCKLIN et al.

Circuit Court of Appeals of the United States, Eighth Circuit, 1932.

59 F.2d 571.

Action by the Atlas Petroleum Company against L. A. Cocklin and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

WYMAN, District Judge. This action was instituted by appellant as plaintiff below against appellees for the recovery of damages claimed to have been sustained by reason of an alleged breach on the part of the appellees of a certain written contract.

Upon its face the contract in question purports to be an unqualified agreement on the part of the appellees to purchase, and on the part of appellant to sell and deliver, one hundred cars of distillate of 8,000 gallons capacity each, at the agreed price of 4 cents per gallon, said distillate to be delivered in as nearly equal monthly installments as possible upon shipping instruction to be placed by appellees between September 1, 1927, and April 1, 1928.

The complaint, among other things, alleges, in substance, the execution and delivery of the contract in suit; the purchase by appellant of the distillate necessary to enable it to make deliveries under said contract; the failure of appellees to order shipment of said distillate in accordance with the terms of said contract; that notice was given to appellees that, unless orders were given for shipment within the limits specified in the contract, appellant would sell for appellees the 800,000 gallons of distillate as provided in said contract, and that any loss incurred by reason of such sale should be borne by appellees; that appellant did sell said distillate at a loss of \$7,000, and concludes with a prayer for judgment against the appellees in the sum of \$7,000, with interest, as damages resulting from said alleged breach of contract.

The answer, in effect, admits the execution and delivery of the contract in suit, but alleges that at the time of the execution of the same there was a collateral oral agreement between the parties whereby it was mutually agreed and understood by them, and each of them, that

said contract was to be of no force or effect, unless and until the price of distillate of the quality specified in said contract had advanced on the open market to a price equal to or in excess of the price specified in said written contract; that the price of distillate did not so advance during the term of said contract; and that by reason thereof said contract never became effective or binding upon the parties thereto. * * *

Upon the filing of said answer the plaintiff moved the court to strike certain parts thereof upon the following grounds:

"1. That said matter thus pleaded violates the parol testimony rule, and that parol testimony cannot vary or change the terms of a written contract.

"2. That all of the conversation and negotiations made by the plaintiff and defendants prior to the execution of the contract sued upon were merged in the contract itself, and the contract itself is the contract between the plaintiff and the defendants. * * *

This motion was overruled by the court, to which ruling the plaintiff duly excepted.

The case was tried to a jury, and upon the trial evidence was introduced tending to prove the allegations set forth in the answer as to the collateral agreement between the parties to the written contract, that the same was not to go into effect unless and until the price of distillate advanced to 4 cents per gallon. * * *

At the conclusion of the testimony, appellant asked the court to direct the jury to return a verdict in its favor, which motion was denied and the case submitted to the jury, with the result that a verdict was returned in favor of the defendants.

There are numerous assignments of error, each one of which grows out of the contention of appellant that the allegations of the answer and the testimony with reference to the oral collateral agreements above referred to all tended to vary the terms of the written agreement, and that for that reason the allegations of the answer do not constitute a provable defense, and the evidence above referred to was inadmissible and improperly received.

It is manifest from the record that this case does not come within the contemplation of the so-called "parol evidence rule." The answer does not allege, nor does the evidence complained of tend to prove, any change or variation in the terms or conditions specified in said contract, but the evidence complained of, if true, would establish the defense set forth in the answer that the agreement in suit was not to be effective as a binding contract until the happening of some future event. The pleadings in this case bring it well within the rule to the effect that, where a written instrument, whether delivered to a third person in escrow, or to an obligee, is, by contemporaneous

oral agreement, made to depend as to its going into operation upon events to occur or to be ascertained in the future, parol evidence is admissible to show such oral agreement. This rule seems to have been recognized at an early date by the United States Supreme Court, and is undoubtedly supported by the great weight of authority. * * *

We find no error in the admission of parol evidence tending to prove the conditional delivery or the subsequent cancellation of the contract. As, under the well-established law, either the conditional delivery or the subsequent cancellation of the contract, as alleged in the answer, if established by a preponderance of the evidence to the satisfaction of the jury, constitutes a complete and valid defense to the cause of action set forth in the complaint, it follows that the trial court was clearly correct in denying the appellant's motion to strike those portions of the answer. There being ample evidence of a substantial character in the record to sustain the allegations of the answer, if believed by the jury, the case was properly submitted to the jury. * * *

QUESTIONS:

1. Was a valid contract made for the purchase and sale of 100 cars of distillate?
2. If the market price had risen to 4 cents per gallon would the defendant have been legally bound to take and pay for the distillate?
3. After the execution of the writing did either party have a power of revocation?
4. If the collateral oral agreement, made simultaneously with the writing, had been incorporated in the writing, would there have been a valid contract in writing?
5. Was the market rise to 4 cents a condition precedent to the existence of a valid contract, or was it a condition precedent to the defendant's legal duty to take and pay for the distillate?
6. Suppose that the defendant wanted delivery even though the market price did not rise to 4 cents, could he "waive the condition" and maintain suit if the seller refused to deliver?
7. Was the writing a complete "integration" of the terms of agreement? [Wigmore's word, adopted and used in Restatement, Contracts. See Sections 237-244 of the Restatement, purporting to state the "Parol Evidence Rule" and its limitations; also Corbin, "The Parol Evidence Rule," 53 Yale L.J. 603 (1944).]
8. Was there any "inconsistency" between the terms of the writing and those of the simultaneous oral agreement? See Restatement, Contracts, § 241.

PYM v. CAMPBELL, 6 El. & Bl. 370 (1856), is the leading case, now followed everywhere, that established the rule applied in the Cocklin case preceding. The plaintiff sued for breach by the defendant of a written contract to buy an invention and produced a written document purporting to be such a contract, duly signed by the parties. The defendant testified that negotiations for such a contract had proceeded so far that the purchase had been agreed upon at a stated price, depending however upon the approval of the invention by an engineer named Abernethie. The report proceeds thus: "Abernethie could not then be found. It was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should be then drawn up and signed, which if Abernethie approved of the invention should be the agreement, but if Abernethie did not approve, should not be one. Abernethie did not approve of the invention when he saw it; and the defendants contended that there was no bargain."

ERLE, J.—The point made is that this is a written agreement, absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so it would have been wrong. But I am of the opinion that the evidence showed that in fact there never was any agreement at all. The production of a paper purporting to be an agreement by a party, with the signature attached, affords a strong presumption that it is his written agreement; and if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and can not be varied by parol evidence: but in the present case the defence begins one step earlier: the parties met and expressly stated to each other that, though for convenience they would sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion: but if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party can not fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible.

Judgment was rendered for the defendant.

QUESTIONS:

1. Did the defendant sign *animo contrahendi*?
2. If Abernethie had approved would the parties have been bound without any further expression of assent?
3. Before Abernethie approved was Pym privileged to sell the invention to others?

4. If the buyer wanted the invention in spite of Abernethie's disapproval and tendered the agreed price, would the seller have been bound to sell the invention?
5. Was Abernethie's approval a condition precedent to the existence of a contract or to the buyer's duty to pay the price?

HAMILTON v. HOME INS. CO.

Supreme Court of the United States 1890.
137 U.S. 370, 11 S.Ct. 133, 34 L.Ed. 708.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action, brought June 26, 1886, upon a policy of insurance, numbered 3,190, by which the Home Insurance Company of New York insured Robert Hamilton for one year from February 23, 1886, on a stock of tobacco in his warehouse at 413 and 415 Madison street in Covington in the state of Kentucky, against loss or damage by fire to the amount of \$5,000, "to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company in New York."

The policy, after providing that in case of loss the assured should forthwith give notice, and as soon afterwards as possible furnish proofs of loss, with a magistrate's certificate, submit to examination on oath, and produce books and vouchers, and copies of lost books and invoices, further provided, among other things, as follows:

"When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles, according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the company of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers) to be mutually appointed by the assured and the company, their report in writing to be made under oath before any magistrate, or other properly commissioned person, one-half of the appraisers' fees to be paid by the assured. The company reserves the right to take the whole or any part of the articles at their appraised value; and, until such proofs, declarations, and certificates are produced, and examinations and appraisals permitted by the claimant, the loss shall not be payable."

"But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial

arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy." * * *

[In its answer the defendant asserted that a dispute arose over the amount of the loss, the plaintiff claiming \$40,000 and the defendant asserting that it was much less, that the defendant requested the submission of the dispute to arbitration as provided in the policy but the plaintiff refused to arbitrate and sold the damaged goods at auction, and that because of this refusal and sale the plaintiff could maintain no action against the company.]

Upon the evidence, the court instructed the jury that, on the issues joined on the special defenses in the answer, the plaintiff could not recover, and that they should return a verdict for the defendant. The plaintiff tendered a bill of exceptions to these instructions, and, after verdict and judgment for the defendant, sued out this writ of error.

Mr. Justice GRAY. This case resembles in some aspects that of *Hamilton v. Insurance Co.*, 136 U.S. 242, 10 S.Ct. 945, 34 L.Ed. 419 (decided at the last term), but it is essentially different in important and controlling elements.

In that case, the effect of the provisions of the policy by reason of which it was held that the assured, having refused to submit to the appraisal and award provided for, could not maintain his action, was thus stated by the court: "The conditions of the policy in suit clearly and unequivocally manifest the intention and agreement of the parties to the contract of insurance that any difference arising between them as to the amount of loss or damage of the property insured shall be submitted, at the request in writing of either party, to the appraisal of competent, and impartial persons, to be chosen as therein provided, whose award shall be conclusive as to the amount of such loss or damage only, and shall not determine the question of the liability of the company; that the company shall have the right to take the whole or any part of the property at its appraised value so ascertained; and that until such an appraisal shall have been permitted, and such an award obtained, the loss shall not be payable, and no action shall lie against the company. The appraisal, when requested in writing by either party, is distinctly made a condition precedent to the payment of any loss, and to the maintenance of any action." 136 U.S. 254, 255, 10 S.Ct. 949, 34 L.Ed. 419. That policy looked to a single appraisal and award, to be made as one thing, and by one board of appraisers or arbitrators, whenever any difference should arise between the parties, and to be binding and conclusive as to the amount of the loss, although not to determine the question of the liability of the company; and the policy contained, not only a provision that until such an appraisal the loss should not be payable, but an express condition [pro-

vision] that no action upon the policy should be sustainable in any court until after such an award.

In the case now before us, on the other hand, the appraisal and the award are distinct things, and to take place at separate times, and the effect assigned to each is quite different from that given to the appraisal and award in the other policy. The "appraisal," without which the loss is not payable, is required to be made not merely when differences arise as to its amount, but in all cases, and results in a mere "report in writing," which is not declared to be binding upon the parties in any respect, and is in truth but a part of the proofs of loss. It is only by a separate and independent provision, and when differences arise touching any loss "after proof thereof has been received in due form," that the matter is required, at the request of either party, to be submitted to "arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss, but shall not decide the liability of this company under the policy"; and there is no provision whatever postponing the right to sue until after an award. * * * The instruction to the jury, therefore, that on the issues joined on the special defenses in the answer, and upon the evidence in the case, the plaintiff could not recover, was, in effect, a ruling that the plaintiff could not maintain his action because he had refused to submit the amount of his loss to arbitration.

A provision in a contract for the payment of money upon a contingency that the amount to be paid shall be submitted to arbitrators, whose award shall be final as to that amount, but shall not determine the general question of liability, is undoubtedly valid. If the contract further provides that no action upon it shall be maintained until after such an award, then, as was adjudged in *Hamilton v. Insurance Co.*, above cited, and in many cases therein referred to, the award is a condition precedent to the right of action. But when no such condition is expressed in the contract, or necessarily to be implied from its terms, it is equally well settled that the agreement for submitting the amount to arbitration is collateral and independent; and that a breach of this agreement while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. * * * Applying this test, it is quite clear that the separate and independent provision, in the policy now before us, for submitting to arbitration the amount of the loss, is a distinct and collateral agreement, and was wrongly held by the circuit court to bar this action.

Judgment reversed, and case remanded, with directions to set aside the verdict, and to take such further proceedings as may be consistent with this opinion.

QUESTIONS:

1. Did the plaintiff commit a breach of contract?
2. Does this case illustrate the difference between a "promise" and a "condition"?
3. Were there any conditions precedent to the defendant's duty to pay the loss?

NOTE

Many states now have arbitration statutes authorizing the court, in a suit brought by the plaintiff in breach of his promise to submit the dispute to arbitration, to stay the court proceeding until the arbitration shall be held as agreed and an award rendered. The award will be enforced by the court, if the arbitration proceeding is held as provided in the agreement and in accordance with the provisions of the statute.

SECTION 2.—IMPLIED AND CONSTRUCTIVE CONDITIONS
PRECEDENT—BREACH OF PROMISE AS AN EXCUSE FOR
FAILURE TO PERFORM A RETURN PROMISE

INTRODUCTORY NOTE

When in the course of bargaining one party offers his promise of some future performance in exchange for a specified actual performance by the promisee, it is the rendition of the latter performance that constitutes an acceptance of the offer and the consideration for the promise. When this acceptance is completed, the transaction is described as a unilateral contract. It was once thought that the requested performance must be wholly completed by the offeree before a "contract" can be said to exist and that at any time before such completion the offeror has a power of revocation. As has heretofore appeared, this view has suffered material change; but it is nevertheless clear that in these cases the rendition of the requested performance, at least substantially in full, is a condition precedent to the promisor's duty of immediate performance of the offered promise.

When bilateral contracts came to be recognized and enforced, new problems arose as to the conditions of a promisor's enforceable duty. A promise having been offered in exchange for a return promise, a valid contract was consummated as soon as the return promise was made. The agreed consideration for each party's promise was a return promise, not an executed performance. It was for a very long time thought that each of the two promisors, having received the consideration for which he bargained (the return promise), was bound to

perform his own promise whether the return promise had been performed or not and even though the other party had definitely repudiated his promise or had caused its performance to be impossible. Each party had received a promise and had the proper legal remedy for its enforcement. Of course either promise might be made conditional in express terms, either on antecedent performance of the promise given in exchange or on its concurrent performance along with one's own; but in the absence of such an express provision the promises were unconditional and were described as "independent promises."

Hundreds of cases were decided in accordance with the foregoing doctrine; but in the course of time these decisions gave great dissatisfaction, both to the litigating parties and to the judges themselves. Parties do indeed bargain for a return promise and do not expect immediate performance; but in most cases they intend to effect an exchange not merely of the two promises but also of the promised performances. If one party has already failed to keep his promise as made or has refused to perform when the time shall arrive or has made his promised performance impossible, the other party feels justified in refusing his own performance. The failure of performance by one party is called "failure of consideration" for the other party's promise. This does not mean absence of consideration, for the promise was the consideration for the return promise. But failure of performance by one party is a failure of the bargained-for equivalent of the other party's performance. Their bargain is an exchange of promises; but in the ordinary case it is intended to be an exchange of performances also.

Dissatisfaction with the older doctrine that mutual promises are independent unless made conditional in express terms caused its gradual abandonment except where there are special facts that make its application reasonable. For a time, the courts struggled manfully to find that a promise was expressly conditional by a forced interpretation of words that are not commonly used to express a condition. It was often held that if A promised to deliver goods and B promised to pay a sum of money *for the said goods*, the use of the word "for" made B's promise expressly conditional on performance by A. But the favorite method of avoiding the old doctrine has been to hold that one of the promises is "impliedly" conditional on performance of the return promise. In numberless cases, the courts have made use of the process of "implication" to serve the ends of justice. Implied promises, never put into words, are discovered by "reading between the lines" or otherwise; and in like manner "implied conditions" limiting the operation of an express promise are discovered. It can not be said that the "implications" of promises or of conditions of promissory duty are always reasonable and just; but it is very clear that the process itself is a very reasonable and necessary one, for the reason

that at best language is an imperfect instrument and that even the most intelligent persons make contracts on a background of unexpressed assumptions and without the ability to foresee many material events that subsequently occur.

Courts have long distinguished between promises that are "implied in fact" and those "implied in law", the latter often being called "quasi contracts." The "promise" that is discovered by the latter sort of "implication" is a mere fiction, one that is indulged in by the court in order to produce a just and desirable result by the use of the legal procedure for the enforcement of contracts. It is a method used in all systems of law to facilitate their evolution and to give legal effect to the changing mores.

Exactly the same distinction **must be drawn** between conditions "implied in fact" and conditions "implied in law." The latter should be recognized for what they are, limitations on promissory legal duty that are not based on actual assent but are constructed by the courts in order to satisfy the prevailing conceptions of justice. In the cases in which a promise has been found by process of "implication" to be conditional on some fact or event, it is often quite impossible to tell whether the condition is one that the parties intended without putting it into words or is a pure construction of law. It is not necessary for a court to determine the question in its own mind when the same result will be reached in either case; but it is very important indeed for us to realize that it is not judicial usurpation for a court to do justice through the device of a "constructive condition." This term should itself always be used when it is reasonably clear that the process of "implication" is in fact one of judicial "construction." Conditions "implied in fact" differ from "express" conditions only in the manner of their expression. Both differ very materially from "constructive" conditions; but in many cases it is impossible to say whether the court's mental process was one of real interpretation of the expressions of the parties or was one of pure judicial construction. The cases in the present Section, therefore, will be found to include and to illustrate them all; they are classified with respect to the **character** of the conditioning event or the subject matter of the transaction, not with respect to their being described as Express, Implied, or Constructive.

One party to a contract is not necessarily wholly discharged from his contractual duty by the fact that the other party has not yet rendered either in part or in full the reciprocally promised performance. The time for rendering that performance may not yet have expired; and even if the agreed time is past, the delay may not be of great importance and the breach may be a slight one. When one is sued for an alleged breach of his contractual duty, it is a good defense for him to show that he has committed no breach even if he is not wholly dis-

charged. It is a good defense that some condition precedent to his duty of immediate performance has not happened or been performed. The present chapter deals with this problem, not with the question of total discharge from duty.

For a discussion of constructive conditions, see Patterson, "Constructive Conditions in Contracts," 42 Col.L.Rev. 903 (1942).

(A) DEPENDENCY OF MUTUALLY EXCHANGED PROMISES

NICHOLS v. RAYNBRED.

In the King's Bench, 1615. Hob. 88.

Nichols brought an assumpsit against Raynbred, declaring that in consideration, that Nichols promised to deliver the defendant to his own use a cow, the defendant promised to deliver him 50 shillings: adjudged for the plaintiff in both Courts, that the plaintiff need not to aver the delivery of the cow, because it is promise for promise. Note here the promises must be at one instant, for else they will be both *nuda pacta*.

QUESTIONS:

1. Promise was the agreed exchange for promise; but was not the cow also the agreed exchange for the 50 shillings? See Restatement, Contracts, § 266(1).
2. Would this case be decided differently under the rule in Restatement, Contracts, § 267?

NOTE

This case is truly representative of the common law for at least two centuries and until the process of "implication" began to make progress in the courts.

In *Thomas v. Cadwallader*, Willes, 496 (1744), it was said by Willes, J.: "I expressed my dislike of those cases, though they are too many to be now overruled, where it is determined that the breach of one covenant, though plainly relative to the other, cannot be pleaded in bar to an action brought for the breach of the other. * * * If therefore this were a new point, I should be inclined to be of opinion that though, where there are mutual covenants relative to one another in the same deed, a plaintiff is not obliged, in an action brought for the breach of them, to aver the performance of the covenant which is to be performed on his part, yet that the defendant in such action may in his plea insist on the non-performance of the covenant to be performed on the part of the plaintiff:

but this has been so often determined otherwise, that it is too late now to alter the law in this respect."

Statements like this became numerous; and decisions holding that promises were conditional by "implication" proved that it was not "too late to alter the law."

PORDAGE v. COLE.

In the King's Bench, 1669. 1 Wms. Saund. 319.

Debt upon a specialty for £774 15s. The plaintiff declares that the defendant, by his certain writing of agreement made at, &c. by the plaintiff by the name, &c. and the defendant by the name, &c. and brings the deed into Court, &c., it was agreed between the plaintiff and defendant in manner and form following, (*viz.*) that the defendant should give to the plaintiff the sum of £775 for all his lands, with a house called Ashmole-House thereunto belonging, with the brewing vessels remaining in the said house, and with the malt-mill and wheel-barrow; and that in pursuance of the said agreement, the defendant had given to the plaintiff 5s. as an earnest; and it was by the said writing further agreed between the plaintiff and defendant, that the defendant should pay to the plaintiff the residue of the said sum of £775 a week after the Feast of St. John the Baptist the next following (all other moveables, with the corn upon the ground, except). And although the defendant has paid five shillings, parcel, &c. yet the said defendant, although often requested, has not paid the residue to the damage, &c. The defendant prays oyer of the specialty, which is entered in *hæc verba*, to wit: "11 May, 1668. It is agreed between Doctor John Pordage and Bassett Cole, Esquire, that the said Bassett Cole shall give unto the said doctor £775 for all his lands, with Ashmole-House, thereunto belonging, with the brewing-vessels as they are now remaining in the said house, and with the malt-mill and wheel-barrow. In witness whereof we do put our hands and seals: mutually given as earnest in performance of this 5s.; the money to be paid before Midsummer 1668; all other moveables, with the corn upon the ground, excepted." And upon oyer thereof the defendant demurs. And Withins, of counsel with the defendant, took several exceptions to the declaration: * * * 3. The great exception was, that the plaintiff in his declaration has not averred that he had conveyed the lands, or at least tendered a conveyance of them; for the defendant has no remedy to obtain the lands, and therefore the plaintiff ought to have conveyed them, or tendered a conveyance of them, before he brought his action for the money. And it was argued by Withins, that if by one single deed two things are to be performed, namely, one by the plaintiff and the other by the defendant, if there be no mutual remedy, the plaintiff ought to aver performance of his part: Trin. 12 Jac. 1,

between *Holder v. Tayloe*, 1 Rol.Abr. 518 (C) pl. 2, 3; *Ughtred's case*, and *Sir Richard Pool's case*, there cited, and *Gray's case*: and that the word "pro" made a condition in things executory. And here in this case it is a condition precedent which ought to be performed before the action brought; wherefore he prayed judgment for the defendant.

But it was adjudged by the Court, that the action was well brought without an averment of the conveyance of the land; because it shall be intended that both parties have sealed the specialty. And if the plaintiff has not conveyed the land to the defendant, he has also an action of covenant against the plaintiff upon the agreement contained in the deed, which amounts to a covenant on the part of the plaintiff to convey the land; and so each party has mutual remedy against the other. But it might be otherwise if the specialty had been the words of the defendant only, and not the words of both parties by way of agreement as it is here. And by the conclusion of the deed it is said, that both parties had sealed it; and therefore, judgment was given for the plaintiff, which was afterwards affirmed in the Exchequer-Chamber, Trin. 22 of King Charles the Second.

NOTE

Observe that, in the sealed instrument quoted above, there are express words of agreement "that Bassett Cole shall give unto the said doctor £775 for all his lands," but no such words that Dr. Pordage shall deliver a deed of conveyance. Since the document contained a statement that both parties had sealed it, the court found it easier to hold that Pordage made an "implied promise" to convey than that Cole's promise to pay was "impliedly conditional" on tender of conveyance. Had there been no such "implied promise," so that Cole would have had no remedy against Pordage the court would have adopted the other device by holding that the words "for all his lands" made Cole's promise to pay "expressly" conditional.

In his edition of *Saunders' Reports*, Serjeant Williams appended a footnote to this case, in which he reviewed many cases and made the first attempt to construct rules as to when mutual promises should be regarded as "dependent." *Pordage v. Cole* was itself a case of little note; but the rules of Serjeant Williams were found useful and are sometimes repeated in modern cases, without quotation marks. A part of this note, with the rules, is here reprinted.

Footnote by the reporter, Serjeant Williams:

"Almost all the old cases, and many of the modern ones on this subject, are decided upon distinctions so nice and technical, that it is very difficult, if not impracticable, to deduce from them any certain rule or principle by which it can be ascertained, what covenants are independent, and what dependent; and of course, when it is necessary to aver performance in the declaration, and when not. Thus if A covenant with B to serve him for a year, and B covenant with A to pay him £10, it is held that these are independent covenants, and A may maintain an action against

B for the money before any service; but if B had covenanted to pay him £10 for the service, these words make the service a condition precedent, and A cannot enforce payment of the money until he has performed the service. So where A covenants with B to marry his daughter, and B covenants to convey an estate to A and the daughter in special tail, it is said that though A marry another woman, or the daughter another man, still A may have an action against B on the covenant; but if B had covenanted to convey the estate for the cause aforesaid, the marriage is a condition precedent, and no action will lie until it be solemnized. * * * Hence it appears that the Judges in these cases seem to have founded their construction of the independency or dependency of covenants or agreements on artificial and subtle distinctions, without regarding the intent and meaning of the parties. For the rule which is contained in them all seems clear and indisputable; that where there are several covenants, promises, or agreements, which are independent of each other, one party may bring an action against the other for a breach of his covenants, &c. without averring a performance of the covenants, &c. on his, the plaintiff's part; and it is no excuse for the defendant to allege in his plea a breach of the covenants, &c. on the part of the plaintiff; according to Justinian's rule in the civil law, '*Qui actionem habet ad rem recuperandum, ipsam rem habere, videtur.*' Justin. de Regulis Juris, 361. But where the covenants, &c. are dependent, it is necessary for the plaintiff to aver and prove a performance of the covenants, &c. on his part, to entitle himself to an action for the breach of the covenants on the part of the defendant; and so are also 7 Rep. 10 a. b. Ughtred's case; Doug. 690, 3d ed. Kingston v. Preston, cited in Jones v. Barkley. The difficulty lies in the application of this rule to the particular case. It is justly observed, that covenants, &c. are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case; and technical words should give way to such intention. 1 T.R. 645, Hotham v. East India Company; 6 T.R. 668, Porter v. Shepard; Ibid. 571, Campbell v. Jones; 7 T.R. 130, Morton v. Lamb. In order therefore to discover that intention, and thereby to learn, with some degree of certainty, when performance is necessary to be averred in the declaration, and when not, it may not be improper to lay down a few rules, which will perhaps be found useful for that purpose.

"1. If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that, which is the consideration of the money or other act. [cf. Restatement, Contracts, § 267.]

"But, 2. When a day is appointed for the payment of money, &c. and the day is to happen after the thing which is the consideration of the money, &c. is to be performed, no action can be maintained for the money, &c. before performance. 1 Salk. 171, Thorpe v. Thorpe, 2d Resolution, 12

Mod. 462, 1 Ld. Raym. 665, 1 Lutw. 251; Dyer 76 a. pl. 30. [See Restatement, Contracts, §§ 269, 270.]

"3. Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. [The cases of *Boone v. Eyre*, 1 H.Bl. 273, and *Campbell v. Jones*, 6 T.R. 570, were here discussed.] Hence it appears that the reason of the decision in these and other similar cases, besides the inequality of the damages, seems to be, that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing any thing for it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damage he may have sustained in not having received the whole consideration. * * * [Compare Restatement, Contracts, §§ 274-276.]

"4. But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions, and performance must be averred. 1 Vent. 147, *Large v. Cheshire*; 1 H.Black. 270, *Duke of St. Albans v. Shore*.

"5. Where two acts are to be done at the same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof B covenants to pay A a sum of money on the same day, neither can maintain an action without shewing performance of, or an offer to perform his part, though it is not certain which of them is obliged to do the first act: and this particularly applies to all cases of sale." [See Restatement, Contracts, §§ 267, 268, 273.]

KINGSTON v. PRESTON.

In the King's Bench, 1773. 2 Doug. 689.
Quoted in *Jones v. Barkley*, 2 Doug. 684.

"It was an action of debt, for non-performance of covenants contained in certain articles of agreement between the plaintiff and the defendant. The declaration stated:—That, by articles made the 24th of March, 1770, the plaintiff, for the considerations therein-after mentioned, covenanted, with the defendant, to serve him for one year and a quarter next ensuing, as a covenant-servant, in his trade of a silk-mercier, at £200 a year, and in consideration of the premises, the defendant covenanted, that at the end of the year and a quarter, he would give up his business of a mercier to the plaintiff, and a nephew of the defendant, or some other person to be nominated by the defendant, and give up to them his stock in trade, at a fair valuation; and that, between the young traders, deeds of partnership should be executed for 14 years, and from and immediately after the execution of the said deeds, the defendant would permit the said young traders to carry on the said business in the defendant's house.—Then the declaration stated

a covenant by the plaintiff, that he would accept the business and stock in trade, at a fair valuation, with the defendant's nephew, or such other person, &c., and execute such deeds of partnership, and, further, that the plaintiff should, and would, at, and before the sealing and delivery of the deeds, cause and procure good and sufficient security to be given to the defendant, to be approved of by the defendant, for the payment of £250 monthly, to the defendant, in lieu of a moiety of the monthly produce of the stock in trade, until the value of the stock should be reduced to £4,000.—Then the plaintiff averred, that he had performed, and been ready to perform, his covenants, and assigned for breach on the part of the defendant, that he had refused to surrender and give up his business, at the end of the said year and quarter.—The defendant pleaded, 1. That the plaintiff did not offer sufficient security; and, 2. That he did not give sufficient security for the payment of the £250, &c.—And the plaintiff demurred generally to both pleas.—On the part of the plaintiff, the case was argued by Mr. Buller, who contended, that the covenants were mutual and independent, and therefore, a plea of the breach of one of the covenants to be performed by the plaintiff was no bar to an action for a breach by the defendant of one which he had bound himself to perform, but that the defendant might have his remedy for the breach by the plaintiff, in a separate action. On the other side, Mr. Grose insisted, that the covenants were dependent in their nature, and therefore, performance must be alleged: the security to be given for the money, was manifestly the chief object of the transaction, and it would be highly unreasonable to construe the agreement, so as to oblige the defendant to give up a beneficial business, and valuable stock in trade, and trust to the plaintiff's personal security (who might, and, indeed, was admitted to be worth nothing) for the performance of his part.—In delivering the judgment of the Court, LORD MANSFIELD expressed himself to the following effect: There are three kinds of covenants: 1. Such as are called mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant, to allege a breach of the covenants on the part of the plaintiff. 2. There are covenants which are conditions [conditional] and dependent, in which the performance of one depends on the prior performance of another, and, therefore, till his prior condition is performed, the other party is not liable to an action on his covenant. 3. There is also a third sort of covenants, which are mutual conditions [concurrently conditional] to be performed at the same time; and, in these, if one party was ready, and offered to perform his part, and the other neglected, or refused, to perform his, he who was ready, and offered, has fulfilled his engagement, and may maintain an action for the default of the other; though it is not certain that either is obliged to do the first act.—His Lordship then proceeded to say, that the dependence, or independence,

of covenants, was to be collected from the evident sense and meaning of the parties, and that, however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance. That, in the case before the Court, it would be the greatest injustice if the plaintiff should prevail: the essence of the agreement was, that the defendant should not trust to the personal security of the plaintiff, but, before he delivered up his stock and business, should have good security for the payment of the money. The giving such security, therefore, must necessarily be a condition precedent.—Judgment was accordingly given for the defendant because the part to be performed by the plaintiff was clearly a condition precedent."

QUESTIONS:

1. Was the condition precedent express or constructive?
 2. Is this decision in conflict with *Nichols v. Raynbred and Pordage v. Cole*?
 3. Was Lord Mansfield making new law in this case?
 4. Could the defendant have maintained suit for damages against the plaintiff for failing to give the security?
 5. Does this case support Restatement, Contracts, § 268(1)?
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MORTON v. LAMB.

In the Court of King's Bench, 1797. 7 Term R. 125.

The plaintiff brought an action on the case for damages alleging that the defendant had contracted to sell to the plaintiff 200 quarters of wheat at £5 per quarter to be paid for it by the plaintiff and to deliver the wheat at Shardlow within one month; also that the defendant failed to deliver as agreed although the plaintiff was ready to receive the wheat. After a verdict for the plaintiff, the defendant obtained a rule to show cause why the judgment should not be arrested because the plaintiff had failed to allege that he had tendered payment of the price or that he was ready to pay it on delivery. The plaintiff argued that the promises were mutual and independent, each party having his remedy in case of nonperformance by the other; also that even if the seller's duty was conditional on the buyer's readiness to pay on delivery, the latter's unreadiness should be pleaded as an affirmative defense by the seller when sued for his failure to deliver. [Statement is condensed. Observe that this is an action for damages for the expected profits on the deal, not an action of debt for the full price of £1,000.]

LORD KENYON, C. J. If this question depended on the technical niceties of pleading, I should not feel so much confidence as I do: but it depends altogether on the true construction of this agreement. The defendant agreed with the plaintiff for a certain quantity of corn, to be delivered at Shardlow within a certain time, and there can be no doubt but that the parties intended that the payment should be made at the time of the delivery. It is not imputed to the defendant that he did not carry the corn to Shardlow, but that he did not deliver it to the plaintiff: to this declaration the defendant objects, and says "I did not deliver the corn to you (the plaintiff), because you do not say that you were ready to pay for it; and if you were not ready, I am not bound to deliver the corn"; and the question is, whether that should or should not have been alleged. The case decided by Lord Holt in *Salk.* 112 [*Callonel v. Briggs*], if indeed so plain a case wanted that authority to support it, shews that where two concurrent acts are to be done, the party who sues the other for non-performance must aver that he had performed or was ready to perform, his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn, without alleging that he was ready to pay the price of it. A plaintiff, who comes into a Court of Justice, must shew that he is in a condition to maintain his action. But it has been argued that the delivery of the corn was a condition precedent, and some cases have been cited to prove it: but they do not appear to me to be applicable. In the one in *Saunders* [2 *Saund.* 250] the party was to pull down a wall, and was then to be paid for it; there is no doubt but that the pulling down of the wall was a condition precedent to the payment; the act was to be done, and then the price was to be paid for it. So in the case in *Salk.* 171, where work was to be done, and then the workman was to be paid. And in ordinary cases of this kind the work is to be done before the wages are earned: but those cases do not apply to the present, where both the acts are to be done at the same time. Speaking of conditions precedent and subsequent in other cases only leads to confusion. In the case of *Campbell v. Jones* [6 *T. R.* 570] I thought, and still continue of that opinion, that whether covenants be or be not independent of each other must depend on the good sense of the case, and on the order in which the several things are to be done: but here both things, the delivery of the corn by one, and the payment by the other, were to be done at the same time; and as the plaintiff has not averred that he was ready to pay for the corn, he cannot maintain this action against the defendant for not delivering it.

Rule absolute.

NOTE

In the above case no time for payment was alleged. Sales of goods are normally for cash on delivery unless there is an express agreement for

cash in advance or for a period of credit. When performances are to be simultaneous, the promises are concurrently conditional. Compare this with *Nichols v. Raynbred* ante. Also, see Restatement, Contracts, § 267(b).

GOODISSON v. NUNN.

In the Court of King's Bench, 1792. 4 Term R. 761.

This was an action of debt to recover £21 on certain articles of agreement, the substance of which was stated in the declaration. The defendant craved oyer of the agreement by which the plaintiff agreed that he would on or before the 2d of September then next, "by such conveyances, surrenders, assurances, ways, and means in the law, shall reasonably devise, advise, or require, well and sufficiently grant, sell and release, assign and surrender, or otherwise convey to the defendant all that copyhold tenement lying," &c. In consideration whereof the defendant covenanted to pay to the plaintiff the sum of £210 on or before the 2d day of September next ensuing; on failure of complying with the before mentioned agreement the defendant was to pay to the plaintiff the sum of £21; and if the plaintiff did not deliver the estate according to the before-mentioned agreement, then he was to pay to the defendant the sum of £21. * * *

The defendant pleaded that the plaintiff had made no conveyance of the land, either on September 2 or since then. To this plea the plaintiff demurred.

LORD KENYON, C. J. This case is extremely clear, whether considered on principles of strict law or of common justice. The plaintiff engaged to sell an estate to the defendant, in consideration of which the defendant undertook to pay £210; and, if he did not carry the contract into execution, he was to pay £21; and now not having conveyed his estate, or offered to do so, or taken any one step towards it, the plaintiff has brought this action for the penalty. Suppose the purchase-money of an estate was £40,000 it would be absurd to say that the purchaser might enforce a conveyance without payment, and compel the seller to have recourse to him, who perhaps might be an insolvent person. The old cases, cited by the plaintiff's counsel, have been accurately stated; but the determinations in them outrage common sense. I admit the principle on which they profess to go: but I think that the Judges misapplied that principle. It is admitted in them all that where they are dependent covenants, no action will lie by one party unless he have performed, or offered to perform his covenant. Then the question is, Whether these are, or are not, dependent covenants? I think they are; the one is to depend on the other; when the one party conveyed his estate he was to receive the

purchase-money; and when the other parted with his money he was to have the estate. They were reciprocal acts, to be performed by each other at the same time. * * * It is our duty, when we see that principles of law have been misapplied in any case, to over-rule it. The principle is admitted in all the cases alluded to, that, if they be dependent covenants, performance, or the offer to perform, must be pleaded on the one part, in order to found the action against the other. The mistake has been in the misapplication of that principle in the cases cited; and I am glad to find that the old cases have been over-ruled; and that we are now warranted by precedent as well as by principle to say that this action cannot be maintained.

Judgment for the defendant.

NOTE

Lord Kenyon was known as a very conservative judge. That he could speak as he did of a long line of ancient cases shows how strongly the newer doctrine had taken hold. It cannot be said that such decisions as *Nichols v. Raynbred* and *Pordage v. Cole* "outraged common sense" at the time that they were decided. The "common sense" of one century is often not that of another. Observe that Lord Kenyon tries to convince himself that he is not deciding contrary to ancient "principle." But the "principle" on which the ancient cases "professed to go" was that the mutual promises in a bilateral contract are independent and unconditional unless they contain words that make them expressly conditional.

This was an action of debt, not for the full contract price of the land but for the damages that had been liquidated by express agreement. Was an actual conveyance a condition precedent to the vendor's right to such damages, or would it be sufficient for him to allege and prove that he had made a proper tender of such a conveyance?

SHERMAN v. LEVERET et al.

Superior Court of Connecticut, 1790. 1 Root, 169.

Action declaring that the defendants, on the 2nd of October, A. D. 1786, made a written contract and bargain with the plaintiff, which is in the words following, viz. October 2d, A. D. 1786, agreed that David Leveret, Jr. and Co. give Peter Sherman £170 lawful money for his store, land and barn, in Washington; half to be paid next spring, in cash when Sherman is to quit said store, and half the spring after, in good neat, saleable cattle, with interest after next spring until paid. Peter Sherman, David Leveret, Jr. and Co.—and the plaintiff says that by said store, land and barn, mentioned in said writing, was meant the store then occupied by the plaintiff, and a small tract of land on which it stood and lay contiguous to it, and a small barn standing thereon: and the plaintiff says that the defendants entered upon said land some-

time in April, A. D. 1787, in pursuance of said written bargain and agreement, and improved the same, and the plaintiff quitted said store upon the request of the defendants, pursuant to said agreement, and fulfilled everything on his part to complete and carry the same into execution; but the defendants have wholly neglected to fulfil said bargain and contract on their part, and have never made said payments, promised in said agreement, although often requested—Damage £200, dated 15th November, A. D. 1788.

Plea—Not guilty. Issue to the court—Judgment that the defendants are not guilty.

LEVERET AND BELLAMY v. SHERMAN.

Action declaring that on the 2d of October, A. D. 1786, they purchased of the defendant a piece of land, lying in Washington, containing about three-quarters of an acre, together with a store and barn thereon standing, and that the plaintiffs and the defendant did enter into the following agreement, viz. Washington, October 2d, 1786, agreed that David Leveret, Jr. and Co. give to Peter Sherman £170, lawful money, for his store, land and barn, in said Washington, one-half to be paid next spring, in cash, when said Sherman is to quit said store and execute a warranty deed of the same to said Leveret and Co. and half the spring following, in good neat cattle, on interest from the first payment till paid; and the plaintiffs say that the defendant did not quit said store nor execute a warranty deed to the plaintiffs in the spring succeeding October, A. D. 1786, according to said agreement, but continued in possession of said premises, and utterly refused to quit or convey the same to the plaintiffs, whereby an action has accrued to the plaintiffs to recover of the defendant their just damages, which is £100, lawful money, writ dated 15th November, A. D. 1788. Plea—Not guilty. Issue to the court.

Judgment—That the defendant is not guilty.

The two preceding cases were heard and tried by the court together, and upon the evidence, the court found that neither of the parties had performed or made any tender of performing their parts of the agreement. The question then came up, whether, as they were mutual covenants, one was the consideration of the other; and so a performance not necessary to be laid in the declaration, nor to be proved on the trial.

The defendants, in the first action, insisted that the plaintiff, by the stipulations in the agreement, was to do the first act, viz. was to quit the store, etc. and to give a deed of the premises the then next spring; when, and not till that was done, did the duty of paying arise; but it was the opinion of the court, that by the terms of the contract; the

quitting the store, etc., and giving a deed of the premises, the then next spring, when half of the price was to be paid, were concurrent, concomitant acts, to be performed by each of the parties at the same time; and that neither had right to recover, without a performance of his or their part of the agreement, or at least an offer to perform it.

NOTE

Observe that these two cases were decided two years before *Goodisson v. Nunn* and that the Connecticut court cited no antecedent authority. In the time just after the American Revolution the courts here were quite ready to decide cases in accordance with the prevailing business and social mores, disregarding ancient rules of the English common law with which they were in conflict. In this instance, however, the Connecticut court was doing exactly what the English courts were doing, and for the same reasons.

See Restatement, Contracts, §§ 266-268.

(B) PARTIAL FAILURE OF PERFORMANCE

INTRODUCTORY NOTE

When two parties in making a bilateral contract have agreed upon an exchange of their promised performances as bargaining equivalents, it is clear enough that the one whose performance has totally failed or who has repudiated before rendering any part of his promised performance should not be able to enforce the return promise of the other party. There has been a "total failure of consideration." There are innumerable cases, however, in which one party has failed only in part, having performed the rest, or in which although no part has yet been performed the failure that is in prospect is only a partial failure. The problem then arises as to the effect of this partial failure, actual or prospective, upon the duty of the other party. The extent of this partial failure varies in degree and in its importance in relation to the whole transaction and to the purposes for which the other party assented to the bargain. A major part of contract litigation is over the effect of these partial failures, a matter the determination of which requires much experience and comparative study of cases. It is involved in the cases of this entire chapter.

The following section of the Restatement, Contracts, gives several suggestions for determining the materiality and legal effect of a partial failure of performance:

§ 275. RULES FOR DETERMINING MATERIALITY OF A FAILURE TO PERFORM.

In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

- (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
- (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
- (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
- (d) The greater or less hardship on the party failing to perform in terminating the contract;
- (e) The wilful, negligent or innocent behavior of the party failing to perform;
- (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

BOONE v. EYRE.

In the King's Bench, 1777. 1 H.Bl. 273, note.

Covenant on a deed, whereby the plaintiff conveyed to the defendant the equity of redemption of a plantation in the West Indies, together with the stock of the negroes upon it, in consideration of £500 and an annuity of £160 per annum for his life; and covenanted that he had a good title to the plantation, was lawfully possessed of the negroes, and that the defendant should quietly enjoy. The defendant covenanted, that the plaintiff well and truly performing all and everything therein contained on his part to be performed, he the defendant would pay the annuity. The breach assigned was the non-payment of the annuity. Plea, that the plaintiff was not, at the time of making the deed, legally possessed of the negroes on the plantation and so had not a good title to convey.

To which there was a general demurrer.

LORD MANSFIELD. The distinction is very clear, where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a

condition precedent. If this plea were to be allowed, any one negro not being the property of the plaintiff would bar the action.

Judgment for the plaintiff.

QUESTIONS:

1. Did Lord Mansfield, in *Kingston v. Preston*, ante, follow the rule that he lays down here?
2. Can the decision be reconciled with the rules in *Restatement, Contracts*, §§ 268, 274, 275?

ELLEN v. TOPP.

In the Court of Exchequer, 1851. 6 Exch. 424, 155 Eng.Rep. 609.

Covenant on an indenture of apprenticeship of the 21st of July, 1846, by the master against the father of the apprentice, the father being a party to the indenture. The material parts of this indenture (of which profert was made) were as follows: "This indenture witnesseth, that Richard Topp, an infant, of the age of sixteen years or thereabouts, by and with the consent of his father George Topp, of &c., farmer, doth put himself apprentice to Frederick Ellen, of &c., auctioneer, appraiser, and corn-factor, to learn his art, and with him after the manner of an apprentice to serve from the 1st day of July now last past, unto the full end and term of five years from thence next following, to be fully complete and ended; during which term the said apprentice his master faithfully shall serve, his secrets keep, his lawful commands everywhere gladly do." The indenture then proceeded to state, that * * * the said Frederick Ellen, in consideration of the sum of £70 to him in hand paid by the said George Topp upon the execution of these presents (the receipt whereof the said Frederick Ellen doth hereby acknowledge), doth hereby covenant and agree to and with the said George Topp, his executors and administrators, and also the said Richard Topp, that he, the said Frederick Ellen, his executors and administrators his said apprentice in the art of an auctioneer, appraiser, and corn-factor, which he useth, by the best means that he can shall teach and instruct; * * * and for the true performance of all and every the said covenants and agreements, either of the said parties bindeth himself unto the other by these presents." The declaration then stated, that the said Richard Topp after serving for three years wrongfully deserted the service of the plaintiff in breach of his and his father's agreement.

The defendant pleaded in defense that before his son quitted service the plaintiff had abandoned the business of a corn-factor and ceased to teach his son that part of the business as he had promised.

Macnamara, for the defendant, cited the note to *Pordage v. Cole* and quoted the opinion of Lord Mansfield in *Boone v. Eyre*. He argued that although the plaintiff's non-exercise of his trade as a corn-factor for a few days would not justify the apprentice in leaving service, the abandonment of the trade would do so. The question seems to be, whether, notwithstanding the breach, the contract can be substantially carried out, and whether adequate compensation can be obtained for such breach. The reason of the rule is, that the damages would be unequal if a breach of a comparatively unimportant part of the contract afforded a ground for rescinding it altogether. The chief tests to be applied appear to be the materiality and importance of the covenants broken, and the difficulty of assessing damages thereupon. [Statement of facts and argument condensed.]

POLLOCK, C. B. This was an action on an indenture of apprenticeship by the master against the father of the apprentice, the father having been party to the indenture. * * * Now, service with a man after the manner of an apprentice imports, according to the meaning of those words as ordinarily understood, that the party served should be carrying on the trade which the apprentice is to learn; otherwise the one is teaching and the other learning the trade, not as master and apprentice but as instructor and pupil. When therefore the one party ceases to carry on the trade, he by his act makes it impossible for the other to serve him after the manner of an apprentice; and he cannot be heard to complain that the other party has not done that which he has wilfully made it impossible that he should do.

The other objection taken by Mr. Taprell was, that the carrying on all the three trades was not a condition precedent to the plaintiff's right to recover, but that his omission or refusal to carry on any one must be the subject of a cross action.

This objection is founded on one of the rules for determining when covenants are dependent on each other; which is laid down in *Boone v. Eyre*, 1 H.Bl. 273, n. (a), and followed in *Campbell v. Jones*, 6 T. R. 570, and other cases collected in the note to 1 Wms.Saund 320 c. That rule is, that when a covenant goes to part of the consideration on both sides, that is, forms a part of the consideration on the plaintiff's side for the defendant's covenant on the other, and a breach of such covenant may be paid for in damages, and the whole of the remaining consideration has been had by the defendant, the covenant is independent, and the performance of it is not a condition precedent.

"The reason of the decision in these cases is," as is observed by the learned editor, "that where a person has received a part of the consideration for which he entered into the agreement, it would be unjust that, because he had not had the whole, he should therefore, be permitted to enjoy that part without either paying or doing anything for

it. Therefore the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover any damages he may have sustained in not having received the whole consideration."

It is remarkable that, according to this rule, the construction of the instrument may be varied by matter *ex post facto*; and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less: as in the cases referred to, the defendant, in the first, might have objected to the transfer, if the plaintiff had no good title to the negroes and refused to pay; in the second, he might have objected to the payment if the plaintiff had refused to transfer the patent, though he had been willing to teach the art of bleaching. But this is no objection to the soundness of the rule, which has been much acted upon. But there is often a difficulty in its application to particular cases, and it cannot be intended to apply to every case in which a covenant by the plaintiff forms only a part of the consideration, and the residue of the consideration has been had by the defendant. That residue must be the substantial part of the contract; and if, in the case of *Boone v. Eyre*, two or three negroes had been accepted, and the equity of redemption not conveyed, we do not apprehend that the plaintiff could have recovered the whole stipulated price, and left the defendant to recover damages for the non-conveyance of it.

Whether the rule can be applied to the present case has been a matter of great doubt in the minds of some of us: but, after much consideration, we agree that it is not applicable. If this had been an action on a covenant to pay an apprentice fee at the end of the term, and the apprentice had served the whole period, and had had the benefit of instruction as such in two of the trades, it would, we are disposed to think have been no answer to the action that the plaintiff had discontinued one. But this is an action for not continuing to serve as an apprentice; and although the later services of an apprentice are much more valuable than the early, and are in part a compensation to the master for his instruction in the commencement of the apprenticeship, and so are analogous in some degree to an apprentice fee payable in futuro, yet the immediate cause of action is the breach of the contract to serve, and the obligation to serve depends upon the corresponding obligation to teach as an apprentice; and, if the master is not ready to teach in the very trade which he has stipulated to teach, the apprentice is not bound to serve. To this particular covenant to serve, the relative duty to teach seems to us to be directly a condition precedent; and we are not able to distinguish between the three trades of auctioneer, appraiser, and corn-factor, so as to say that one is more the substantial part of the contract than another.

As the plaintiff by his own fault has disabled himself from acting as a master in all the three trades, he has no right to complain of the defendant's son refusing to continue to serve in any.

Our judgment will therefore be for the defendant.

QUESTIONS:

1. Does the occurrence of subsequent facts change the meaning of the written instrument?
2. Do such facts change the legal relations of the parties?
3. Was not the plaintiff ready and willing to perform the "substantial" part of the agreed exchange for the boy's service?
4. Should not the boy's remedy be limited to money damages, for the reason that the contract had been so far performed as to make it unjust to terminate wholly the master's rights?

NOTE

See, also, *Chanter v. Leese*, 4 M. & W. 296, 5 M. & W. 698 (1838), plaintiff agreed that defendant might make and sell under several patents; one patent was void; the defendant was held privileged to repudiate the whole, nothing having as yet been done under the contract; *Jansen v. Schneider*, 78 Misc.Rep. 48, 138 N.Y.S. 144 (1912), where one agreed to instruct another to become an aviator for \$250, but did not complete the instruction as to the construction of the machine within a reasonable time, the breach went to the essence; *Vigers v. Cook*, [1919] 2 K.B. 475, an undertaker is entitled to nothing if he performs the service in all except that he fails to preserve the body so that it can be taken into the church.

GRAVES v. LEGG et al.

In the Court of Exchequer, 1854. 9 Exch. 709, 156 Eng.Rep. 304.

The declaration alleged a contract, made in May, 1853, by the plaintiff to sell and the defendant to buy about 300 to 350 bales of wool at 10½ d. per pound, payable on arrival in good condition at Liverpool, Hull, or London, deliverable at Odessa during August, to be shipped with all despatch, warranted of fair average quality, and the names of the vessels to be declared as soon as the wool was shipped. The wool was shipped in August at Odessa as agreed on board a vessel called the "Science," which arrived at Liverpool in November with the wool in good condition. When notified of the arrival, the defendant refused to accept and pay for the wool.

The defendants pleaded that the wool was bought for resale, that the market price of wool fluctuates, that it could not be resold until after the buyer had notice of shipment with the name of the vessel

on which the wool was shipped, that the plaintiff gave no notice of the name of the vessel for a long and unreasonable time after shipment when the market price of wool had greatly fallen and resale was possible only at a great loss. [Statement condensed.]

PARKE, B. The pleadings in this case are these: [His Lordship stated them, and proceeded:] The question raised by these pleadings is, whether the provision, that the names of the vessels should be declared as soon as the wools were shipped, was a condition precedent [made such declaration a condition precedent] to the defendants' obligation to accept and pay for the wools according to the contract stated in the declaration, and under the circumstances stated in the plea.

This contract, we think, is to be construed with reference to some of those circumstances. It is stated in the plea, that the wool was bought, with the knowledge of both parties, for the purpose of re-selling it in the course of the defendants' business; that it is an article of fluctuating value, and not saleable until the names of the vessels in which it was shipped should have been declared according to the contract.

The declaration having averred, according to the 57th section of the Common Law Procedure Act, the performance of conditions precedent generally, the defendant proceeds in this plea to specify this condition of declaring the names of the vessels, as one on the breach of which he insists. The loss which he avers to have sustained by that breach is immaterial. The only question is, whether the performance of the agreement was a condition precedent or not to the defendants' contract to accept and pay for the goods.

In the numerous cases on the subject, in which it has been laid down that the general rule is, to construe covenants and agreements to be dependent or independent according to the intent and meaning of the parties to be collected from the instrument, and of course to the circumstances legally admissible in evidence with reference to which it is to be construed, one particular rule well acknowledged is, that where a covenant or agreement goes to part of the consideration on both sides, and may be compensated in damages, it is an independent covenant or contract, and an action might be brought for the breach of it without averring performance in the declaration, under the old system of pleading; and under the new, the denial of such performance would be bad; and the cases of *Campbell v. Jones*, 6 T.R. 570, and *Boone v. Eyre*, 2 Black Rep. 1312 and 1315, are instances of the application of the rule. But then it appears, as Mr. Serjt. Williams observes in 1 Saund. 320-d. (and the Lord Chief Baron, in delivering the judgment of this court in *Ellen v. Topp*, 6 Exch. 441, adopts the observation), the reason of the decision in that and similar cases, besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permit-

ted to enjoy that part without either payment or doing anything for it. Therefore the law obliges him to perform the agreement on his part, leaving him to his remedy to recover any damages he may have sustained in not having received the whole consideration. Mr. Serjt. Williams goes on to observe, that it must appear upon the record that the consideration was executed in part. This may appear by the instrument declared on itself, whereby a valuable right, part of the consideration, is conveyed, as in *Campbell v. Jones*, or *Boone v. Eyre*, or by averment in pleading. When that appears, it is no longer competent for the defendant to insist upon the non-performance of that which was originally a condition precedent; and this is more correctly expressed, than to say it was not a condition precedent at all.

In this case, if the stipulation, that the names of the vessels should be stated as soon as the wools were shipped, was originally a condition precedent, it is so still. No other benefit was taken under the contract itself, as the consideration for the promise to pay the money, than the shipment and delivery of the goods by the named vessels; nor was any subsequently received by the acceptance of the goods or any part thereof. After such acceptance, the defendants would have been bound to pay the price, or the residue of it, and could not have insisted on the neglect to name in due time, but, if there had been any such neglect, would nevertheless have had their remedy for the damage by cross action on the contract to declare the names. In the state of things on this record, the simple question is, whether this contract was originally a condition precedent or not. Looking at the nature of the contract, and the great importance of it to the object with which the contract was entered into with the knowledge of both parties, we think it was a condition precedent, quite as much, indeed, as the shipping of the goods at Odessa with all dispatch after the end of August. And with respect to the shipment itself, Mr. Blackburn did not venture to contend that the performance of the plaintiff's contract in that respect was not a condition precedent.

The defendants, therefore, have a right to object to fulfil the contract on their part, as the plaintiff did not fulfil his, though they could no longer object to the plaintiff's non-performance, had they afterwards taken any benefit under the contract.

Judgment for the defendants.

QUESTIONS:

1. Was the prompt declaration of the name of the vessel a condition precedent to the defendant's duty because the parties had expressed an intention to make it so, or for other reasons?
2. Was Baron Parke correct in saying, "The loss which he avers to have sustained by that breach is immaterial"?

NOTE ON PLEADING AND BURDEN OF PROOF

It is commonly provided by statute in the United States that it is sufficient for the plaintiff to put a blanket averment in his complaint, alleging performance of all conditions precedent, without enumerating or specifying them in particular. If the defendant then wishes to take issue in the matter, he must specify in his plea the particular conditions that he says have not been performed. On the issue thus raised, the burden of proof is normally on the plaintiff. See *Kendall v. Brownson*, 47 N.H. 186, 196 (1866), for a general discussion.

In the absence of statute such a general allegation will probably be sustained after verdict, but it is demurrable. *Cadwell v. Blake*, 6 Gray (Mass.) 402 (1856).

The fact constituting the condition precedent is a part of the "cause of action." *Hernaman v. Smith*, 10 Ex. 659 (1855).

As to the burden of pleading and proving a "condition subsequent," see section 3 of this chapter, *post*.

TICHNOR BROS. v. EVANS.

Supreme Court of Vermont, 1918. 92 Vt. 278, 102 A. 1031, L.R.A.1918C, 1025.

Assumpsit by Tichnor Bros. against Joseph Evans, with plea of general issue. Judgment for plaintiffs on facts found by the court, and defendant excepts. Affirmed.

POWERS, J. In the spring of 1914, the plaintiffs, through their traveling salesman, Pierce sold the defendant a bill of goods which included the post card sets here in controversy. At the time of the sale, Pierce told the defendant that if he would buy the sets at the price named, he (Pierce) would not sell like sets to anyone else in the town. Upon this assurance, the defendant made the purchase. The plaintiffs did not keep this agreement, but at some time during the following winter they sold similar sets to one of the defendant's competitors doing business on the same street. The defendant learned of this about the 1st of June, 1915, but said or did nothing about it until some two years later and just before the trial below. The suit is brought to recover the balance due on the goods sold, and is defended on the ground that the plaintiffs having broken the contract in the particular named, are not entitled to recover anything under it.

The trial below was by the court, and it is recited in the findings that there was no evidence from which a determination could be made as to the amount of damage the defendant had suffered by reason of the above-mentioned breach of the contract by the plaintiffs. There-

fore the court assessed such damage at \$1, deducted it from the amount due the plaintiffs, and rendered judgment for the latter for the balance, with interest thereon. To this the defendant excepted. So the only question before us is, Were the plaintiffs entitled to recover anything on the facts found?

The defense is predicated upon the doctrine, frequently approved by this court, that a breach that goes to the essence of the contract operates as a discharge of it. This rule will not avail the defendant. It is not every breach that goes to the essence. It gives rise to an action for damages, but it does not necessarily justify a refusal to perform. Where, as here, the stipulation goes only to a part of the consideration, and may be compensated for in damages, its breach does not relieve the other party from performance. In such cases, the broken promise is an independent undertaking and [its performance is] not a condition precedent. *Kauffman v. Raeder*, 108 F. 171, 47 C.C.A. 278, 54 L.R.A. 247; *Lowber v. Bangs*, 2 Wall. 728, 17 L.Ed. 768. See *Rioux v. Ryegate Brick Co.*, 72 Vt. at p. 155, 47 A. 406. In order to operate as a discharge or give rise to a right of rescission, the partial failure to perform must go to the very root of the contract. *Chamberlin v. Booth*, 135 Ga. 719, 70 S.E. 569, 35 L.R.A., N.S., 1223; *Keenan v. Brown*, 21 Vt. 86, is a case of partial failure of performance, and it was held that the defendant therein was not absolved thereby, and was only entitled to recover his damages.

Moreover, when a contract has been partly performed by one party, and the other has derived a substantial benefit therefrom, the latter cannot refuse to comply with its terms simply because the former fails of complete performance. *Kauffman v. Raeder*, *supra*; 13 C.J. 659. "Where a person has received a part of the consideration for which he entered into the agreement," says Mr. Serjt. Williams, "it would be unjust that, because he has not had the whole, he should therefore be permitted to enjoy that part without either paying or doing anything for it." 1 Saund. 320d. *Hammond v. Buckmaster*, 22 Vt. 375, is a case of this class, and it was therein held that, inasmuch as each party had received a partial benefit from the contract, and could not be placed in statu quo, the defendant would have to perform the contract, seeking his damages for the plaintiff's breach by cross-action. These holdings are decisive of the case in hand. The stipulation in question was only a part of the consideration of the defendant's undertaking; was subordinate and incidental to its main purpose; its breach is compensable in damages; and the defendant obtained and now holds a substantial benefit under the contract. Other questions argued need not be considered.

The judgment below is without error, and is affirmed.

NOTE

In *Oscar Barnett Foundry Co. v. Crowe*, 219 F. 450, 135 C.C.A. 162 (1915), a breach by the plaintiff, for which judgment had been obtained against him, was held not to privilege the defendant not to perform his part. The court said: "These questions are controlled by the principle of law that a breach of a covenant, which goes to the whole consideration of a contract, gives to the injured party the right to rescind the contract or to recover damages for the breach; or, stated conversely a breach of a covenant, which does not go to the whole consideration of a contract, but which is subordinate and incidental to its main purpose, does not constitute a breach of the entire contract or warrant its rescission by the injured party. While every breach of a contractual obligation confers a right of action upon the injured party, it is thus seen that every breach does not operate as a discharge. A breach which permits a rescission of the contract, discharging the other party, must be of an absolute part of the obligation—that is, a breach of that part of the obligation which goes to the whole consideration, and may be made, first, when the party renounces his liabilities under it; second, when by his own act he makes it impossible to perform; or, third, by failing fully to do what he promised. When this occurs, the party offended against may consider the contract rescinded and himself exonerated, or sue upon the contract for such damages as he has thereby sustained."

In *McAllister-Coman Co. v. Matthews*, 167 Ala. 361, 52 So. 416, 140 Am. St.Rep. 43 (1910), the court said: "Every breach of a contract is, of course, inconsistent with the contract; but every breach by one party does not authorize the other to renounce it in toto."

QUESTION:

How can a partial failure of performance "go to the whole of the consideration"?

KELSO & CO. v. ELLIS et al.

Court of Appeals of New York, 1918. 224 N.Y. 528, 121 N.E. 364.

Action by Kelso & Company against Charles H. Ellis, Sr., and another, copartners doing business under the firm name of Charles H. Ellis & Son. Judgment on directed verdict for plaintiff affirmed by Appellate Division (171 App.Div. 912, 155 N.Y.S. 1117), and defendants appeal. Reversed, and new trial granted.

POUND, J. Thomas Howard, under the name of Thomas Howard Company, dealt in advertising specialties in Brooklyn, N. Y. He had a plan for a piano contest whereby a merchant would offer a piano to be voted for by his customers and given to the contestant receiving the highest number of votes; the right to vote being dependent upon

the purchases made at the store where the contest was being conducted, during a given period. The idea was so to stimulate trade beyond its usual activity as to enhance the sales of the merchant and thus put money in his purse. Careful and voluminous instructions for arousing public interest in the contest were an essential part of the plan. Other prizes were offered to contestants, but the interest centered around the piano. Howard did not deal in pianos himself, but when he obtained a customer for his scheme he placed an order with a manufacturer for a piano to be shipped to such customer. The plaintiff herein was a piano manufacturer. The defendants were merchants in Port Chester, N. Y. On October 24, 1913, they entered into a contract with Howard for the delivery at his earliest convenience of one T. Howard Company \$750 player piano, mahogany finished, warranted and guaranteed for 10 years; five \$500 certificates good on a T. Howard Company \$750 piano, mahogany finished, warranted and guaranteed for 10 years; 20 dozens assorted pieces of flat silverware, permanently warranted. To be distributed by defendants the following: 200 nomination letters, 500 follow-up letters, 1,500 circulars, 1,000 postal cards, 40 posters, 50 bulletins, 150 \$1, 100 \$2, and 300 \$5 trading books, 1 voting register, 1 Howard Company's instruction book, 2 sets of "Display Card" signs, instructions for newspaper advertising, to be done without expense to vendor, 54,000 certificates in four colors for piano votes in denominations of 5 to 25,000 votes; all the foregoing to be used in a piano advertising contest to open November 3, 1913, and close May 3, 1914.

In consideration therefor they gave their six negotiable promissory notes payable to Howard and due two, three, four, five, six, and seven months after date, aggregating \$650. The defendants agreed to "keep the piano well displayed in my store," and it is a fair inference that it was the intention of the parties that the piano should be delivered for that purpose before the opening of the contest on November 3, 1913.

On December 4, 1913, Howard sent an order to plaintiff to deliver a player piano at once to the defendants. He had previously delivered to them some of the silverware and all of the printed matter which they made use of in a voting contest. But the contest without a piano was like the play of Hamlet with the part of Hamlet left out. Plaintiff had sold pianos to Howard for over two years and had shipped many pianos to merchants for him and had received from him notes of merchants to whom it had shipped pianos on his order. He had previously told it that he had an advertising plan; that he was supplying merchants with pianos all over the country and he had thus obtained from it a line of credit. It stenciled the name "T. Howard Company" on such pianos. But plaintiff did not ship the piano to defendants. Howard owed it upwards of \$2,000 for pianos actually shipped and further credit was refused. On December 22, 1913, prior to the maturity of

the first note in suit, Howard transferred the Ellis notes to it, and it gave him credit therefor on his general account as cash, knowing at the time that no piano had been delivered by it to defendants. It does not appear that plaintiff then had actual knowledge of the terms of the contract between Howard and defendants.

This action is brought to recover on the notes. The answer sets up many defenses and a counterclaim, none of which are substantial except the defense that the plaintiff was not a holder in due course; that it did not take the notes in good faith and did not take them for value. This defense calls for careful examination.

In the hands of Howard, the notes were subject to the defense that the contract was entire, that there had been no full performance by Howard, and that there was no obligation to pay until performance was complete. Defendants were constantly demanding performance by Howard on his contract to furnish the piano, and it cannot be said as matter of law that there was a waiver on their part of this condition of the contract. They therefore did not become liable to pay for or return even the articles received in part performance. "A party may retain, without compensation, the benefits of a partial performance, where, from the nature of the contract, he must receive such benefits in advance of a full performance, and by its terms or just construction is under no obligation to pay until the performance is complete." *Avery v. Willson*, 81 N.Y. 341, 344 (37 Am.Rep. 503). The agreement to deliver the piano and the other articles and the agreement to pay the notes, being concurrent in time, were dependent, and Howard could not maintain an action against defendants without tendering full performance on his part. Where a promissory note is given for the purchase money on an executory contract for the sale of lands or chattels the law is the same as obtains in a case where the only promise to pay is found in the contract of sale itself, provided the action is between the original parties. *Ewing v. Wightman*, 167 N.Y. 107, 60 N.E. 322. * * * [The court held that there was evidence sufficient to go to the jury that the plaintiff received the note with knowledge of the defense against Howard.]

Judgment reversed and new trial granted.

KINNEY v. FEDERAL LAUNDRY CO.

Court of Errors and Appeals of New Jersey, 1907. 75 N.J.L., 497, 68 A. 111.

Action by George H. Kinney against the Federal Laundry Company. Judgment for plaintiff, and defendant brings error. Affirmed.

GUMMERE, C. J. This action was brought by Kinney as assignee of the Chicago Belting Company against the Federal Laundry Company

to recover the purchase price of certain belting sold and delivered to it by the belting company. By the terms of the contract of sale, the vendee was to pay the purchase price within 60 days and the vendor was to replace any of the belting which should prove defective. The defendant failed to pay the purchase money when it fell due, and later repudiated its liability to do so upon the ground that some of the belts furnished had been discovered to be defective at the end of three months' user, and that the vendor had failed to replace them when called upon to do so. The belting company thereupon assigned their claim for the purchase money to the plaintiff, who at once brought suit, declaring upon the common counts alone. The defendant pleaded the general issue, but failed to annex to its plea any notice of a claim against the plaintiff by way of recoupment. At the trial, after the plaintiff had proved the sale and nonpayment, the defendant offered evidence showing that some of the belting had been found to be defective after it had been used for three months; that this fact had been communicated to the vendor before the assignment to the plaintiff and demand made upon it to replace it with sound belting; and that this demand had been ignored. After hearing the defense, the trial judge overruled it and directed a verdict for the full amount of the plaintiff's claim.

The single assignment of error relied upon by counsel for the defendant challenges the soundness of this judicial ruling, the contention being that the facts proved by the defendant constituted a bar to the plaintiff's right to recover, for the reason that the agreement on the part of the defendant to pay the purchase price was conditioned upon the promise of the belting company to replace defective belting. In our judgment this position is untenable. The promise of the vendee to pay was to be performed within 60 days. The promise of the vendor to replace defective belting was, by necessary implication, to be performed within a reasonable time after discovery of the defect and notification thereof. In construing contracts containing mutual promises, where the time for the performance of the promise by one party is to arrive, or may arrive, before the time for the performance of the promise by the other, the former promise is held to be an independent obligation, the nonperformance of which raises a cause of action merely, and does not constitute a bar to the right of the party making it to recover for a breach of the promise made to him. 9 Cyc. p. 643; Benj. on Sales, § 738. And this rule of construction prevails as fully where the promise is to pay money as where it is to do some other thing. *Front Street, etc., Ry. Co. v. Butler*, 50 Cal. 574; *American Emigrant Co. v. Adams County*, 100 U.S. 61, 25 L.Ed. 563.

Applying this rule of construction to the contract in the present case, the facts proved merely showed a right in the defendant to recover such damages as it had sustained from a breach by the belting company of an independent provision of the contract. But the defendant could only

have that right determined in the present suit by following the method of procedure prescribed by section 105 of the practice act (P.L. 1903, p. 568), which requires that a defendant who wishes to recoup damages which he may have sustained by reason of any cause of action arising out of the contract which is the subject of the action shall annex to his plea and file therewith a notice of the particulars of his counterclaim. This, as has already been stated, the defendant failed to do. The action of the trial court, therefore, in taking from the jury the question of the defendant's right to recoup and directing a verdict for the full amount of the plaintiff's claim was entirely proper.

The judgment under review must be affirmed.

QUESTIONS:

1. Was the buyer's duty to pay conditional on delivery of belting without defects?
2. Was it conditional on replacement of defective belting by the seller? See Restatement, Contracts, §§ 269, 273; Rule 1 of Serjt. Williams.
3. Did the seller's partial failure of performance go "to the essence"? Was it "material"? See Restatement, Contracts, §§ 274, 275, 277.

PICKENS v. BOZELL

Supreme Court of Indiana, 1858. 11 Ind. 275.

DAVISON, J. Bozell brought this action against Pickens, upon a written agreement, which bears date October 6, 1854, and is as follows:

"This agreement made, &c., between Joseph Bozell and Henry Pickens, witnesseth: That Bozell has leased, and by these presents doth lease, to said Pickens, for the term of two years from the first of March, 1855, twenty-five acres of upland, and forty acres of bottom land, described, &c.; and is to furnish house and garden, pasture for one cow, and firewood off the place; and is to put the farm in good repair. Pickens is to farm the land as follows: The upland is to be put in oats, and he is to pay Bozell one-third of the same in the shock. The bottom land, he Pickens, is to farm in corn, and pay Bozell twenty-two and one-half bushels of corn per acre, to be delivered on the premises. Pickens is to have all the pasture of the corn ground, and two-thirds of the pasture of the oats ground," &c.

In the complaint, it is averred that the defendant failed to deliver to the plaintiff, on the premises or elsewhere, any of said rent corn for the year 1856, except six hundred and twenty bushels—leaving unpaid and undelivered two hundred and eighty bushels, which was, at

the time the same should have been delivered on the premises, worth forty cents per bushel—wherefore, &c.

Defendant demurred to the complaint, but his demurrer was overruled, and thereupon he answered by a general denial, and also by way of counterclaim. * * *

Verdict in favor of the plaintiff for \$10.58, upon which the Court rendered judgment, &c.

The only point made in the argument of the cause relates to the action of the Court in overruling the demurrer to the complaint. That pleading is said to be defective because it fails to allege the performance of certain stipulations which the plaintiff agreed he would perform, namely, that he would "furnish the defendant a house and garden, and pasture for one cow, and put the farm in good repair." This construction does not seem to be correct. In the agreement before us, the promises are evidently mutual. Those of which the plaintiff has failed to allege performance, constitute only a part of the consideration of the defendant's contract; and where, in such case, he has actually received a partial benefit from the consideration of the engagement on his part, and the plaintiff's failure to perform may be compensated in damages, the stipulations of the parties will be construed independently; and the result is, that an action for a breach may be maintained against the defendant without alleging performance. 1 Chit.Pl. 323,a; *Pordage v. Cole*, 1 Saund. 320,b; *Bennet v. Executors of Pixley*, 7 Johns. (N.Y.) 249; *Tompkins v. Elliot*, 5 Wend. (N.Y.) 496; *Obermyer v. Nichols*, 6 Bin. (Pa.) 159, 6 Am.Dec. 439; *Bream v. Marsh*, 4 Leigh (Va.) 21; *Gourdin v. Davis*, 2 McCord (S.C.) 514. And this doctrine is plainly consistent with the new rules of pleading; because under them, the defendant may, in every such case, set up in his defense, by way of counterclaim, the plaintiff's failure to perform, in reduction of damages. 2 R.S. 1852, p. 41, § 59. True, where the mutual promises go to the whole consideration on both sides, performance must be averred; but in the case at bar, the main consideration of the defendant's stipulation to pay rent, was not the furnishing of the house, &c., but the use and occupation of the leased premises for a stated term. The record, in this instance, sufficiently shows that he took possession, and occupied under the lease; hence, it would be unequal and unjust to hold that the plaintiff cannot sue for the rent without alleging performance. *Bryan v. Fisher*, 3 Blackf. 316.

PER CURIAM. The judgment is affirmed, with 10 per cent. damages and costs.

NOTE

The law of Landlord and Tenant is a subject that has been dealt with in many special treatises and in separate courses in law schools. It consists in part of Property law and in part of Contract law. The present

casebook does not undertake to deal with it in either one of these aspects. The land law of England had a much earlier development than the law of contract and has suffered many changes by statute and judicial decision. Land law in the United States varies greatly from that of England; and the law of short term leases has much more in common with contract law than with the law of property. Nevertheless, it may be said, especially in the case of long term leases, that after the execution of the lease and delivery of possession the lessee has received a large part (perhaps indeed the principal part) of the agreed exchange for the rental that he has promised to pay. The written lease, both a conveyance and a contract, commonly makes the duties of the parties expressly conditional on various factors, this being especially true of the duties of the lessor for whose benefit the common forms of lease have been constructed. The lessor's advantage in this respect has been considerably reduced by war-time legislation.

Breach of covenants in the lease by the lessor, going as they do to only part of the agreed exchange for the lessee's payments and covenants, generally do not justify nonpayment of rent by the lessee. Nor would nonpayment of rent by the lessee justify eviction by the lessor except that the leases generally provide to the contrary. See Restatement, Contracts, § 290. A breach of covenant by the lessor may be so material as to amount to an actual or practical eviction of the lessee justifying nonpayment of further rent by him, thus making the rule of Restatement, Contracts, § 274, applicable.

(C) INSTALMENT CONTRACTS—LAND

HUNT'S CASE.

In the Exchequer Chamber, 1588. Owen, 42.

Hunt brought an action on the case against Torney, and declared that he being seised of lands in Swainton in Norf. in fee, *secundum consuetudinem mannerii*; the defendant did promise to the plaintiff, in consideration the plaintiff would permit him to occupy the same for the space of five years, that he would pay him at the Feast of All-Saints next coming, and so yearly twenty pounds at the Feast of the Annunciation, and All-Saints by equall portions, during the terme aforesaid, and alleged that he had injoyed the lands by the space of a year and half, and so brought his action on the *assumpsit*. And ANDERSON was of opinion that until the five years were expired, no money was to be paid, because the contract was intire. But all the other justices on the contrary, for the consideration was to pay a certain summe yearly, which made severall duties and so severall ac-

tions. For by PERIAM, if a man be bound to pay J. S. twenty pounds in manner and forme following, viz. ten pounds at such a day, and ten pounds at such a day, in this case the obligee cannot have an action of debt for the first, before the day of payment of the last ten pounds be past, because the duty in itself is an intire duty, but if a man be bound to pay J. S. ten pounds at such a day, and ten pounds at such a day, here the obligee shall have his action for the first, because the duty was in itself severall.

ANDERSON at another day said, that if a man makes a lease for ten years, rendring rent, in that case he may have an assumpsit for the rent due every year: so if I covenant with you to build you twenty houses, the covenantee shall have a severall action for each default.

PERIAM. That case of the assumpsit is much to the purpose, for an assumpsit is in the nature of a covenant, and is indeed a covenant without writing.

RHODES cited this case: Gascoigne promised in consideration of a marriage of his daughter with such a man's son, to give seven hundred marks, and to pay a hundred marks every year, until all the summ were paid, and it was held clearly in this Court, that a severall action might be brought upon every hundred pounds, but because the action was brought for all the seven hundred marks before the seven years were out, judgment was given against him, for if a man be bound in a bond of a hundred pounds to pay twenty pounds for so many years, he shall not have an action of debt until the last year expired.

And after judgment was given for the plaintiff, viz. Mich. 29 Eliz. Rot. 2248.

NOTE

As is shown in the above case, the common law judges were puzzled as to the nature of a contractual duty and the remedy for its enforcement when the contract provides for a series of instalment payments or other performances in instalments. In this particular case, the question was whether a series of actions can be maintained for a series of instalments promised in a single contract. See on this point *Rudder v. Price*, 1 H.Bl. 547 (1791). The distinctions that seem to have been made between the actions of debt and assumpsit, and between a bond with a single penalty conditioned on a series of separate performances and an affirmative promise to render those performances, need make no trouble for us at the present time. A study of the many cases that are concerned with "divisibility" and "entirety" of contract, however, will show that confusion of mind and of expression still continues. Assuming erroneously that the two terms have a plain and definite meaning, they are so used in court opinions as to darken understanding and defy analysis.

The main problem that is here to be presented is not whether there can be a series of breaches of a single contract, for which a series of actions can be maintained as in Hunt's case; it is the determination of the effect of a partial failure of performance by one party upon the legal duty of the other party, and in particular the effect of failure to pay an instalment of money when due, or of failure to render any other kind of instalment performance.

The application of the terms "divisible" and "entire" depends on the issue before the court and the purpose that they are being used to serve. It helps greatly to consider "contract," not as a single relation between two parties, but as involving many relations between them. Often a contract is so made as to be capable of a series of breaches, justifying several independent suits. Also, breaches of contract vary in importance and effect; and the character of the remedy that is available varies in accordance therewith. See discussion by Baker, J., in *Vulcan Trading Corporation v. Kokomo Steel & Wire Co.* (C.C.A.) 268 F. 913 (1920); also a Comment in 37 *Yale L.Jour.* 634 (1928).

Instead of trying to determine whether a contract is "divisible" or "entire," it will be more useful to approach the problem from the standpoint of specific questions like the following:

1. Must A perform in full (or tender such performance) before B owes anything?
2. Must A perform (or tender) anything before B owes anything?
3. Was performance by either party to be in gross or by instalments?
4. If by instalments, was there a definitely apportioned exchange and equivalent for each instalment?
5. On failure of one instalment (a) is the injured party privileged to abandon the whole contract; (b) can he maintain suit for a "total Breach"; (c) can he maintain suit for a "partial breach", while the rights and duties of further performance remain as before?

GREEN v. REYNOLDS.

Supreme Court of New York, 1807. 2 Johns. 207.

This was an action of covenant. By articles of agreement entered into between the parties, the plaintiff, for the consideration therein after-mentioned, covenanted to execute and deliver to the defendant a good and sufficient deed for eighty-four acres of land, in Pittstown, in the county of Rensselaer, on the first day of May, 1806. The defendant, on his part, covenanted to pay to the plaintiff, one thousand dollars, on the first day of May, 1806, and the further sum of eight

hundred and seventy-five dollars, on the first day of May, 1812. The declaration was for the non-payment of the one thousand dollars, but did not aver that the plaintiff had tendered a deed on the first day of May, 1806. There was a general demurrer to the declaration, and joinder in demurrer.

KENT, C. J. It has been decided in this court, in regard to a contract for the delivery of stock, that the delivery, and payment of the money were dependent covenants, and that the plaintiff must aver a performance, or an offer to perform, before he could bring his action.

Allen was stopped by the court, who desired to hear the other side.

Foot, *contra*. The principle laid down in the authorities cited by the counsel, on the other side, apply to cases where the whole consideration is to be paid, not where a part of the money is to be paid, on the day the deed is to be delivered, and the residue afterwards. In the present case, a part only of the money was to be paid, so that the covenants are not mutual and dependent conditions, but each party has his remedy without averring a performance.

PER CURIAM. The covenants in this case are clearly dependent. The one thousand dollars, being in part of the consideration for the deed, and to be paid on the same day the deed was to be delivered, the fair intent, and good sense of the contract is, that the money is not to be paid, until the deed is ready for delivery. The declaration, therefore, is defective in not averring a tender of the deed by the plaintiff. We are of opinion, that the defendant is entitled to judgment; but the plaintiff may amend his declaration on payment of the costs.

Judgment for the defendant.

NOTE

Observe that the two performances to be rendered on May 1, 1806, were not the agreed equivalents of each other. Study Restatement, Contracts, §§ 267-269.

GRANT v. JOHNSON, 5 N.Y. 247 (1851). There was a contract for the sale of land made August 24, 1845. Performances by the two parties were subdivided as follows: possession to be given November 1, 1845; \$200 to be paid April 1, 1846; deed of conveyance to be delivered May 1, 1846; \$200 to be paid April 1, 1847; balance in two equal instalments April 1, 1848, and April 1, 1849. Possession was given and the first payment made. The vendor sued for the amount of the second instalment of the price after the date for its payment, without alleging that he had ever delivered or tendered a deed of conveyance. For the plaintiff it was argued that the promises were independent, since the instalment sued for and the conveyance were not

agreed equivalents. The trial court agreed with this and gave judgment for the plaintiff. This was reversed in the Court of Appeals. After discussing the case of *Boone v. Eyre* and the rules of *Serjeant Williams* in the note to *Pordage v. Cole*, the court said:

"A covenant, therefore, which goes only to a part of the consideration, is not necessarily independent. Nor is it conclusive upon this point that the consideration is divisible in its own nature, or that a part of it has been received by the defendant; nor will the circumstance that one or any number of covenants in an agreement are independent, render others so. * * *

"The question then returns, was the consideration in this case divisible, and were the payments apportioned by the agreement to the different parts of the consideration within the principles above stated? According to the contract, the \$950 to be paid by the defendant, as therein stipulated, was the entire consideration for a complete title to the premises. The possession was incident to the title, the whole of which the defendant was to receive as the consideration for his payments. He received one element of a complete title, to-wit, the possession, on the 1st of November, 1845. He then paid on the 1st of the following April all that he was to advance by the terms of the agreement, until the fee should be added to the possession by a conveyance from the plaintiff, and the title of the defendant be then perfected. The plaintiff refuses or neglects to convey, and yet by this action claims the purchase-money of the defendant.

"If we assume that the consideration of the defendant's undertaking was divisible, yet by the terms of the agreement he was to receive both the possession and a deed of the premises before he could be called upon for the payment of the instalment in controversy. These things were 'to be done to him' according to the rule of Lord Holt adopted in *Cunningham v. Morrell*, 10 Johns. 206, 6 Am.Dec. 332. He was not to trust to the personal responsibility of the plaintiff. *Dey v. Dox*, 9 Wend. 134, 24 Am.Dec. 137. The plaintiff had covenanted that the thing stipulated should be performed before the defendant could be required to pay. Nor by the contract were the payments to be made by the defendant apportioned to any particular part of the consideration. He was not to pay any thing for the possession as distinguished from the fee of the land, but a gross sum for both by separate instalments. If he had refused to accept a deed, all that the plaintiff could have recovered would have been the balance of the purchase-money with interest. On the contrary had the plaintiff refused to convey, the recovery on the part of the defendant would have been confined to the difference between the contract price and the actual value of the land with interest. In a word, the covenant sought to be enforced against the defendant in this action went to the whole consideration on the other side, and depended on it.

"The judgment of the supreme court should be reversed."

QUESTIONS:

1. Was delivery of the deed of conveyance the "whole consideration" for the defendant's promise to pay the second instalment?
2. Was payment of the first instalment a condition precedent to the vendor's duty to deliver the deed?

HILL v. GRIGSBY et al.

Supreme Court of California, 1868. 35 Cal. 656.

This was an action upon nine promissory notes made jointly by defendants to plaintiff, dated June 1st, 1865. The complaint was in the usual form.

The answer of the defendants admitted the execution of the notes, and as a defense to the action alleged, that at the time the notes were executed, the plaintiff as vendor, and the defendants as vendees, entered into a contract for the sale and purchase of one undivided half interest in a quartz mill and certain real property in the State of Nevada; that the defendants agreed to pay the sum of eighteen thousand dollars for the property, to be paid by instalments, and that the notes sued on were given for the last nine instalments; that plaintiff executed a bond conditioned for the conveyance of the property upon full payment of the purchase money; that the whole amount of purchase money was due at the time this action was commenced, and that this action was brought to recover the unpaid portion of the purchase money, including the note given for the last instalment; that about ten thousand dollars of the purchase money had been paid; that the notes and bond were executed and delivered contemporaneously, and are parts of one contract for the sale and purchase of said property.

The answer further alleged that plaintiff, before the commencement of this action, executed and delivered to one William G. Hill a deed of conveyance of the identical property described in said bond; that plaintiff had not performed, or offered to perform, on his part, the conditions of said bond; that neither plaintiff nor said William G. Hill had tendered a deed for said property, and that they had not offered to convey the same upon payment of the purchase money or otherwise. * * *

On the plaintiff's motion, the court struck out of the answer all the defensive matter alleged therein, upon the ground that it is redundant and immaterial. To which ruling the defendants duly excepted.

The plaintiff had judgment as demanded, and the defendants appealed.

The other facts are stated in the opinion of the Court.

By the Court, RHODES, J. The leading question is, whether plaintiff is entitled to recover upon certain promissory notes representing the unpaid portion of the purchase money for certain real estate, sold by the plaintiff to the defendants, without conveying or offering to convey the property. The solution of the question depends upon the construction to be given to the bond or covenant of the plaintiff. The bond, after reciting the purchase and terms of payment, proceeds as follows:

"Now, therefore, the said Hill agrees and binds himself, on condition that the said Grigsby and Smittle shall pay the sum of eighteen thousand dollars, less eight thousand two hundred dollars heretofore paid with interest, as aforesaid, to execute and deliver to the said Smittle and Grigsby a good deed, conveying all his right, title, and interest of, in, and to the one undivided half interest in said mill and premises herein as aforesaid, which if he shall well and truly do, the above obligation to be null and void and of no effect; otherwise the above obligation to be and remain in full force and effect. The said deed to be executed by the said Hill as soon as the full sum of eighteen thousand dollars and interest, as above provided, is paid, and to be sufficient to convey to said Grigsby and Smittle one undivided half interest in and to said mill, free from all incumbrance."

In the first clause the plaintiff covenants to convey on condition that the defendants pay the price. These acts were plainly intended to be simultaneous, that is to say, the payment in full and the conveyance. The words "on condition" are susceptible of no other interpretation. The second clause was added as if to put the matter beyond question. There the covenant is, to convey as soon as the full sum is paid. The conveyance must, of necessity, be executed concurrently with or before payment in full, or it will not be executed as soon as such payment is made.

Neither argument nor illustration will make the meaning of the covenants in respect to the time for their performance more apparent.

When the meaning of the terms employed in the covenants is ascertained, the application of the rules of law governing the performance of the covenants is not difficult. In a contract for the sale of real estate, where the purchaser covenants to pay the purchase money, and the vendor covenants to convey the premises at the time of payment, or upon the time of payment of the money, or as soon as it is paid—and they all mean the same thing—the covenants are mutual and dependent, and neither can sue without showing a performance, or an offer to perform, on his part; and performance, or the offer to perform, on the one part, is a condition precedent to the right to insist upon a performance on the other part. *Barron v. Frink*, 30 Cal. 488.

When the purchase money is payable in instalments, and the conveyance is to be executed on the last day of payment, or upon the pay-

ment of the whole price, or at any previous day, the covenants to pay the instalments falling due before the time appointed for the execution of the conveyance are independent covenants, and suit may be brought thereon without conveying or offering to convey.

The covenants to pay the instalments falling due on or after the day appointed for the conveyance are dependent covenants, and the vendor, in his suit to recover the same, whether he sues for those alone or joins instalments that became due before the time, must show a conveyance or offer to convey. In these respects, contracts of all kinds are governed by the same rule as covenants. * * *

We are of opinion that the portion of the answer setting up the contract of sale, and alleging the failure of the plaintiff to convey, or offer to convey, to the defendants the interest in the premises sold to them, is a good defense to the action, and that the order striking it out was erroneous.

Judgment reversed, and cause remanded for further proceedings.

NOTE

Observe that the vendee's duty to pay the earlier instalments, although originally independent and enforceable by a series of actions, may become dependent and conditional on tender of a deed along with the final instalment if action is not brought until after the final instalment is due. See Restatement, Contracts, § 273.

Observe also that mutual promises may be dependent, even though the agreement of which they form a part is evidenced by several entirely separate documents, for these will be construed together. *Hunt v. Livermore*, 5 Pick. (Mass.) 395 (1827); *Bryne v. Dorey*, 221 Mass. 399, 109 N.E. 146 (1915). In *Ewing v. Wightman*, 167 N.Y. 107, 111, 60 N.E. 322 (1901), the court said: "Some learned text-writers have asserted the doctrine that promises contained in unilateral contracts cannot be dependent, though each is given in consideration of the other, and have criticised the cases in this country holding a contrary rule. Whatever may be the force of the arguments of those writers, or whatever the rule in England, the general current of authority in this and other states is opposed to that doctrine." Where a note is given for a return promise, it should not be called a "unilateral contract," even though the promises are contained in separate instruments. See Restatement, Contracts, §§ 256, 279.

A negotiable note given in a transaction of this kind, if transferred before maturity to a purchaser for value without notice of any breach by the vendor, is enforceable by the purchaser in spite of a breach by the vendor that would have prevented him from enforcing payment.

GRAY v. MEEK.

Supreme Court of Illinois, 1902. 199 Ill. 136, 64 N.E. 1020.

This suit was brought in the circuit court of Cook county by S. M. Meek, defendant in error, against Adolph Gray, plaintiff in error, on a certain written contract and supplemental contract between the parties. The original contract of October 25, 1890, provided: That Gray was to act as the agent of Meek in selling about 80 lots that Meek owned in a certain subdivision. That Gray was to have the exclusive right of selling these lots for one year, and no longer, at prices averaging \$130.50 per lot for all inside lots, and \$175 for corner lots and lots fronting on Milwaukee avenue; the first payment to be not less than \$5 down, and monthly payments to be not less than \$2.50; all deferred payments to draw 6 per cent interest per annum. That Meek agreed to convey the lots when paid for according to the agreement. That, of the cash paid in on the contracts of sale, one-half should go to Meek, and one-half to Gray, as his commission, less 10 per cent on such half (the ten per cent to be kept back until final settlement), and all amounts over and above the stipulated prices for the lots realized on the sales should go to Gray in full payment for his services in making such sales. That, in case any lots remained unsold at the end of the year, Gray was to buy such remaining lots, and Meek to sell them to him, at the above prices, and to allow the 10 per cent. kept back to apply on the purchase price of the lots so remaining, and Gray to pay the balance on the same terms and at the same prices as provided on sales to others. After the expiration of the year provided in this contract, * * * the plaintiff sued for the agreed price of the lots remaining unsold. The plea was the general issue. The jury found a verdict for \$5,468.03 for the plaintiff below, being the total amount claimed by him to be due on the contract, and judgment was entered for the same. The appellate court affirmed the judgment, and the defendant below has brought the case before us on writ of error.

CARTER, J. * * * It is next urged by plaintiff in error that the defendant in error is not entitled to a recovery on the basis of the agreed price of the lots, but that the true measure of damages is the difference between the agreed price and the fair market value at the time Gray agreed to take and pay for the lots in question. This contention is not tenable. Meek sued on the contract, by which Gray agreed to pay the stipulated prices for the lots unsold at the expiration of the contract. When this contract was extended, he again agreed to take the lots unsold at the expiration of the extension, and to pay the stipulated prices, and both contracts contained specific directions as to the application of moneys received towards paying for these lots to be taken by Gray.

It is also urged that there was no tender of a deed for these lots from Meek to Gray pleaded or proved. There was no tender pleaded, but no advantage was taken of this in apt time. The only proof in regard to a tender is the evidence of Meek that he offered Gray a deed for these lots, and the further offer he made in a letter to give him a deed and take a mortgage back. Nothing further was elicited in regard to the tender. No tender was necessary, under the terms of the contract, until the last payment became due, as Meek did not agree to make a conveyance until the lots were paid for. But demanding the whole amount due on these lots, he should have tendered a deed. A purchaser of property to be paid for in instalments, where there is no time fixed for the delivery of the deed, is not entitled to receive his deed until the last payment is made; nor is a purchaser obliged to part with his money before he receives the deed. *Duncan v. Charles*, 4 Scam. 561; *Weiss v. Binnian*, 178 Ill. 241, 52 N.E. 969. The lots were to be paid for, \$5 down, and monthly payments of not less than \$2.50. The time for all payments by Gray had elapsed when suit was brought. The obligation to pay all but the last instalment was absolute and unconditional. By neglecting to enforce payment on these instalments as they became due, and by waiting until the last one became due and the time for making the conveyance had elapsed, the promise to pay the previous instalments, once absolute and independent, did not become mutual and dependent. *Duncan v. Charles*, supra; *Sheeren v. Moses*, 84 Ill. 448. To remedy this error respecting the failure to tender a deed, defendant in error offers to enter a remittitur in this court for the amount of the last payment on these lots, 33 in number, and interest thereon, namely \$94.87. * * *

As the judgment below was too large by the amount of the last payment and interest thereon, to wit, \$94.87, and as the defendant in error remits that amount, the judgment will be affirmed as to the balance, except as to costs in the appellate court. The judgment for such costs will be reversed, and all costs incurred in this court up to the time of entering the remittitur will be taxed against the defendant in error. Remittitur allowed and judgment affirmed.

NOYES v. BROWN et al.

Supreme Court of Minnesota, 1919. 142 Minn. 211, 171 N.W. 803.

Action by Williard L. Noyes against Edward Richard Brown and others, with answer only by defendant Brown. Verdict directed for defendant Brown and from an order denying his motion for a new trial, plaintiff appeals. Order reversed.

LEES, C. This action was brought to recover all deferred payments of the purchase price of 40 acres of land in Saskatchewan, Canada,

sold to defendants by one Upton under a written contract thereafter assigned to plaintiff.

The answer interposed by defendant Brown, upon whom alone the summons was served, was a general denial.

There was a trial by jury and a directed verdict for defendant. Plaintiff appeals from an order denying his motion for a new trial. Defendant has not appeared in this court, and the case has been submitted on the brief and oral argument of plaintiff's counsel.

The motion for a directed verdict was based on three grounds, which may be stated as follows: That an action at law on a contract for the sale of land to recover the purchase price will not lie; that plaintiff failed to plead or prove that he had tendered a deed to defendant or was able and willing to convey the land to him; and that defendant was entitled to a deed from Upton, his immediate vendor, who had disabled himself from conveying by transferring his interest in the land to plaintiff.

Unaided by brief or argument by defendant's counsel, we have attempted to discover a theory upon which the ruling of the trial court might be sustained.

1. In *Freeman v. Paulson*, 107 Minn. 64, 119 N.W. 651, 131 Am. St.Rep. 438, it was held that a vendor of land is not entitled to recover the purchase price from his vendee in an ordinary action at law, but is limited to a recovery of the damages he has sustained by reason of the breach of the contract, if legal, as distinguished from equitable, relief is sought.

In that case, the vendee was to make an initial payment when the contract was executed, and final payment upon the delivery of the deed. In the case at bar the contract provides for the payment of \$1,000 on the day of its execution and of \$4,000 in four equal semiannual instalments. It recites that the times of such payments shall be "a condition precedent and of the essence of this agreement;" that the vendee will "punctually pay the sums of money above specified as each of the same becomes due"; that if he makes the payments as stipulated then "upon request at the office of the vendor * * * at the city of Saskatoon, and the surrender of this agreement, [he] shall be entitled to a conveyance of said land in fee simple"; that if he fails in the strict performance of his part of the agreement, the vendor shall have the right to declare the contract null and void by notice in writing to that effect, "but that no forfeiture shall take away the right of the vendor to recover the purchase money"; that the vendee "accepts title of the vendor, and the said vendor, * * * or assigns, as the case may be, shall not be bound to furnish any abstract of title nor to produce any title deeds nor other evidence of title whatever, or to

answer any requisition on title"; and that the vendee, after the execution of the contract, shall have the right of possession of the land.

Appellant contends that these provisions distinguish this contract from the one considered in *Freeman v. Paulson*, *supra*. We are of the opinion that this contention must be sustained.

In the *Freeman* Case final payment of the purchase price and the execution of the deed were to be concurrent acts. Here payment of the purchase price is expressly made a condition precedent to the right of the vendee to a conveyance. In the ordinary contract for the sale of land the vendee's covenant to pay and the vendor's to convey are mutual and dependent, but here the covenant to pay is to be performed before the vendor's covenant to convey becomes operative. When final payment is made, the vendee is to get his deed "upon request at the office of the vendor" and the surrender of the contract.

In a contract to convey as soon as the vendor obtained title to the land, this court held that "where, by the terms of a contract, the time to perform the covenant on the one side is to happen * * * before the time for the performance of the covenant on the other side, the former is not dependent on the latter." *State v. Winona, etc., Co.*, 21 Minn. 472.

Where the contract provided that the time for paying the consideration was a date prior to that for the transfer of the property, it held that the payment of the consideration was intended to be a condition precedent to the obligation to transfer. *Robson v. Bohn*, 27 Minn. 333-344, 7 N.W. 357. It has also held that "the question whether covenants are to be held to be dependent on or independent of each other turns upon the intention of the parties, to be ascertained from the subject-matter and terms of their contract. Such intention is paramount, to which, when once discovered, all technical forms of expression must yield." *Reynolds v. Lynch*, 98 Minn. 58, 107 N.W. 145.

The doctrine of these three cases is fully supported by the decisions of other courts. Early cases recognized nice and refined distinctions in determining the character of covenants. The rule is now thoroughly settled that the intention of the parties is the vital thing, that it is to be ascertained from the sense of the entire contract rather than from any particular form of expression, and that the order of time in which it is intended that performance shall take place is a controlling circumstance. Rules were formulated long ago in a note to *Pordage v. Cole*, 1 Saund. 319 i. This is one of them:

"If a day be appointed for payment of money, or part of it * * * and the day is to happen, or may happen, before the thing which is the consideration of the money * * * is to be performed, an action may be brought for the money * * * before performance; for it appears that the party relied upon his remedy, and did not intend to

make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money."

In *Paine v. Brown*, 37 N.Y. 228, this rule was cited with approval. Following the lead of New York, the courts in many other states have since given their approval to the rule. It is unnecessary to rehearse the cases here. They are collected in 13 C.J. § 540.

The following language quoted from *Collins v. Schmidt*, 126 Wis. 227, 105 N.W. 671, exactly fits the case at bar: "Under a contract like this, where conveyance is only to be made upon demand after completed payment, the promise of payment is absolute and may be enforced by suit without tender of conveyance. The duty of the vendor to convey [the conveyance of the land] is neither a condition precedent to payment nor an act which may be demanded concurrently therewith."

2. The consideration which led to the adoption of the rule that an action at law to recover the purchase price in an executory contract for the sale of land will not lie was first stated in the early case of *Laird v. Pim*, 7 M. & W. 474, as follows: "The question is: How much worse off is the plaintiff by the diminution of the value of the land, or the loss of the purchase money in consequence of the nonperformance of the contract? It is clear that he cannot have the land and its value, too."

We find this thought expressed in substantially the same language in subsequent cases and by text-writers. *Porter v. Travis*, 40 Ind. 556; *Prichard v. Mulhall*, 127 Iowa 545, 103 N.W. 774, 4 Ann.Cas. 789; *Hogan v. Kyle*, 7 Wash. 595, 35 P. 399, 38 Am.St.Rep. 910; *Bensinger v. Erhardt*, 74 App.Div. 169, 77 N.Y.S. 577; 2 Warv.Vnd. § 937; 2 Suth.Dam. § 569. It would be manifestly unjust to give the vendor the purchase money and allow him to keep the land. If such were the result of permitting a recovery of the purchase price we should hesitate to sanction a recovery. The situation which has troubled the courts and which is presented in this case may be thus stated:

A vendor whose contract entitles him to receive the purchase price before he can be called upon to convey, or who is to have a reasonable time after he gets his money within which to convey, cannot logically be denied the right to sue for and recover the purchase price after it falls due; but, if he may get judgment and collect it before conveying, a vendee whose contract is not recorded and who is not in possession, may be deprived of the land through a wrongful conveyance to another, or through judgments against the vendor, and, if his vendor is contumacious, he may be put to the expense of a suit in equity to get title to the land after paying for it. The situation has

been met in various ways by different courts. Some have cast logic aside, and while permitting a recovery of all but the last instalment of the purchase price, have refused to allow it to be recovered in an action at law, no matter how trifling it may be. The rule adopted in these cases is that the vendor may sue for each instalment as it falls due except the last. If he waits until all the instalments are due, and then sues for the whole obligation, or, having been paid all but the last instalment, he sues for that, he must first tender a deed, and cannot recover in the absence of such tender. *Biddle v. Coryell*, 18 N.J.L. 377; 38 Am.Dec. 521; *Robinson v. Harbour*, 42 Miss. 795, 97 Am.Dec. 501, 2 Am.Rep. 671; *First Nat. Bank v. Agnew*, 45 Wis. 131; *Boone v. Templeman*, 158 Cal. 290, 110 P. 947, 139 Am.St.Rep. 126.

Another line of cases holds that there may be a money judgment for the entire purchase price, but that its enforcement will be stayed until the vendor deposits in court a deed, to be delivered to the vendee upon payment of the judgment. There is little practical difference between a judgment with execution stayed until a vendor deposits a deed and a judgment for the purchase money at the end of a suit for specific performance. The right to the latter remedy is well established. *Freeman v. Paulson*, *supra*; *O. W. Kerr Co. v. Nygren*, 114 Minn. 268, 130 N.W. 1112, Ann.Cas. 1912C, 538.

The former course of procedure has been termed an "irregular expedient to give a judgment at law the effect of specific performance, * * * of doubtful propriety in jurisdictions where * * * the distinction between actions at law and in equity is still preserved." *Prichard v. Mulhall*, *supra*. The expedient may be irregular, but its adoption is sanctioned in cases entitled to the highest consideration. *Loud v. Pomona Co.*, 153 U.S. 564, 14 S.Ct. 928, 38 L.Ed. 822; *Rindge v. Baker*, 57 N.Y. 209-224, 15 Am.Rep. 475. The following statement is found in *Freeman on Executions*, § 32, and appears to be well fortified by numerous decisions:

"The power of courts to temporarily stay the issuing of execution is exercised in an almost infinite variety of circumstances, in order that the ends of justice may be accomplished. In many cases this power operates almost as a substitute for proceedings in equity, and enables the defendant to prevent any inequitable use of the judgment or writ"—citing among other cases *Blair v. Hilgedick*, 45 Minn. 23, 47 N.W. 310.

See, also, *Richardson v. Merritt*, 74 Minn. 354, 77 N.W. 234, 407, 968, and *Eaton v. Cleveland, etc., Ry. Co. (C.C.)* 41 F. 421.

Our conclusion is that if a vendor in such an action as is now before us, obtains judgment for the purchase price, it is the duty of the trial court to stay execution thereon until the deed is deposited with the clerk of court, to be delivered to the vendee on payment of the

judgment, and that, the stay should be continued long enough to give the vendee a reasonable opportunity to ascertain whether the deed conveys the title in compliance with the terms of the contract. The views expressed in *Knoblauch v. Foglesong*, 37 Minn. 320, 33 N.W. 865, point to the conclusion we have reached on this phase of the case.

3. The complaint does not plead a tender of a deed, or ability and willingness on the part of the vendor to convey.

It would seem that such allegations have no place in an action to recover the purchase price when the covenant to pay it is independent of the covenant to convey.

Lewis v. Prendergast, 39 Minn. 301, 39 N.W. 802, one of the first cases to refer to the necessity of pleading an offer to perform, was a case where the covenants were held to be concurrent and dependent. That was an action for specific performance. In *Blunt v. Egeland*, 104 Minn. 351, 116 N.W. 653, an action for damages for breach of a contract for the sale of land, it was said by the present Chief Justice that, "generally speaking, where the stipulations of the contract are concurrent and dependent, a tender of performance before suit is necessary, * * * and in those cases where the time of performance is past an allegation of the failure and refusal by defendant to perform, the first act of performance being by the terms of the contract cast upon him, sufficiently states a right of action."

The language quoted precisely fits the case at bar, and the rule there laid down dispenses with necessity of pleading an offer to perform in such a case as we have here. The same rule was laid down in *Gale v. Best*, 20 Wis. 48, and in *Shenners v. Pritchard*, 104 Wis. 287, 80 N. W. 458.

There is nothing inconsistent in *Freeman v. Paulson*, *supra*. Had the contract in that case been similar in its terms to the contract now in question, the practice we have sanctioned here would have been applicable.

4. The provisions of the contract relating to the title defendant was to receive have been sufficiently pointed out. They do not entitle him to a deed with personal covenants by his vendor. If he receives a conveyance of title in fee, he will get all that the contract provides for. Such title may come from his vendor's assignee, or from any other source, provided it conveys the fee to him. The case does not fall within the rule stated in *McNamara v. Pengilly*, 64 Minn. 543, 67 N.W. 661, but is governed by *Meyers v. Markham*, 90 Minn. 230, 96 N.W. 335, 787, and *McManus v. Blackmarr*, 47 Minn. 331, 50 N.W. 230.

Order reversed.

QUESTIONS:

1. Was the vendee's promise independent and unconditional on any performance by the vendor?
2. Did the vendee commit a breach of contract?
3. Did the vendee fail to perform a condition precedent to the vendor's duty?
4. Could the vendor have maintained a common-law action of debt, or indebitatus assumpsit, for the full price without conveying the property?
5. Was the vendor's ability to convey good title a condition precedent to the vendee's duty to pay?
6. Was this an action at common law or in equity or a statutory "civil action"?
7. Was it an action of debt or a suit for specific performance?
8. If tender of a deed was not a condition precedent, why does the court make execution conditional on conveyance?
9. Did the vendor commit a breach by assigning and conveying to the plaintiff?
10. Did such conveyance make performance by the vendor impossible?
11. Did the vendee's breach give the vendor the power "to declare the contract null and void" while still retaining the right to the full price? See Restatement, Contracts, §§ 339, 374.

(D) INSTALMENT CONTRACTS—GOODS

WITHERS v. REYNOLDS.

In the Court of King's Bench, 1831. 2 Barn. & Adol. 882.

Assumpsit for not delivering straw to the plaintiff pursuant to agreement. At the trial before Lord Tenterden, C. J., at the sittings in Middlesex after last Hilary term, the agreement proved was as follows:

"John Reynolds undertakes and agrees to supply Joseph Withers with wheat straw of good quality sufficient for his use as a stablekeeper, and delivered on his premises as above" (i.e. at Long Acre, London) "till the 24th of June 1830, at the sum of thirty-three shillings per load of thirty-six trusses, to be delivered at the rate of three loads in a fortnight, in a dry state and without damage. And the said J. W. hereby agrees to pay to the said J. R. or his order the sum of thirty-three shillings per load for each load of straw so delivered on his

premises from this day till the 24th of June 1830, according to the terms of this agreement.

“[Signed] Joseph Withers, John Reynolds.”

The straw was regularly sent in from the 20th of October 1829, when this agreement was made, till the end of January 1830. At that time, the plaintiff being in arrear for several loads of straw, the defendant called upon him for the amount, and he thereupon tendered to the defendant £11 11s., being the price of all the straw delivered except the last load, saying that he should always keep one load in hand. The defendant objected to this; but was at length obliged to take the sum offered: and he then told the plaintiff that he would send no more straw unless it was paid for on delivery: and accordingly no more was sent. On the part of the defendant it was submitted that there must be a nonsuit, inasmuch as the plaintiff, on his own shewing, had not performed his own part of the contract, which was, in effect, to pay for each load on delivery. Lord Tenterden C. J. was of this opinion: but directed a verdict for the plaintiff, reserving the point. A rule nisi was afterwards obtained for entering a nonsuit.

Campbell and R. V. Richards now shewed cause. Two things independent of each other were stipulated by this contract to be done by the respective parties: the defendant was to deliver straw; the plaintiff to pay the price. No time of payment was specified. There appears nothing which could entitle the defendant to insist on receiving his money till the whole quantity of straw was delivered. Payment, then, was not a condition of the defendant's performance of his contract. His promise was given in consideration that the plaintiff promised to pay, not in consideration of performance. If the plaintiff was bound to pay for each load on delivery, still it does not follow that a refusal to pay for one load excused the defendant from any future performance of his contract. *Weaver v. Sessions* (6 Taunt. 154). And, according to that case, he ought at least to have shewn that he subsequently made a tender of executing his part of the agreement, which the plaintiff rejected. The defendant, therefore, upon his construction of the agreement, may be entitled to bring a cross action, but has no defence to this.

Platt, contra. The only question is upon the construction of this agreement. It is true, no time of payment was specified, but in the absence of any express stipulation, the money would be payable on demand as often as it became due; and here the words, “to pay thirty-three shillings per load for each load so delivered,” intimate that the price of each load was to be due as soon as it was delivered. [Here he was stopped by the Court.]

LORD TENTERDEN, C. J. I am of opinion that the plaintiff is not entitled to recover. There is, I think, no doubt that by the terms of this agreement the plaintiff was to pay for the loads of straw as they were

delivered. If that were not so, the defendant would have been liable to the inconvenience of giving credit for an indefinite length of time, and, in case of non-payment, bringing an action for a very large sum of money, which does not appear to have been intended by the contract. Then the only question is, whether upon the plaintiff's saying, "I will not pay for the goods on delivery" (for that was the effect of his communication to the defendant), it was incumbent on the defendant to go on supplying straw; and he clearly was not obliged to do so.

PARKE, J. The substance of the agreement was, that the straw should be paid for on delivery. The defendant clearly did not contemplate giving credit. When, therefore, the plaintiff said that he would not pay on delivery, (as he did, in substance, when he insisted on keeping one load on hand) the defendant was not obliged to go on supplying him.

TAUNTON, J. The contract does not say merely that so much straw shall be supplied at thirty-three shillings a load, but it adds, that the plaintiff shall pay that sum "for each load of straw delivered on his premises," from the date of the agreement till the 24th of June 1830. That *prima facie* imports that each load was to be paid for as delivered.

PATTESON, J. If the plaintiff had merely failed to pay for any particular load, that, of itself, might not have been an excuse to the defendant for delivering no more straw: but the plaintiff here expressly refuses to pay for the loads as delivered; the defendant, therefore, is not liable for ceasing to perform his part of the contract.

Rule absolute.

QUESTIONS:

1. Were the instalments so apportioned that 33 shillings was exactly the agreed exchange for one load of straw?
2. Were payment of 33 shillings and delivery of one load concurrent conditions? See Restatement, Contracts, §§ 266(3), 272.
3. Was the contract divided into 36 independent parts, so that the seller's duty to deliver a load was not affected by the buyer's failure to pay for earlier loads?

KELLY CONST. CO. v. HACKENSACK BRICK CO.

Court of Errors and Appeals of New Jersey, 1918.
91 N.J.Law, 585, 103 A. 417, 2 A.L.R. 685.

Action by the Kelly Construction Company against the Hackensack Brick Company. Judgment for plaintiff on a directed verdict, and defendant appeals. Affirmed.

TRENCHARD, J. The plaintiff below brought this action to recover damages for the refusal of the defendant to perform a contract to deliver brick. A verdict was directed for the plaintiff at the Bergen circuit and the defendant appeals. We are of the opinion that the judgment must be affirmed.

No objection is made to the amount of the verdict directed. The defendant's contention is that it was legally justified in its refusal to complete its contract. We think that contention is unsound, and we find no error in record.

The plaintiff had a contract for the building of a high school at Englewood. It placed a written order with the defendant for the "furnishing and delivering and stacking on the job all the common hard brick required by the plans and specifications for the Englewood High School at \$7 per thousand; brick to be delivered as required by us and sufficient brick to be kept on the job so that we will always have approximately 50,000 brick stacked until the completion of the job." This order the defendant accepted in writing. Neither the order nor the acceptance fixed any time for payment. The defendant after delivering some of the brick, refused to complete the contract, and a verdict was directed on the basis of the difference between the contract price and that which the plaintiff was required to pay in the market for the remainder of the brick contracted for. The defendant's contention is that it was legally justified in refusing to complete its contract by reason of the admitted fact that the brick already delivered in part performance of the contract had not been paid for. But that contention is unsound in law. Where, as here, the sale is of a specified quantity of brick (i.e., sufficient to complete a building according to stated specifications), the contract is entire, and a failure to pay when a part delivery has been made does not excuse the seller from completing delivery; no time for payment being stated in the contract. *Baker v. Higgins*, 21 N.Y. 397.

And this is so notwithstanding section 42 of the Sale of Goods Act (Comp.St. p. 4657), enacting that "unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions," etc. This section does not require payment with each delivery where, as here, such deliveries are made pursuant to an entire contract for goods the quantity and character of which necessitates delivery in instalments. * * *

The judgment will be affirmed, with costs.

MINTURN, J., dissents.

QUESTIONS:

1. Did the contract bind the seller to deliver and the buyer to take a definite total number of brick?

2. Were the deliveries and the payments apportioned into parts such that the delivery of one part was the exact exchange for one payment?
 3. Would the time and manner of payment be affected by usage in the brick business? By the previous course of dealing between the two parties themselves?
 4. Is Restatement, Contracts, § 270, applicable here?
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GILL v. JOHNSTOWN LUMBER CO.

Supreme Court of Pennsylvania, 1892. 151 Pa. 534, 25 A. 120.

Action by John L. Gill against the Johnstown Lumber Company for services for driving logs. Verdict was directed for defendant, and plaintiff appeals. Reversed.

HEYDRICK, J. The single question in this cause is whether the contract upon which the plaintiff sued is entire or severable. If it is entire, it is conceded that the learned court below properly directed a verdict for the defendant; if severable, it is not denied that the cause ought to have been submitted to the jury. The criterion by which it is to be determined to which class any particular contract shall be assigned is thus stated in Parsons on Contracts, 29-31: "If the part to be performed by one party consists of several and distinct items, and the price to be paid by the other is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable. * * * But if the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." The rule thus laid down was quoted with approval and applied in *Oil Co. v. Brewer*, 66 Pa. 351, and followed in *Rugg v. Moore*, 110 Pa. 236, 1 A. 320. It was also applied in *Ritchie v. Atkinson*, 10 East, 295, a case not unlike the present. There the master and freighter of a vessel of 400 tons mutually agreed that the ship should proceed to St. Petersburg, and there load from the freighter's factors a complete cargo of hemp and iron, and deliver the same to the freighter at London on being paid freight, for hemp £5 per ton, for iron 5s. per ton, and certain other charges, one half to be paid on delivery and the other at three months. The vessel proceeded to St. Petersburg, and when about half loaded was compelled by the imminence of a Russian embargo upon British vessels to leave, and returning to London delivered to the freighter so much of the stipulated cargo as had been taken on board. The freighter, conceiving that the contract was entire, and the delivery of a complete cargo a condition precedent to a recovery of any compensation, refused to pay at the stipulated rate for so much as was delivered. LORD ELLENBOROUGH said: "The

delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery; leaving the defendant to his remedy in damages for the short delivery."

Applying the test of an apportionable or apportioned consideration to the contract in question, it will be seen at once that it is severable. The work undertaken to be done by the plaintiff consisted of several items, viz., driving logs, first, of oak, and, second, of various other kinds of timber, from points upon Stony creek and its tributaries above Johnstown to the defendant's boom at Johnstown, and also driving cross-ties from some undesignated point or points, presumably understood by the parties, to Bethel, in Somerset county, and to some other point or points below Bethel. For this work the consideration to be paid was not an entire sum, but was apportioned among the several items at the rate of \$1 per 1,000 feet for the oak logs; 75 cents per 1,000 feet for all other logs; 3 cents each for cross-ties driven to Bethel; and 5 cents each for cross-ties driven to points below Bethel. But while the contract is severable, and the plaintiff entitled to compensation at the stipulated rate for all logs and ties delivered at the specified points, there is neither reason nor authority for the claim for compensation in respect to logs that were swept by the flood to and through the defendant's boom, whether they had been driven part of the way by plaintiff, or remained untouched by him at the coming of the flood. In respect to each particular log the contract in this case is like a contract of common carriage, which is dependent upon the delivery of the goods at the designated place, and, if by casus the delivery is prevented, the carrier cannot recover *pro tanto* for freight for part of the route over which the goods were taken. Whart.Cont. § 714. Indeed, this is but an application of the rule already stated. The consideration to be paid for driving each log is an entire sum per 1,000 feet for the whole distance, and is not apportioned to parts of the drive.

The judgment is reversed, and a *venire facias de novo* is awarded.

QUESTIONS:

1. Was the agreement unilateral or bilateral?
2. Does it make any difference which it was, in determining when payment was due for driving a quantity of logs?
3. Does the fact that there was no total quantity, not even a maximum or minimum, affect the determination of the case?
4. Is it affected by the fact that part of the logs were swept away by flood?
5. Would the plaintiff have a right of action for \$1 immediately after delivering 1,000 feet of oak logs?

NOTE

In *NAT. KNITTING CO. v. BOUTON & GERMAIN CO.*, 141 Wis. 63, 123 N.W. 624 (1909), there was a contract to make and deliver a quantity of gloves of different kinds at stated prices, delivery in May, bill to be dated November 1 and payable in 30 days. The plaintiff delivered most of the gloves, except two items amounting to 24 dozen. An action was held maintainable for the price of the gloves delivered. A list of the principal recurring factors that enter into the interpretation of contracts of this sort and influence the court's decision as to its legal construction would be more useful than an attempt to state a general rule of law. The Uniform Revised Sales Act, now completed but not yet enacted, states a reasonable rule for these cases.

SIMPSON et al. v. CRIPPIN et al.

In the Court of Queen's Bench, 1872. L.R. 8 Q.B.Cas. 14.

Declaration on a contract to supply from 6,000 to 8,000 tons of coal, to be delivered in equal monthly quantities during the period of twelve months, from the 1st of July, 1871. Breach, that the defendants did not deliver the coal monthly, and had refused wholly to deliver the coal and to perform the contract.

Plea, *inter alia*: that the plaintiffs were not ready and willing to accept the coals, and that the defendants were prevented from delivering the coals, and performing the agreement, by the acts, neglects, and defaults of the plaintiffs.

At the trial before Lush, J., at the Liverpool Spring Assizes, 1872, it appeared that the defendants were coal proprietors, and the plaintiffs were coal merchants. On the 10th of June 1871, the plaintiffs wrote to the defendants the following letter: "We agree to take from you about 6,000 to 8,000 tons of your best Wigan four-foot coal, at 5s. 6d. per ton of 21 cwt. to the ton, put into our wagons at the colliery. Delivery to commence from the 1st of July next, and to be taken in about equal monthly quantities over the next twelve months. It is understood that you are not bound to supply in case of accidents or strikes. Terms, cash monthly, less 2½% discount."

The defendants, by letter also dated the 10th of June, replied as follows: "We agree to supply you from 6,000 to 8,000 tons of our best four-foot Wigan coal, properly screened, and free from slack, to be delivered into your wagons at our collieries, in equal monthly quantities during the period of twelve months from the 1st of July next—strikes of our workmen, accidents and other circumstances beyond our control excepted—at 5s. 6d. per ton of 21 cwt. Terms, cash monthly, less 2½% discount."

On the 8th of July the defendants wrote, complaining that the first week for the fulfilment of the contract had terminated without the plaintiffs sending wagons or orders for coals. The correspondence continued, the defendants requesting that wagons might be sent and the plaintiffs promising to comply. During the month of July the plaintiffs took from the defendants only 158 tons of coal. On the 1st of August the defendants wrote to the plaintiffs, that inasmuch as the latter had only taken 158 tons during the month of July, and as the sole inducement for the defendants to entertain the contract was the regular and punctual withdrawal by the plaintiffs of the stipulated quantity during the summer months, which they had failed to perform, the defendants gave notice that the contract was cancelled. On the 2nd of August the plaintiffs replied, stating that they would not allow the contract to be cancelled.

On these facts the learned judge told the jury, that as the plaintiffs did not intend to break the contract month by month, and only broke it for the first month's delivery, that did not justify the defendants, in point of law, in cancelling the contract, and left the question of damages to them.

The jury found a verdict for the plaintiffs for £475, leave being reserved to move to enter a verdict for the defendants.

A rule was afterwards obtained upon the ground that under the circumstances the plaintiffs had disentitled themselves to sue for the breach of the contract, and that the defendants were entitled to cancel the contract, and refuse to deliver the residue of the coal.

BLACKBURN, J. I think that the rule ought to be discharged. It cannot be denied that the plaintiffs were bound in every month to send wagons capable of carrying at least 500 tons, and that by failing to perform this term they have committed a breach of the contract; and the question is, whether by this breach the contract was determined. The defendants contend that the sending of a sufficient number of wagons by the plaintiffs to receive the coal was a condition precedent to the continuance of the contract, and they rely upon the terms of the letter of the 1st of August. No sufficient reason has been urged why damages would not be a compensation for the breach by the plaintiffs, and why the defendants should be at liberty to annul the contract; but it is said that *Hoare v. Rennie*, 5 H.&N. 19, is in point, and that we ought not to go counter to the decision of a court of co-ordinate jurisdiction. It is however, difficult to understand upon what principle *Hoare v. Rennie* was decided. If the principle on which that case was decided is that, wherever a plaintiff has broken his contract first he cannot sue for any subsequent breach committed by the defendant, the decision would be opposed to the authority of many other cases. I prefer to follow *Pordage v. Cole*, 1 Wms. Saund. 319. No

reason has been pointed out why the defendants should not have delivered the stipulated quantity of coal during each of the months after July, although the plaintiffs in that month failed to accept the number of tons contracted for. *Hoare v. Rennie* was questioned in *Jonasohn v. Young*, 4 B. & S. 296.

Rule discharged.

QUESTIONS:

1. Is a failure to deliver an instalment of goods more likely to go "to the essence" of a contract than a failure to pay part of the price?
2. Which kind of failure did the plaintiff commit in this case?
3. Did the plaintiff's failure force the defendant to give credit for a period not agreed upon?
4. Was *Blackburn, J.*, actually following *Pordage v. Cole*? He may be referring to the rules in *Serjt. Williams's note*.

MERSEY STEEL & IRON CO., Limited, v. NAYLOR, BENZON & CO.

In the House of Lords, 1884. L.R. 9 App.Cas. 434.

Appeal from an order (dated June 13th, 1882) of the Court of Appeal (Jessel, M. R., Lindley and Bowen, L. JJ.) reversing an order of Lord Coleridge, C. J.

EARL OF SELBORNE, L. C. • • • Upon the other point, I do not think it desirable to lay down larger rules than the case may require, or than former authorities may have laid down for my guidance, or to go into possible cases differing from the one with which we have to deal. I am content to take the rule as stated by Lord Coleridge in *Freeth v. Burr* [L. R. 9 C. P. 208], which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here. Before doing so, however, I must say one or two words in order to show why I cannot adopt Mr. Cohen's argument, as far as it represented the payment by the respondents for the iron delivered as in this case a condition precedent, and coming within

the rules of law applicable to conditions precedent. If it were so of course there would be an end of the case; but to me it is plain beyond the possibility of controversy, that upon the proper construction of this contract it is not and cannot be a condition precedent. The contract is for the purchase of 5,000 tons of steel blooms of the company's manufacture; therefore it is one contract for the purchase of that quantity of steel blooms. No doubt there are subsidiary terms in the contract, as to the time of delivery, "Delivery 1,000 tons monthly commencing January next"; and as to the time of payment, "Payment, net cash within three days after receipt of shipping documents"; but that does not split up the contract into as many contracts as there shall be deliveries for the purpose, of so many distinct quantities of iron. It is quite consistent with the natural meaning of the contract, that it is to be one contract for the purchase of that quantity of iron, to be delivered at those times and in that manner, and for which payment is so to be made. It is perfectly clear that no particular payment can be a condition precedent of the entire contract, because the delivery under the contract was most certainly to precede payment; and that being so, I do not see how, without express words, it can possibly be made a condition precedent to the subsequent fulfilment of the unfulfilled part of the contract, by the delivery of the undelivered steel.

But quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is whether the facts here justify that conclusion? Now the facts relied upon, without reading all the evidence, are these. The company at the time when the money was about to become payable for the steel actually delivered fell into difficulties, and a petition was presented against them. There was a section in the Companies Act 1862 (§ 153), which appeared to the advisers of the purchasers to admit of the construction, that until in those circumstances the petition was disposed of by an order for the company to be wound up or otherwise, there would be no one who could receive, and could give a good discharge for, the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did, evidently bona fide, because they doubted, on the advice of their solicitor, whether that section of the act, as long as the petition was pending, did not make it impossible for them to obtain the discharge to which they had an unquestionable right. And therefore the case which I put during the argument is analogous to that which

according to the advice they received they supposed to exist—namely, the case of a man who has died between the delivery and the time when payment ought to be made, he being the only person to whom payment is due; and of course until there is a legal personal representative of that person no receipt can be given for the money. By the Act of Parliament, in the event of a winding-up order being made, it would date from the time when the petition was presented; and this clause, which no doubt, according to its true construction, only deals with alienations of the property of the company, was supposed by the solicitor of the purchasers to make it questionable whether the payment of a debt due to the company, to the persons who if there had been no petition would have had a right to receive it, might not be held, in the event of a winding-up order being made, to be a payment of the property of the company to a wrong person and therefore an alienation. I cannot ascribe to their conduct, under these circumstances, the character of a renunciation of the contract, a repudiation of the contract, a refusal to fulfil the contract. It is just the reverse; the purchasers were desirous of fulfilling the contract; they were advised that there was a difficulty in the way, and they expressed anxiety that that difficulty should be as soon as possible removed, by means which were suggested to them, and which they pointed out to the solicitors of the company. The company evidently took up the attitude, in that state of things, of treating the default as one which released them from all further obligation. On February 10th, which was before the winding-up order was made, and while that state of things still continued, the company by their secretary wrote to say that they thought (being so far correct and thinking rightly) that the objection was not well founded in law; and they added: "We shall therefore consider your refusal to pay for the goods already delivered as a breach of contract on your part and as releasing us from any further obligations on our part." I think that they were wrong in that conclusion, and that there is no principle deducible from any of the authorities which supports that view of such—I hardly like to call it a refusal—of such a demurrer, such a delay or postponement, under those circumstances.

The company, until they were wound up, never receded from that position which they took up on February 10th, 1881; and it appears to me to be clear that the liquidator adopted it, and never departed from it, and that the repudiation of the contract on insufficient grounds on the part of the company, which had taken place while the petition was pending and before the winding-up order was made, was adhered to after the winding-up order was made, on the part of the liquidator. On the other hand, it seems to me that, fairly and reasonably considered, the conduct of the respondents was justifiable. Upon February 17th, 1881, after the making of the winding-up order, they state that there are instalments which ought to have been delivered, but which

have not been delivered, in respect of which they would have a claim for damages, and that they apprehend that they would have a right to deduct those damages from any payments then due from them; and, according to the view which has been taken in the Court of Appeal of the effect of § 10 of the Act of 1875, and in which view I believe your Lordships agree, that was the right way of looking at the matter. Then the respondents go on to say, that they are prepared to accept all deliveries which the liquidator may make under the contract, and to pay everything due, only requesting that those payments may be considered as made upon this understanding, in substance, that the right to the set-off which exists in law for the damages shall not be prejudiced—a perfectly reasonable, defensible, and justifiable proposal. And the solicitor who writes the letter adds, “Or I think it probable that my clients would consent to accept delivery now and waive the damages,” a thing which in a later letter they express their willingness to do. In my judgment, they have not in any portion of the proceeding acted so as to show an intention to renounce or to repudiate the contract, or to fail in its performance on their part.

Therefore I think that the judgment of the Court below is right, and that this appeal should be dismissed with costs, and I so move your Lordships.

QUESTIONS:

1. Was this contract so divided into parts that each instalment of steel was the agreed exchange for a corresponding part payment?
2. Were the divisions of the contract (instalment of steel and price thereof) independent of each other, so that the buyer's failure to pay for one or more instalments could not suspend the seller's duty to make another delivery?
3. Did the plaintiff have a legal excuse for withholding the first payment?
4. Does the reason for the plaintiff's nonpayment have any effect in determining whether the defendant was justified in refusing to deliver more steel?
5. Was Selborne correct in thinking that, if there was only one entire contract, payment for one instalment of steel could not be a condition precedent to the duty to deliver a later instalment? Is Restatement, Contracts, § 269, applicable?

NOTE

In *FREETH v. BURE*, L.R. 9 C.P. 208 (1874), there was a contract to sell 250 tons pig iron, price payable 14 days after delivery of each instalment. The seller was very dilatory and the buyer feared that the later instalments would not be delivered. The buyer therefore withheld payment on the first instalment to secure himself against loss to be caused

by future non-delivery, thinking erroneously that he was privileged to do this. The seller at once repudiated the contract, prices of iron having risen greatly. The buyer sued for damages for non-delivery and was given judgment, the court holding that his failure to pay on time did not "evince an intention no longer to be bound by the contract" and that a mere partial failure of performance without any abandonment or repudiation of the contract does not terminate the duty of the other party.

Of this case Sir Frederick Pollock (Wald's Pollock on Contracts [Williston's Ed.] 330) says: "As a positive test the rule of *Freeth v. Burr* is doubtless correct; that is, a party who by declaration or conduct, 'evinces an intention no longer to be bound by the contract,' entitles the other to rescind, and this whether he has or has not, apart from this, committed a breach of the contract going to the whole of the consideration. But it seems doubtful whether the test will hold negatively. Can an intention to repudiate the contract be necessary as well as sufficient to constitute a total and irreparable breach? Can there not be, without any such intent, a failure in a vital part of the performance which destroys the benefit of the contract as a whole? * * * All that the authorities require of us is not to presume delay in payment, as distinguished from delivery, to be in itself a total breach."

NORRINGTON v. WRIGHT et al.

Supreme Court of the United States, 1885.
115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366.

GRAY, J. This was an action of assumpsit, brought by Arthur Norrington, a citizen of Great Britain, trading under the name of A. Norrington & Co., against James A. Wright and others, citizens of Pennsylvania, trading under the name of Peter Wright & Sons, upon the following contract:

"Philadelphia, January 19, 1880.

"Sold to Messrs, Peter Wright & Sons, for account of A. Norrington & Co., London: Five thousand (5,000) tons old T iron rails, for shipment from a European port or ports, at the rate of about one thousand (1,000) tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880, at forty-five dollars (\$45.00) per ton of 2240 lbs. customhouse weight, ex ship Philadelphia. Settlement, cash, on presentation of bills accompanied by custom-house certificate of weight. Sellers to notify buyers of shipments with vessels' names as soon as known by them. Sellers not to be compelled to replace any parcel lost after shipment. Sellers, when possible, to secure to buyers right to name discharging berth of vessels at Philadelphia.
Edward J. Etting, Metal Broker."

* * * The plaintiff shipped from various European ports 400 tons by one vessel in the last part of February, 885 tons by two vessels in March, 1,571 tons by five vessels in April, 850 tons by three vessels

in May, 1,000 tons by two vessels in June, and 300 tons by one vessel in July, and notified to the defendants each shipment. The defendants received and paid for the February shipment upon its arrival in March, and in April gave directions at what wharves the March shipments should be discharged on their arrival; but on May 14th, about the time of the arrival of the March shipments, and having been then for the first time informed of the amounts shipped in February, March, and April, they gave Etting written notice that they should decline to accept the shipments made in March and April, because none of them were in accordance with the contract; and in answer to a letter from him of May 16th, wrote him on May 17th, as follows: "We are advised that what has occurred does not amount to an acceptance of the iron under the circumstances, and the terms of the contract. You had a right to deliver in parcels, and we had a right to expect the stipulated quantity would be delivered until the time was up in which that was possible. Both delivering and receiving were thus far conditional on there being thereafter a complete delivery in due time and of the stipulated article. On the assumption that this time had arrived, and that you had ascertained that you did not intend to, or could not, make any further deliveries for the February and March shipments, we gave you the notice that we declined accepting those deliveries. As to April, it is too plain, we suppose, to require any remark. If we are mistaken as to our obligation for the February and March shipments, of course we must abide the consequences; but if we are right, you have not performed your contract, as you certainly have not for the April shipments. There is then the very serious and much debated question, as we are advised, whether the failure to make the stipulated shipments in February or March has absolved us from the contract. If it does, we of course will avail ourselves of this advantage."

On May 18th Etting wrote to the defendants, insisting on their liability for both past and future shipments, and saying, among other things: "In respect to the objection that there had not been a complete delivery in due time of the stipulated article, I beg to call your attention to the fact that while the contract is for five thousand tons, it expressly stipulates that deliveries may be made during six months, and that they are only to be at the rate of about one thousand tons per month." As to April, while it seems to me 'too plain to require any remark,' I do not see how it can seem so to you, unless you intend to accept the rails. If you object to taking all three shipments made in that month, I shall feel authorized to deliver only two of the cargoes, or, for that matter, to make the delivery of precisely one thousand tons. But I think I am entitled to know definitely from you whether you intend to reject the April shipments, and, if so, upon what ground, and also whether you are decided to reject the remaining shipments under the contract. You say in your last paragraph that you shall avail yourselves

of the advantage, if you are absolved from the contract; but, as you seem to be in doubt whether you can set up that claim or not, I should like to know definitely what is your intention."

On May 19th the defendants replied: "We do not read the contract as you do. We read it as stipulating for monthly shipments of about one thousand tons, beginning in February, and that the six months' clause is to secure the completion of whatever had fallen short in the five months. As to the meaning of 'about,' it is settled as well as such a thing can be; and certainly neither the February, March, nor April shipments are within the limits. As to the proposal to vary the notices for April shipments, we do not think you can do this. The notice of the shipments, as soon as known, you were bound to give, and cannot afterwards vary it if they do not conform to the contract. Our right to be notified immediately that the shipments were known is as material a provision as any other, nor can it be changed now in order to make that a performance which was no performance within the time required." "You ask us to determine whether we will or will not object to receive further shipments because of past defaults. We tell you we will if we are entitled to do so, and will not if we are not entitled to do so. We do not think you have the right to compel us to decide a disputed question of law to relieve you from the risk of deciding it yourself. You know quite as well as we do what is the rule and its uncertainty of application." On June 10th Etting offered to the defendants the alternative of delivering to them one thousand tons strict measure on account of the shipments in April. This offer they immediately declined. On June 15th Etting wrote to the defendants that two cargoes, amounting to 221 tons, of the April shipments, and two cargoes, amounting to 650 tons, of the May shipments (designated by the names of the vessels), had been erroneously notified to them, and that about 900 tons had been shipped by a certain other vessel on account of the May shipments. On the same day the defendants replied that the notification as to April shipments could not be corrected at this late date, and after the terms of the contract had long since been broken. From the date of the contract to the time of its rescission by the defendants, the market price of such iron was lower than that stipulated in the contract, and was constantly falling. After the arrival of the cargoes, and their tender and refusal, they were sold by Etting, with the consent of the defendants, for the benefit of whom it might concern.

At the trial the plaintiff contended (1) that under the contract he had six months in which to ship the 5,000 tons, and any deficiency in the earlier months could be made up subsequently, provided that the defendants could not be required to take more than 1,000 tons in any one month; (2) that, if this was not so, the contract was a divisible contract, and the remedy of the defendants for a default in any month

was not by rescission of the whole contract, but only by deduction of the damages caused by the delays in the shipments on the part of the plaintiff. But the court instructed the jury that if the defendants, at the time accepting the delivery of the cargo paid for, had no notice of the failure of the plaintiff to ship about 1,000 tons in the month of February, and immediately upon learning that fact gave notice of their intention to rescind, the verdict should be for them. The plaintiff excepted to this instruction, and, after verdict and judgment for the defendants, sued out this writ of error.

In the contracts of merchants, time is of the essence. The time of shipment is the usual and convenient means of fixing the probable time of arrival, with a view of providing funds to pay for the goods, or of fulfilling contracts with third persons. A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or non-performance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 Best & S. 751; *Bowes v. Shand*, 2 App.Cas. 455; *Lowber v. Bangs*, 2 Wall. 728, 17 L.Ed. 768; *Davison v. Von Lingen*, 113 U.S. 40, 5 S.Ct. 346, 28 L.Ed. 885.

The contract sued on is a single contract for the sale and purchase of 5,000 tons of iron rails, shipped from a European port or ports for Philadelphia. The subsidiary provisions as to shipping in different months, and as to paying for each shipment upon its delivery, do not split up the contract into as many contracts as there shall be shipments, or deliveries of so many distinct quantities of iron. *Mersey S. & I. Co. v. Naylor*, 9 App.Cas. 434, 439. The further provision that the sellers shall not be compelled to replace any parcel lost after shipment, simply reduces, in the event of such a loss, the quantity to be delivered and paid for. The times of shipment, as designated in the contract, are "at the rate of about 1,000 tons per month, beginning February, 1880, but whole contract to be shipped before August 1, 1880." These words are not satisfied by shipping one-sixth part of the 5,000 tons, or about 833 tons, in each of the six months which begin with February and end with July. But they require about 1,000 tons to be shipped in each of the five months from February to June inclusive, and allow no more than slight and unimportant deficiencies in the shipments during those months to be made up in the month of July. The contract is not one for the sale of a specific lot of goods, identified by independent circumstances,—such as all those deposited in a certain warehouse, or to be shipped in a particular vessel, or that may be manufactured by the seller, or may be required for use by the buyer, in a certain mill,—in which case the mention of the quantity, accompanied by the qualification of "about," or "more or less," is re-

garded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it. But the contract before us comes within the general rule: "When no such independent circumstances are referred to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight." *Brawley v. United States*, 96 U.S. 168, 171, 172, 24 L.Ed. 622. The seller is bound to deliver the quantity stipulated, and has no right either to compel the buyer to accept a less quantity, or to require him to select part out of a greater quantity; and when the goods are to be shipped in certain proportions monthly, the seller's failure to ship the required quantity in the first month gives the buyer the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

The plaintiff, instead of shipping about 1,000 tons in February and about 1,000 tons in March, as stipulated in the contract, shipped only 400 tons in February, and 885 tons in March. His failure to fulfill the contract on his part in respect to these first two instalments justified the defendants in rescinding the whole contract, provided they distinctly and seasonably asserted the right of rescission. The defendants, immediately after the arrival of the March shipments, and as soon as they knew that the quantities which had been shipped in February and in March were less than the contract called for, clearly and positively asserted the right to rescind, if the law entitled them to do so. Their previous acceptance of the single cargo of 400 tons shipped in February was no waiver of this right, because it took place without notice or means of knowledge that the stipulated quantity had not been shipped in February. The price paid by them for that cargo being above the market value, the plaintiff suffered no injury by the omission of the defendants to return the iron; and no reliance was placed on that omission in the correspondence between the parties.

The case wholly differs from that of *Lyon v. Bertram*, 20 How. 149, 15 L.Ed. 847, in which the buyer of a specific lot of goods accepted and used part of them with full means of previously ascertaining whether they conformed to the contract. The plaintiff, denying the defendants' right to rescind, and asserting that the contract was still in force, was bound to show such performance on his part as entitled him to demand performance on their part, and, having failed to do so, cannot maintain this action.

For these reasons we are of opinion that the judgment below should be affirmed. But as much of the argument at the bar was devoted to a discussion of the recent English cases, and as a diversity in the

law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated, it is proper to add that upon a careful examination of the cases referred to they do not appear to us to establish any rule inconsistent with our conclusion.

[The court here discussed *Hoare v. Rennie*, 5 Hurl. & N. 19; *Simpson v. Crippin*; *Bowes v. Shand*, 2 App.Cas. 455; and other cases.]

The plaintiff in the case at bar greatly relied on the very recent decision of the House of Lords in *Mersey Co. v. Naylor*, 9 App.Cas. 434, affirming the judgment of the Court of Appeal in 9 Q.B.Div. 648, and following the decision of the Court of Common Pleas in *Freeth v. Burr*, L.R. 9 C.P. 208. But the point there decided was that the failure of the buyer to pay for the first instalment of the goods upon delivery does not, unless the circumstances evince an intention on his part to be no longer bound by the contract, entitle the seller to rescind the contract, and to decline to make further deliveries under it. And the grounds of the decision, as stated by Lord Chancellor Selborne in moving judgment in the House of Lords, are applicable only to the case of a failure of the buyer to pay for, and not to that of a failure of the seller to deliver, the first instalment. * * *

Being of opinion that the plaintiff's failure to make such shipments in February and March as the contract required prevents his maintaining this action, it is needless to dwell upon the further objection that the shipments in April did not comply with the contract, because the defendants could not be compelled to take about 1,000 tons out of the larger quantity shipped in that month, and the plaintiff, after once designating the names of vessels, as the contract bound him to do, could not substitute other vessels. See *Busk v. Spence*, 4 Camp. 329; *Graves v. Legg*, 9 Exch. 709; *Reuter v. Sala*, 4 C.P.Div. 239.

Judgment affirmed.

QUESTIONS:

1. Was shipment of an exact amount within an exact time, a condition of the buyer's duty to accept and pay?
2. What do you think of the generalization, "In contracts of merchants, time is of the essence"? Would it be equally true of the contracts of farmers and teachers?
3. Why is the buyer privileged to refuse to take more of the rails and yet to retain the first 400 tons?
4. Was the attitude of the defendant reasonable, as expressed in his letter of May 19?
5. In determining whether shipment of the exact amount within the agreed time was essential, should the court consider the buyer's purposes and needs, the extent of the harm done by delay, and his motive in rejecting the goods? See Restatement, Contracts, § 276.

JENSEN v. GOSS et al.

District Court of Appeal of California, 1919. 39 Cal.App. 427, 179 P. 225.

Action by Fred Jensen against Charles E. Goss and another. From a judgment for plaintiff, defendants appeal. Reversed.

WASTE, P. J. This is an appeal from a judgment for \$231 for damages found to have been suffered by plaintiff by reason of the failure of defendants to deliver to him hay under a written contract dated June 1, 1916, by the terms of which the hay was to be paid for "on the 13th day of each month following delivery." The defense is that plaintiff refused to pay for the hay as required by the contract, thereby releasing defendants from further performance on their part.

The testimony of and in behalf of defendants is corroborated by the evidence and admissions of plaintiff while on the stand, and fails to support the findings of the trial court. Plaintiff never met his obligations to pay as required. On the 15th day of July, the first month following deliveries of hay, one of the defendants personally called on him and demanded payment of the "money due according to his contract." Plaintiff promised "that in a matter of a few days he would pay." He made no payment until the 28th of the month, when he paid \$275 on account.

Defendants continued to deliver hay as required by the plaintiff, and the latter continued his dilatory payments. Statements of the account were regularly sent to him on the 13th of each month. Collectors of the defendants repeatedly called on him. Members of the firm (defendants) as repeatedly conversed with him on the telephone, demanding payment. This condition of affairs continued until October 3d, after which defendants delivered no more hay. At that time plaintiff owed them \$920, on account of which he made three payments of \$200 each, the last on December 12th.

On December 14th one of the defendants personally called on plaintiff and demanded payment of \$320.22, the balance due. Plaintiff, admitting that he "would pay him, that he had some money then," refused to pay until defendants delivered two more carloads of hay. There was some conversation relative to the quality of the hay delivered by the defendants, but refusal to pay the balance due was not predicated on that ground. Defendant told him that he considered the contract canceled. The same day defendants' attorneys made demand for "immediate payment of the" balance due, and notified plaintiff that, unless such payment was made upon receipt of the demand and notice, defendants would, by reason of the breach of the contract by plaintiff in failing to make payments for said hay as provided therein, refuse to deliver any further amount of hay.

Plaintiff did not pay the balance until December 21st, at which time, through his attorneys, he requested the defendants to deliver two carloads of hay. No hay being delivered, the plaintiff four or five days later went to the barn of defendants and personally demanded delivery of the hay, and was informed by them that the contract was at an end. After giving further orders to defendants for delivery of hay, no one of which was filled, plaintiff commenced this action.

In view of the evidence in the case, we have looked to respondent to sustain the findings and judgment of the trial court by weight of authority. This he has not done. None of the cases cited by him, so far as we are able to find, relate to a mercantile contract such as the one here under consideration. They have to do with purchase of real estate on the instalment plan, forfeitures, and equitable rights or leasehold interests. "In mercantile contracts, such as contracts for the manufacture and sale of goods and the like, it is generally held that the parties have intended to make time the essence of the contract." 13 Corpus Juris, 688, and cases cited. The defendants were justified in rescinding the contract when plaintiff showed a clear intention to violate its provisions, and to withhold payments due until the delivery of more hay. *Minaker v. California Canneries Co.*, 138 Cal. 239, 71 P. 110.

The rights of defendants to rescind were not waived, nor were they affected, by the fact that they did not stop delivery of hay immediately after failure of plaintiff to make his first payment as required. They had the right to rely, for a reasonable length of time at least, upon the promise of plaintiff to pay. *San Francisco Bridge Co. v. Dumbarton Land & Improvement Co.*, 119 Cal. 272, 51 P. 335.

Had plaintiff rested his refusal to pay on the ground of a failure to deliver the quality of hay required by the contract, such position would not aid him in this action. He could not offset any damages for such alleged breach on the part of defendants without showing performance on his own part of his own agreement. *Minaker v. California Canneries Co.*, supra.

For the reasons above stated, the judgment is reversed.

HELGAR CORP. v. WARNER'S FEATURES, Inc.

Court of Appeals of New York, 1918. 222 N.Y. 449, 119 N.E. 113.

Action by the Helgar Corporation against Warner's Features, Incorporated. From a judgment of the Appellate Division, modifying and affirming a judgment entered on a referee's report (171 App.Div. 910, 154 N.Y.S. 1125), both parties appeal. Affirmed in part and reversed in part.

CARDOZO, J. The plaintiff's assignor made a contract with the defendant for the sale of films for moving pictures. At least one film was to be delivered every month. Deliveries were to begin in November, 1913, and to end in October, 1914. The price was fixed at eight cents per foot, and payment for each film was to be made within 30 days after exhibition to the public. By way of additional compensation, the defendant was also to pay one-half of the net profits realized by it as the result of foreign sales.

The plaintiff, having received an assignment of the contract, delivered pictures of the value at the contract rate of nearly \$10,000. The price was payable on December 24, 1913. The finding is that payment was then demanded, and that "the defendant refused and neglected to pay the same or any part thereof, nor did the defendant offer or tender a part payment of said amount or offer to pay the same in instalments." Two days later this action was begun. The plaintiff alleged its election to terminate the contract by reason of the breach. Judgment was demanded for the price of the films delivered, and also for the profits that would have been gained through the completion of the contract. The referee gave judgment for the price, but refused to award the profits. In his opinion, he put his refusal upon the ground that the failure to make punctual payment was not accompanied by acts or words evincing repudiation or abandonment. The Appellate Division added \$2,000 to the judgment. This was the estimated value of foreign rights which attached to the sales already made. That value was thought to be recoverable as an incident to the price. With this modification, the judgment was unanimously affirmed. There are cross-appeals in this court.

The rights of vendor and vendee upon the breach of an instalment contract are now regulated by statute. The rule is to be found in section 126, subdivision 2, of the statute governing sales of goods (Personal Prop.Law, Consol.Laws, c. 41, amended by L.1911, c. 571): "Where there is a contract to sell goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving rise to a claim for compensation, but not to a right to treat the whole contract as broken."

The statute thus establishes a like test for vendor and for vendee. The earlier cases may not be wholly uniform. *Wharton & Co. v. Winch*, 140 N.Y. 287, 35 N.E. 589; *Kokomo Strawboard Co. v. Inman*, 134 N.Y. 92, 31 N.E. 248; *Wolfert v. Caledonia S. I. Co.*, 195 N.Y.

118, 88 N.E. 24, 21 L.R.A., N.S., 864. We do not need to reconcile them. We have departed from the rule of the English statute (St. 56 & 57 Vict. c. 71, § 31, subd. 2), which keeps the contract alive unless the breach is equivalent to repudiation. Note of Commissioners on Uniform Laws, American Uniform Commercial Acts, p. 98; Williston on Sales, pp. 809, 810; 25 Halsbury, Laws of England, p. 220. We have established a new test which weighs the effect of the default, and adjusts the rigor of the remedy to the gravity of the wrong. "It depends in each case on the terms of the contract and the circumstances of the case" whether the breach is "so material" as to affect the contract as a whole.

The answer to that question must vary with the facts (Williston on Sales, p. 810). Default in respect of one instalment, though falling short of repudiation, may under some conditions, be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing but a technical omission to observe the letter of a promise. Williston on Sales, p. 823; *Nat. Machine Co. v. Standard Co.*, 181 Mass. 275, 279, 63 N.E. 900; *Wharton & Co. v. Winch*, *supra*. General statements abound that, at law, time is always of the essence. Williston, *supra*; *Norrington v. Wright*, 115 U.S. 188, 6 S.Ct. 12, 29 L.Ed. 366; *Booth v. S. D. Rolling Mills Co.*, 60 N.Y. 487; *Schmidt v. Reed*, 132 N.Y. 108, 30 N.E. 373. For some purposes this is still true. The vendor who fails to receive payment of an instalment the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end. Williston, p. 823; *Beatty v. Howe Lumber Co.*, 77 Minn. 272, 79 N.W. 1013, and cases there cited; *Graves v. White*, 87 N.Y. 463, 466. That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. Whatever the rule may once have been, this is the test that is now prescribed by statute. The failure to make punctual payment may be material or trivial according to the circumstances. We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. If the default is the result of accident or misfortune, if there is a reasonable assurance that it will be promptly repaired, and if immediate payment is not necessary to enable the vendor to proceed with performance, there may be one conclusion. If the breach is wilful, if there is no just ground to look for prompt reparation, if the delay has been substantial, or if the needs of the vendor are urgent so that continued performance is imperiled, in these and in other circumstances, there may be another conclusion. Sometimes the conclusion will follow from all the circumstances as an inference of law to be drawn by the judge; sometimes, as an inference of fact to be drawn by the jury.

The findings in this case do not enable us to say that the plaintiff was justified in its precipitate election to declare the contract at an end. There is a finding that payment was refused. That is inconclusive by itself. The refusal may have been nothing more than a declaration of inability to make payment on the instant. There is a finding that the defendant did not offer part payment or payment in instalments. That again is inconclusive. It is not an ultimate, but at most an evidentiary, fact. The circumstances may none the less have indicated a temporary default to be followed promptly by full payment. The referee must have interpreted the situation in that way, for he states in his opinion that the default was not accompanied by any act or declaration that would indicate abandonment. If we were at liberty to look into the evidence and draw our own inferences we might reach a contrary conclusion. But the evidence is not open to our scrutiny. The plaintiff has not requested the referee to find the ultimate fact on which the right to the recovery of profits depends. It has not requested a finding that the breach was so material as to justify its hasty election to declare the contract at an end. It has not requested a finding of the circumstances preceding or accompanying the default. There is not even a request which brings before us in due form the ruling that all profits must be excluded. The only request made specifies the extent of the loss, and includes elements of damage which the referee, in any view of the breach, was at liberty to reject. In these circumstances, we must hold the plaintiff to the rule which requires a request to find and an exception. *Sherman v. Foster*, 158 N.Y. 587, 597, 53 N.E. 504; *Ostrander v. Hart*, 130 N.Y. 406, 414, 29 N.E. 744; *Burnap v. Nat. Bank of Potsdam*, 96 N.Y. 125, 131; *Thomson v. Bank of B. N. A.*, 82 N.Y. 1; *Drake v. N. Y. Iron Mine*, 156 N.Y. 90, 50 N.E. 785. The findings as made leave the character of the default equivocal. In the absence of an appropriate request for other findings, the evidence is not before us. The rule would be different if we were asked to go behind the findings for the purpose of affirmance. *Ogden v. Alexander*, 140 N.Y. 356, 35 N.E. 638; *Ostrander v. Hart*, *supra*. The plaintiff asks us to go behind them for the purpose of reversal. Its appeal must therefore fail.

The defendant complains of the increase of the judgment directed at the Appellate Division. We think the increase was erroneous. We have seen that the plaintiff was not at liberty to treat the entire contract as broken. Its cause of action was limited to the recovery of payments in default. But there has thus far been no default in respect of foreign sales. No foreign sales have yet been made. The award in that respect is an estimate of sales to be made hereafter. Until the conditions prescribed by the contract have been satisfied, the extra compensation is not payable. The plaintiff's recovery must be limited to payments already due.

The judgment of the Appellate Division to the extent that it modifies the judgment entered on the report of the referee should be reversed, and the judgment entered upon such report affirmed, with costs in this court to the defendant.

QUESTIONS:

1. Did the plaintiff have a right to damages for breach?
2. Why was not the defendant's nonpayment a "total breach"? See Restatement, Contracts, §§ 313, 317.
3. Did the defendant's failure to pay on time privilege the plaintiff to refuse further deliveries? See Restatement, Contracts, §§ 275, 276.
4. Could the plaintiff maintain an action of debt or indebitatus assumpsit for the payment due? Did he maintain such an action in fact?
5. Would a buyer's failure to establish a "banker's credit" exactly on time discharge a manufacturer from the duty to proceed with deliveries? See *Vulcan Trading Corporation v. Kokomo Steel & Wire Co.* (C.C.A.) 268 F. 913 (1920).

(E) INSTALMENT CONTRACTS—LABOR AND CONSTRUCTION

HARTON v. HILDEBRAND et al.

Supreme Court of Pennsylvania, 1911. 230 Pa. 335, 79 A. 571.

Suit by William E. Harton against William E. Hildebrand and another. From a decree dismissing the bill, plaintiff appeals. Reversed, and bill reinstated.

MESTREZAT, J. We do not agree with the learned court below in dismissing this bill, which was filed to restrain the defendant Howley from selling and disposing of the houses until he had paid the debts due from Hildebrand, the other defendant, to the plaintiff Harton.

No exceptions were filed by either party to the findings of fact made by the learned trial court, and therefore the case must be disposed of upon those facts. They may be summarized as follows:

On June 1, 1901, Hildebrand entered into a contract with Harton for the erection of eight dwelling houses on certain lots fronting on Brackenridge avenue in the thirteenth ward of the city of Pittsburgh. On June 9, 1901, Frank P. Howley made a deed to Hildebrand for these

lots, and he proceeded at once with the erection of the buildings. On August 7, 1901, Michael P. Howley, father of Frank P. Howley, conveyed to Hildebrand 26 lots of ground on Avalon street in the thirteenth ward of the city of Pittsburg. Judgment notes were given to secure the purchase money, but they were withheld from record until the Prudential Trust Company, which was to furnish the money for the erection of the houses, had put on record as a first lien a mortgage from Hildebrand. On September 26, 1901, Hildebrand made a contract with Harton for the erection of 19 houses on the Avalon street property. This contract provided that the buildings should all be finished by April 1, 1902, and that the contract price should be \$62,149, and should be paid "by the owner to the contractor in instalments as follows: 70 per cent of the above amount to be paid on estimated amount of work done as the buildings progress."

The Brackenridge avenue houses were completed in March, 1902. The houses on Avalon street were not finished or nearly finished by April 1, 1902, and Hildebrand and Harton agreed in the winter of 1901-1902 that no attempt should be made in the cold weather to complete these houses on April 1st. The contract price for the Brackenridge avenue houses was \$18,000 and when they were completed in March, 1902, there was due from Hildebrand to Harton \$5,573.61.

Harton began the Avalon street houses soon after making the contract and carried on the work until December when it was suspended and began work again about March 1, 1902, and continued until about May 20, 1902, only nine of the houses, however, being begun at this or any later time by him; this action on his part being apparently acquiesced in by Hildebrand. On the latter date Harton presented to Hildebrand an estimate of the work already done on these houses, showing the value of the work done to date, the 70 per cent of the amount required to be paid in instalments, the amount of extra work done, the aggregate of the amount already paid him, and the balance of \$2,496.26, which was then due and payable. This statement was admitted by Hildebrand in writing to be correct.

In May, 1902, a number of mechanics' liens were filed against the Brackenridge property; but no liens were ever filed against the Avalon street houses.

On May 22, 1902, Harton quit work on the Avalon street houses and declared that he would not go on with the contract because of the failure of Hildebrand to pay him the sum owing on the first and on the second contracts as above stated.

On June 14, 1902, Hildebrand conveyed to Frank P. Howley both the Brackenridge avenue and Avalon street properties, and as part of the same transaction an agreement was entered into between Hildebrand and Howley by which the latter accepted the conveyance, sub-

ject to all legal claims for labor and materials furnished in and about the erection of the houses. By this agreement, Howley assumed payment of these claims.

On July 31, 1902, Howley wrote Harton that if the latter was willing to go on under the contract he would aid him as much as he could in the construction of the buildings; that if he declined to go on he would complete the buildings himself. This notice was given under the sixth paragraph of the contract relating to the Avalon street houses, which provides that, if the contractor at any time during the progress of the work fails to supply material or workmen, or causes any unreasonable suspension of work, the owner may terminate the contract and finish the buildings at the contractor's expense. Immediately upon the receipt of this communication Harton replied that as there was owing to him for a long time at least \$2,500 on this contract which had not been paid, and as it was impossible by reason of the nonpayment for him to carry out the contract, that he thereupon declared the contract null and void. Howley then proceeded to finish the nine houses, which cost him \$12,548 more than the contract price. * * *

The parties agree that the only question in the case is whether, under the circumstances existing at the time, Harton was justified in stopping work on the Avalon street houses on May 22, 1902, and, subsequently, in refusing to proceed with it on notice by Frank P. Howley, who was then the owner of the property. As noted above, the learned court below held that "under all the circumstances it was altogether unreasonable for Harton to rescind the contract for any such delay of payment as this." The court, it will be observed, does not find that the amount of the estimate of May 20, 1902, is not correct or was not due Harton at that date, or that Howley was dissatisfied with it; nor does the court base its decree against the plaintiff on either of those grounds. It, therefore, becomes important to ascertain what the circumstances were on May 22, 1902, when Harton declined to proceed under the Avalon street contract, and on August 1, 1902, when he declared the contract rescinded. While, as suggested by the counsel for the appellee, a balance due Harton under the Brackenridge avenue contract has no bearing upon the rights of the parties under the Avalon street contract and would not justify the rescission of the latter contract by Harton, yet it may not be out of place to note the fact that, at the date of the suspension of work by Harton on the Avalon street houses, Hildebrand was indebted to him under the Brackenridge avenue contract, which had been fully performed by Harton, in the sum of over \$5,500. For the payment of this balance, Harton had no security, and Hildebrand had no property out of which it could be collected. * * *

The contract price was to be paid, as stipulated in the agreement, "by the owner to the contractor in instalments as follows: 70 per cent

of the above amount to be paid on estimated amount of work done as the buildings progress." It is manifest, therefore, that estimates were to be made as the work progressed. While the contract does not state when the estimates were to be made, yet it clearly contemplated that when an estimate had been made that 70 per cent of it was then due and payable. On May 20, 1902, an estimate of the work done and the material furnished was made, and it appeared by the estimate that there was due and payable from Hildebrand to Harton on the Avalon street contract the sum of \$2,496.26. Hildebrand was the owner of the property, and the money was due from him. It is not pretended that he made any offer to pay it or secure it. At that time he had no property, except the Brackenridge avenue and Avalon street properties. As found by the court, there was yet due Harton on the Brackenridge avenue contract over \$5,500. That property was incumbered by a first mortgage to the Prudential Trust Company and by judgments entered on notes for the purchase price of the land. Hildebrand had signed a no-lien contract. By agreement of the parties another Prudential Trust Company mortgage of \$60,000 was a first lien on the Avalon street property, and it was also subject to the judgments entered for the purchase money. It is therefore apparent that, for the balance due Harton for labor and material furnished in the construction of the Avalon street houses, recourse to that property or the Brackenridge avenue property would avail him nothing. Hildebrand was without means, and a pursuit of him by Harton would have simply resulted in the pursuer being mulcted in the cost in a vain endeavor to collect the claim.

These were the conditions existing at the time the estimate of the balance due Harton on the Avalon street contract was made on May 20, 1902, and on the second day thereafter when he declined to proceed with the work until the balance was paid. The same conditions prevailed on August 1, 1902, when he rescinded the contract. Both parties consented to the jurisdiction of equity, and that a chancellor should adjust their differences in accordance with equitable principles. Was it unreasonable, as held by the court below, for Harton to stop work under these circumstances? Was he compelled to proceed with the work, put his labor and material in it, and thus add to the amount already owed him by Hildebrand, with neither property nor any responsible party in view from whom he could compel payment? Is there any principle of equity or rule of law which would require him under these circumstances to proceed with the work simply for the benefit of Hildebrand's creditors and, possibly, for the improvement of Howley's property? Having due regard for the rights of the parties under the stipulations of their contract, these questions permit of but one answer, and that is in the negative. * * *

Hildebrand, the owner, had breached the Avalon street contract, and he was not in a position to demand its enforcement. Howley occupied no better position. The contract was entire as to the erection of the 19 houses, and divisible and severable as to the payment of the instalments for the work and material furnished. Hildebrand's failure therefore, to perform his part of the agreement by paying the estimate of May 20, 1902, gave Harton the right to declare the contract at an end. *Rugg v. Moore*, 110 Pa. 236, 1 A. 320; *Easton v. Jones*, 193 Pa. 147, 150, 44 A. 264, 265. In the last case it is said: "While plaintiff's failure in ability or intention to complete the work will be a good defense, even to an action for a payment stipulated to become due on a state of progress shown to be reached, yet a refusal to pay such an instalment without that or other legal excuse is such a breach of the contract as will justify a rescission, and entitle the plaintiff to recover pro tanto for the work." * * *

Decree reversed and bill reinstated.

QUESTIONS:

1. Did Hildebrand have a right to damages against Harton for stopping work?
2. After stopping work, did Harton have a right to the full contract price?
3. Did Hildebrand's breach prevent Harton from having legal power to create a right to the full price?
4. Did Harton have a right to compensatory damages for total breach? See Restatement, Contracts, §§ 313, 317.
5. Did Hildebrand's breach of the Brackenridge avenue contract affect Harton's duties under the Avalon contract?
6. Is the fact that the property was covered with liens and mortgages material?
7. Was the contract both "divisible" and "entire"?

NOTE

"As is usually the case with building contracts, it evidently was in the contemplation of the parties that the contractor could not be expected to finance the operation to completion without receiving the stipulated payments on account as the work progressed. In such cases a substantial compliance as to advance payments is a condition precedent to the contractor's obligation to proceed." *Guerini Stone Co. v. P. J. Carlin Const. Co.*, 248 U.S. 334, 39 S.Ct. 102, 63 L.Ed. 275 (1919).

If a construction contract specifies no time for payment, all the work must be substantially completed before the money is due. Restatement, Contracts, § 270; *Stewart v. Newbury*, 220 N.Y. 379, 115 N.E. 984, 2 A.L.R. 519 (1917).

ST. REGIS PAPER CO. v. SANTA CLARA LUMBER CO.

Court of Appeals of New York, 1906. 186 N.Y. 89, 78 N.E. 701.

Action by the St. Regis Paper Company against the Santa Clara Lumber Company. From a judgment of the Appellate Division of the Third Department (105 App.Div. 341, 42 Misc. 102, 93 N.Y.S. 1146), affirming a judgment entered on a decision of the Special Term (105 App.Div. 341, 85 N.Y.S. 1034) in favor of defendant, plaintiff appeals. Reversed, and new trial granted.

CULLEN, C. J. This action was brought for the specific performance of a contract whereby the defendant agreed to cut and deliver to the plaintiff from 11,000 to 13,000 cords of pulp wood a year from a large tract of wild lands in the Adirondacks owned by the defendants, during the term of 10 years, at a price of \$9 a cord, with the privilege to the plaintiff to obtain a renewal of the contract for an additional term of 10 years at \$12 per cord. The case has been before this court on a previous appeal and is reported in 173 N.Y. 149, 65 N. E. 967. In that report will be found a statement of the parts of the contract material to this controversy. On the former appeal, this court, reversing the decisions of the courts below, held that the contract was one the performance of which a court of equity could properly enforce. After our decision the case was tried on its merits and judgment was rendered by the trial court in favor of the defendant on the ground that the plaintiff had made default in the performance of that provision of the contract whereby the plaintiff agreed to make advances to the defendant for the cost of cutting and getting out the wood. The provision is as follows: "Party of the first part (defendant) shall commence to cut wood on or about the 15th day of August of each year for the following season's supply. Party of the second part (plaintiff) shall make such advances of money to party of the first part as it may request during the progress of the work, but party of the second part need not advance more than approximately the cost of the work done. Payment for the said wood shall be made by the party of the second part to the party of the first part on the 15th day of each month for the wood delivered during the next preceding calendar month, after first deducting from the aggregate of the purchase price of the said wood one-tenth of the advances made upon that season's operations until such advances have been repaid." The judgment of the Special Term was affirmed by the Appellate Division by a divided court, and from the judgment of affirmance this appeal is taken.

The contract, dated the 29th day of August, 1899, was executed by the parties about the 1st of October in that year. For some time prior to the execution of the contract, however, the parties had been in nego-

tiation concerning it, and during that interval, in contemplation of the contract, the defendant had built roads, constructed permanent camps, and incurred expenses for various items necessary for the prosecution of the work. Under the contract, the wood was to be delivered to the plaintiff at any point, the expense of the transportation to which should not exceed the cost of the transportation from Tupper Lake Junction to Watertown, N. Y., and the delivery was to commence on or about the 1st day of June in each year. The ordinary method of taking out wood was to cut it, and haul it to the streams during the winter season, whence the next spring it was floated to the point of delivery. No deliveries would be, therefore, made to the plaintiff till June, 1900. On October 7th the defendant demanded the sum of \$2,500 on account of expenses already incurred by it, with which demand the plaintiff complied on October 18th. On October 26th the defendant demanded the sum of \$5,000 on account, and on November 17th an additional sum of \$5,000. On account of these two demands, the plaintiff, on December 5th, paid the sum of \$7,500. Now, while the whole controversy and the decision of the court below proceed on the failure of the plaintiff to properly respond to the defendant's demands for advances, it would be impracticable to give within the limits of an opinion even an abstract of the details of the correspondence between the parties. It is sufficient to say that from October 26, 1899, to March 24th following, the defendant made repeated demands for advances, while the plaintiff insisted that the advances asked for by the defendant were largely in excess of those ordinarily made for the purpose of taking pulp wood from the forest. On March 24, 1900, which was the date of the last demand by the defendant prior to its notification to the plaintiff that the contract was rescinded by it, the account between the parties, as found by the trial court, stood as follows: The defendant had expended \$37,132.80; the plaintiff had advanced the defendant the sum of \$25,000.

On March 24th the defendant sent to the plaintiff the following letter: "Malone, N. Y., March 24th, 1900. The St. Regis Paper Co., Watertown, N. Y.—Dear Sirs: In response to my notice to you some time since you sent me check for \$5,000 on the Santa Clara Lumber Co. pulp-wood contract, which I at once forwarded to the company in New York. I have to-day received a letter from the company, saying that they have received \$25,000 which was \$12,500 short of the actual cost of the wood in its present condition, and they request me to ask you to remit at least \$5,000 more; that the annoyance that they experience in getting these advances is so great that they feel very much disinclined to continue trying to fulfill the contract on their part unless the advances can be more promptly made. Hoping that you will remit at least \$5,000 I remain, Very respectfully yours, John P. Badger."

To which the plaintiff made this reply: "Watertown, N. Y., March 26th, 1900. John P. Badger, Esq., Malone, N. Y.—Dear Sir: Your favor of the 24th inst. at hand and noted. We have advanced the Santa Clara Lumber Co. \$2 per cord upon the quantity of pulp wood which they claim to have cut, and we have advanced this amount promptly upon receiving their several requests. As we have already explained to you, this is the amount which is ordinarily advanced to cover the cost of pulp wood delivered to the stream. We understand that the Santa Clara Lumber Co. have spent an unusual amount of money this year in establishing permanent camps and roads with a view of reducing the expense of maintenance in the future. We also understand that they have been lumbering upon their own account. We could hardly be expected to share in unusual expenses, and in view of the fact that they are conducting extensive operations of their own, it seems to us the only way we can arrive at the amount to advance is to take the customary amount. As we have heretofore said to you, however, the matter is merely one of interest, and we have suggested a friendly arbitration. You have consented to the arbitration, but, nevertheless, continue to make further requests for additional advances. Very truly yours, G. C. Sherman, Treas."

Nothing further passed till April 12th, when the defendant notified the plaintiff that on account of the latter's failure to make advances to the extent of the cost of work done the contract was rescinded, and at the same time sent to the plaintiff a certified check for \$25,344.79, the amount advanced by it with interest. It appears that at this time pulp wood had appreciated in price, and the defendant had made a contract for the sale of its wood to other parties on more favorable terms. The plaintiff refused to receive the check, and wrote the defendant insisting that the contract still continued in force, and thereupon the plaintiff brought this action for its specific performance.

The learned trial court found that the plaintiff failed and refused to "advance the cost of the work as requested by the defendant or any fair approximation thereof. That the defendant repeatedly notified the plaintiff of its intention to rescind the contract in case its requests were not complied with. * * * That the plaintiff did not make the advances, as requested, for approximately the cost of the work done, and that, with knowledge of the cost and of the terms of the contract, and with notice of the intention of the defendant to rescind if its requests were not complied with, deliberately and intentionally refused and neglected to make such advances, and that such refusal and neglect was not caused by any inadvertence or by any misunderstanding of the facts." If the testimony in any aspect justified this finding of the trial court, it is a complete answer to this appeal, for equity will not enforce a contract at the instance of a party who has deliberately and intentionally neglected and refused to comply with

its requirements. But we think that there is no evidence to support this finding. Granting, as we must, for the trial court has so found, the fact, that the advances made by the plaintiff did not equal the expenditure incurred approximately by the sum of \$12,500, that fact alone does not show that the plaintiff's default was deliberate and intentional.

We agree with the learned counsel for the respondent that the advances, which under the contract the plaintiff was obliged to make, were not limited by the ordinary and customary advances made to parties who get out wood for the market, but only by the sum which the defendant actually and properly expended towards cutting and hauling the lumber. Nevertheless, the contract was one which would naturally breed dispute and difference of opinion, for no definite amount to be advanced was specified. Whether outlay made for the work of a permanent character, such as the construction of roads and the building of camps, the defendant was entitled to demand from the plaintiff, under the provisions of the contract, is not wholly free from doubt. While the fact that the amounts called for by the defendant largely exceeded the usual advances in the business did not justify the plaintiff in refusing to accede to the defendant's demands, still it tended to excuse plaintiff's hesitation in complying. The contract contained a provision that all matters of difference that might arise between the parties respecting the contract or the fulfillment thereof should be determined by arbitration. We concede that this provision was too broad to be enforced by the courts. Nevertheless, granting its invalidity, the parties negotiated for an arbitration under it. These negotiations had not been terminated at the time of the defendant's rescission of the contract. There is nothing to show that the position of the plaintiff in this controversy was not taken by it in good faith. It was willing to help the defendant obtain money, for it expressly offered to discount the defendant's note for such amount as it might need. There is not a word from the plaintiff to be found in the correspondence tending to show an abandonment of the contract. On the contrary, it was constantly insisting on its performance.

It is true that the plaintiff erred in its construction of the contract and as to its liability to make advances thereunder, and therefore, that it had not strictly performed the contract on its part. But that did not necessarily debar it from relief. Of such a situation this court said by Judge Danforth in *Day v. Hunt*, 112 N.Y. 191, 19 N.E. 414: "These objections cannot prevail. On the contrary, the very fact that the plaintiff has not strictly performed his part, and so is without remedy at law, is frequently a sufficient reason for the interposition of courts of equity, where relief is given, notwithstanding the lapse of time according to the actual merits of the case. * * * There is nothing to show that either party abandoned the contract or wished or in-

tended to do so. They differed merely as to the form of the mortgage, and, so far as appears, that difference only prevented the completion of the sale. Although wrong in his construction as to its proper force, the plaintiff cannot be said to be wholly without excuse."

There is this further, and to my mind controlling, factor in this case. There had been at least a part performance by the plaintiff and a substantial part, and courts of equity regard with more favor actions to enforce specific performance where there has been performance in part than where nothing has been done by either party under the contract. Thus Mr. Pomeroy writes (*Equity Jurisprudence*, § 812) of the specific performance of contracts for the sale of land: "But in some cases time almost ceases to be material, as where the vendee has paid the purchase money, or is in possession of the land, it is then said that time does not run against him." While the trial court has found that the defendant notified the plaintiff of its intention to rescind the contract, unless its requests were complied with, it must be borne in mind that this notice was of the most general character; that is to say, that if advances were not more promptly made the defendant would be unable to fulfill and would give up the contract. Nevertheless, despite these notices, the defendant continued to take such moneys as the plaintiff advanced. Such receipt operated to abrogate any right to rescind that might then exist. The last payment so made by the plaintiff was the sum of \$5,000 on March 12th. The rule seems to be well settled that though a party to a contract is in default, if the other party continues to negotiate with him after such default the contract cannot be rescinded without reasonable notice to the party in default to comply with the contract within a specified time. Pomeroy's *Eq. Jurisprudence*, § 815.

In *Webb v. Hughes*, L.R. 10 Eq. 281, a contract for the sale of land was to be closed on February 26th. Negotiations were continued after the date set for closing, and on April 7th the purchaser gave notice of immediate abandonment. Specific performance was decreed, the vice chancellor saying: "But, having once gone on negotiating, beyond the time fixed, he is bound not to give immediate notice of abandonment, but must give a reasonable notice of his intention to give up his contract if a title is not shown." In *Parkin v. Thorald*, 16 Beavan, 59, notice was given on October 21st that the contract must be performed on November 5th or otherwise would be abandoned. Specific performance was decreed, the length of notice being held insufficient.

The defendant's letter of March 24th, already recited in full, gave the plaintiff no notice that a certain amount must be paid by a certain time, but merely expressed the feeling of the defendant that it was "disinclined to continue trying to fulfill the contract on their part, unless the advances can be more promptly made." This was wholly in-

sufficient as a notice of the defendant's election to abandon the contract unless by a certain time the plaintiff made the necessary advances. The defendant could not, under the circumstances, rescind the contract without notice. We are of opinion, therefore, that the judgments below were erroneous. It is unfortunate that the case should have been so long in litigation that during its pendency over half of the first contract term has expired. However, in case the plaintiff succeeds on a new trial the court may mold its decree in such form as, in view of the lapse of time and its effect on the interest of the parties, equity may require.

The judgment appealed from should be reversed, and a new trial granted, costs to abide the final award of costs.

QUESTIONS:

1. Would this case have been decided differently if the plaintiff had sued for damages instead of specific performance?
2. Are the rules in Restatement, Contracts, § 276, to be applied differently at "common law" and in "equity"?
3. Was a decree for specific performance a proper and available remedy? See Restatement, Contracts, §§ 358, 361, 374, 375, 379.
4. Did the defendant have power, by giving some definite notice as mentioned in the last two paragraphs of the opinion, to make some payment by a specified time a condition precedent? See Restatement, Contracts, § 311.
5. Which party committed a breach of contract? An essential or "total" breach?

(F) PERFORMANCE ON TIME AS A CONDITION

BECK & PAULI LITHOGRAPHING CO. v. COLORADO MILLING & ELEVATOR CO.

Circuit Court of Appeals of the United States, 1892. 52 F. 700, 3 C.C.A. 248.

In Error to the Circuit Court of the United States for the District of Colorado. Reversed.

This was an action by the plaintiff in error to recover the contract price of certain stationery and advertising matter furnished the defendant. It was tried on the merits, and at the close of the evidence the court instructed the jury to return a verdict for the defendant, and this instruction is assigned as error. The plaintiff was a corpo-

ration of Wisconsin, engaged in lithographing and printing, and its principal place of business was at Milwaukee, in that state. The defendant was a corporation of Colorado, engaged in the business of milling, and its principal place of business was at Denver, in that state. In June, 1889, the plaintiff agreed to make new designs of certain buildings of defendant, with sketches of its trade-marks; to execute engravings thereof in a strictly first-class style; to embody these on the stationery described below; to submit to defendant for approval proofs thereof; to submit designs and proofs of hangers, on fine chromo plate, for advertising defendant's business, by the following fall; to engrave a strictly first-class vignette of one of defendant's plants; to submit a sketch and proof thereof to defendant; to furnish defendant with 10,000 business cards and 5,000 checks in August, 1889; to furnish in the course of the year, letter heads, noteheads, bill heads, statements, bills, envelopes and cards to the defendant to the number of 331,100, and 5,000 hangers; and to furnish the vignette and 5,000 hangers more after the approval of the proofs thereof by the defendant. The defendant agreed to take and pay for this stationery, this vignette, and these hangers at certain agreed prices, which amounted in the aggregate to about \$6,000. The plaintiff furnished the 10,000 cards and 5,000 checks required under the contract in August, 1889, and the defendant received and paid for them. The plaintiff introduced testimony to the effect that it strictly complied with and fully performed these contracts in every respect, except that it shipped the articles contracted for (which were not delivered in August) by rail from Milwaukee to the defendant, at Denver, in December, 1889, in five boxes, four of which did not arrive at Denver until 9:42 a. m., January 1, 1890, and the fifth did not arrive there until January 4, 1890; that before January 8, 1890, all of these articles were tendered to the defendant, and it refused to examine or receive them; that the sketches and proofs of the designs, trade-marks, and hangers had been submitted to and approved by the defendant during the summer and fall of 1889, before these articles were manufactured, and that the last proof was approved November 16, 1889; that on December 16, 1889, the defendant wrote the plaintiff to forward by express 2,000 statements and 3,000 envelopes "as per proofs submitted"; that the state of the art and process of lithographing is such that, after the general idea of a piece of work is conceived, it is customary to make first a pencil design, and, when this is found satisfactory, to prepare a colored sketch where colored work is required; that after the sketch is colored it is lithographed, that is, transferred to a stone; that each color requires a separate stone; and in these hangers there were nine colors; that it requires from two to three months to reproduce on stone a colored sketch like that used for the hangers; that the artists' work and the reproduction on stone were the most expensive parts of

this work contracted for; and that the expense of the materials and printing was but a small part of the entire expense of the work.

SANBORN, Circuit Judge (after stating the facts). The ground on which it is sought to sustain the instruction of the court below to return a verdict for the defendant in this case is that the plaintiff failed to tender or deliver the articles contracted for to the defendant, at Denver, until six or eight days after the expiration of the year, that the plaintiff did not therefore furnish them "in the course of the year," and that this failure justified the defendant in repudiating the contract, and refusing to pay any part of the contract price.

It is a general principle governing the construction of contracts that stipulations as to the time of their performance are not necessarily of their essence, unless it clearly appears in the given case from the express stipulations of the contract or the nature of its subject-matter that the parties intended performance within the time fixed in the contract to be a condition precedent to its enforcement, and, where the intention of the parties does not so appear, performance shortly after the time limited on the part of either party will not justify a refusal to perform by the party aggrieved, but his only remedy will be an action or counterclaim for the damages he has sustained from the breach of the stipulations. In the application of this principle to the cases as they have arisen, in the promulgation of the rules naturally deduced from it, and in the assignment of the various cases to the respective classes in which the stipulation as to time of performance is, or it not, deemed of the essence of the contract, the controlling consideration has been, and ought to be, to so decide and classify the cases that unjust penalties may not be inflicted, nor unreasonable damages recovered. Thus, in the ordinary contract of merchants for the sale and delivery, or the manufacture and sale, of marketable commodities within a time certain, it has been held that performance within the time is a condition precedent to the enforcement of the contract, and that a failure in this regard would justify the aggrieved party in refusing performance at a later day. *Norrington v. Wright*, 115 U.S. 188-203, 6 S.Ct. 12, 29 L.Ed. 366. This application of the general principle commends itself as just and reasonable, on account of the frequent and rapid interchange and use of such commodities made necessary by the demands of commerce, and because such goods, if not received in time by the vendee, may usually be sold to others by the vendor at small loss, and thus he may himself measure the damages he ought to suffer from his delay by the difference in the market value of his goods. On the other hand, it has been held that an express stipulation in a contract for the construction of a house, that it should be completed on a day certain, and that, in case of failure to complete it within the time limited, the builder would forfeit \$1,000, would not justify the owner of the land on which the house was con-

structed in refusing to accept it for a breach of this stipulation when the house was completed shortly after the time fixed, nor even in retaining the penalty stipulated in the contract, but that he must perform his part of the contract, and that he could retain from or recover of the builder the damages he sustained by the delay and those only. *Tayloe v. Sandiford*, 7 Wheat. 13, 17, 5 L.Ed. 384. This application of the general rule is equally just and reasonable. The lumber and material bestowed on a house by a builder become of little comparative value to him, while they are ordinarily of much greater value to the owner of the land on which it stands, and to permit the latter to escape payment because his house is completed a few days later than the contract requires would result in great injustice to the contractor, while the rule adopted fully protects the owner, and does no injustice to any one. The cases just referred to illustrate two well-settled rules of law which have been deduced from this general principle, and in accordance with which this case must be determined. They are:

In contracts of merchants for the sale and delivery or for the manufacture and sale of marketable commodities [the truth of] a statement descriptive of the subject-matter, or some material incident, such as the time of shipment, is a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Norrington v. Wright*, 115 U.S. 188, 203, 6 S.Ct. 12, 29 L.Ed. 366; *Rolling Mill v. Rhodes*, 121 U.S. 255, 261, 7 S.Ct. 882, 30 L.Ed. 920. But in contracts for work or skill, and the materials upon which it is to be bestowed, a statement fixing the time of performance of the contract is not ordinarily of its essence, and a failure to perform within the time stipulated, followed by substantial performance after a short delay, will not justify the aggrieved party in repudiating the entire contract, but will simply give him his action for damages for the breach of the stipulation. *Tayloe v. Sandiford*, 7 Wheat. 13, 17, 5 L.Ed. 384; *Hambly v. Railroad Co.* (C.C.) 21 F. 541, 544, 554, 557.

It only remains to determine whether the contracts in the case at bar are the ordinary contracts of merchants for the manufacture and sale of marketable commodities or contracts for labor, skill, and materials, and this is not a difficult task. A contract to manufacture and furnish articles for the especial, exclusive, and peculiar use of another, with special features which he requires, and which render them of value to him, but useless and unsalable to others,—articles whose chief cost and value are derived from the labor and skill bestowed upon them, and not from the materials of which they are made,—is a contract for work and labor, and not a contract of sale. *Engraving Co. v. Moore*, 75 Wis. 170, 172, 43 N.W. 1124, 6 L.R.A. 788, 17 Am.St. Rep. 186; *Goddard v. Binney*, 115 Mass. 450, 15 Am.Rep. 112; *Hind's*

v. Kellogg (Com.Pl) 13 N.Y.S. 922; Turner v. Mason, 65 Mich. 662, 32 N.W. 846.

[The Court then held that this contract was governed by the second rule and that performance exactly on time was not a condition precedent. The judgment of the lower court was reversed.]

QUESTIONS:

1. Does the fact that the subject-matter was not a marketable commodity affect the *interpretation* of the agreement?
2. Why does not an "express stipulation" that a house shall be "completed on a day certain" make such completion on time a condition of the duty to pay?
3. Is there any difference between "common law" and "equity" in interpreting this agreement and determining its legal operation?

NOTE

See the dicta in Norrington v. Wright, ante, p. 565 and Helgar Corp. v. Warner's Features, ante, p. 572.

Performance by a time certain can be made a condition precedent without using the phrase "time is of the essence." This is true even though there is a statute providing that "time is never of the essence of a contract unless by its terms expressly so provided." Niagara Fire Ins. Co. v. Pospisil (C.C.A.) 52 F.2d 709, 79 A.L.R. 404 with note (1931), time of making proof of loss by fire.

See Restatement, Contracts, § 276, "Rules for Determining Materiality of Delay in Performance."

KING et al. v. CONNORS et al.

Supreme Judicial Court of Massachusetts, 1915. 222 Mass. 261, 110 N.E. 289.

CARROLL, J. In March, 1913, the plaintiffs agreed to sell and the defendants to buy the hotel property of the plaintiffs in Greenfield, Massachusetts, "on or before May first next, for the sum of thirty thousand dollars." One thousand dollars was deposited with Charles H. Keith "on account of the purchase price of said property." The remainder was to be paid as follows: "Fourteen thousand dollars in cash * * * upon the delivery of a good and sufficient warranty deed of the premises, clear of all incumbrances except taxes assessed April 1, 1913, on or before the first day of May next, and the balance of the purchase price, viz., fifteen thousand dollars, is to be paid * * * by mortgage on the premises."

The agreement was in writing, and in addition to the real estate therein described it included all the personal property in the hotel, with the exception of that in three rooms over the barroom and a few other

articles specially mentioned; it further provided that if the defendants failed to comply with its conditions the one thousand dollars already deposited with Keith was to be paid to the plaintiffs, "in full as agreed upon and liquidated damages."

May 1, 1913, the plaintiffs were not ready and able to perform. On the second day of May, however, they were ready and able to fulfill the terms of the sale. On the morning of that day they notified the attorney for the defendant of their ability and desire to act and were told it was too late, that the sale should have been completed on the first day of May, and the plaintiffs having failed in this respect, the defendants were therefore excused from performance.

Thereupon this bill in equity was brought to specifically enforce the contract. The facts being found by a master, a decree was entered in the superior court dismissing the bill.

In equity, under an agreement like the one before us, time is not considered of the essence of the contract unless it expressly so appears or is to be implied from the surrounding circumstances. *Mansfield v. Wiles*, 221 Mass. 75, 108 N.E. 901; *Lennon v. Napper*, 2 Sch. & L. 681, 684. See *Law Quarterly Review*, July, 1915, p. 253. The written instrument contained no express stipulation making the time stated of the essence of the contract, and there is nothing in the terms of the contract, in the nature of the property to be conveyed, or in the existing circumstances, which requires an inference that the parties intended May first, 1913, to be the necessary and essential time for carrying the sale into effect.

On the second day of May the plaintiffs' tenant had not surrendered the lease of a portion of the premises occupied by him, although it was agreed that the premises were to be free of all incumbrances. The tenant, however, had promised in writing to execute a release and surrender the premises whenever required, within thirty days. This was a sufficient compliance with the contract. *Mansfield v. Wiles*, supra; *Richmond v. Gray*, 3 Allen, 31; *Dresel v. Jordan*, 104 Mass. 407, 415.

It follows that the decree must be reversed and a decree entered for the plaintiff, the terms of which are to be settled by a judge of the superior court.

So ordered.

QUESTIONS:

1. Could not the plaintiff have maintained a suit for damages as well as for specific performance?
2. Do the rules stated in Restatement, Contracts, §§ 275, 276, apply to both actions for damages and suits for specific performance? As to the latter remedy, see Restatement, Contracts, §§ 374, 375.
3. Did the plaintiff commit a breach of contract?

LORD RANELAGH v. MELTON.

In the High Court of Chancery, 1864. 2 Drew. & S. 278.

This was a suit for specific performance.

By articles of agreement, bearing date the 22d day of December, 1857, the defendant, William Melton, agreed to lease certain plots of land in Richmond Road, Round Hill Park, Brighton, to Henry Banks and Joseph Vinall, for a term of ninety-nine years from June, 1856, subject to certain ground-rents; and the articles of agreement contained the following clause:

"In case, at any time within the space of seven years from the 23d day of June, 1856, the lessees shall be desirous of purchasing the fee simple and inheritance of all or any one of the said plots of ground, and of such their desire shall give three months notice to the lessor, and shall, at the expiration of such notice pay unto him the sum of £210 in respect of each plot mentioned in such notice, and all rent payable to and including the current quarter, then the lessor shall and will convey the freehold and inheritance of the plot or plots mentioned in such notice unto and to the use of the lessees, or as they shall appoint."

The articles of agreement provided that the terms lessor and lessee, as used therein, should apply to their assigns in the event of either party disposing of his interest in the premises.

The articles of agreement also provided that the lessees, in exercising their option to purchase, should not investigate the title of the lessor to the premises.

The interest of the lessees, Banks and Vinall, subsequently became vested in the present plaintiffs.

The plaintiffs being desirous of exercising their right, under the clause in the articles of agreement, of purchasing from the defendant the fee simple and inheritance in the said plots of land, on the 20th day of March, 1863, served on the defendant notice, as provided by the articles of agreement, of their desire so to do. It was admitted that this notice was regular in all respects. After the service of this notice, some communications took place between the parties, in the course of which the defendant expressed his wish to have the draft conveyances sent to him for perusal.

The period of three months from the date of the notice expired on the 20th of June, and the seven years from the date of the articles of agreement expired on the 24th of June, but nothing further took place till the 1st of July, when the plaintiff's solicitor sent the defendant draft conveyances for his perusal.

On the receipt of these draft conveyances the defendant wrote the plaintiff's solicitor that he did not consent to excuse the default to

complete on or before the 20th or 24th day of June; and finally, on this ground, the defendant refused to complete the sale to the plaintiffs of the fee in the said plots of land. It appeared that the purchase-money had never been tendered.

Under these circumstances, the plaintiffs filed their bill to enforce specific performance, by the defendant, of the agreement to sell the fee simple to them.

The cause now came on upon motion for a decree.

The VICE-CHANCELLOR (Sir R. T. KINDERSLEY). I apprehend the rule of law applicable to cases like the present is perfectly clear. No doubt, if an owner of land and an intending purchaser enter into a contract constituting between them the relation of vendor and purchaser, and there is a stipulation in the contract that the purchase-money shall be paid and the contract completed on a certain day, this Court in ordinary cases has established the principle that time is not of the essence of the contract, and that the circumstance of the day fixed for the payment of the money and completion of the purchase being past does not entitle either party to refuse to complete. On the other hand, it is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition on the performance of which the party performing is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case: if the agreement fixes a day for the payment of the money, then it is clear that if that day is past without the payment the right to compel a conveyance is lost.

The question then is, whether any time is fixed in this agreement for the payment of the money. The language is, that if the lessees shall at the expiration of three months after the notice (which notice was duly given) pay the money, then the lessor shall convey the freehold and inheritance; and the matter resolves itself into a question of construction,—What is the meaning of the words “at the expiration of three months”?

The plaintiffs contend that these words mean, not at the time at which the three months expire, but at any time afterwards. If that be the true construction, the consequence would be, that not only a day or a week after, but a year or any number of years after the expiration of the three months, the plaintiffs would have a right to tender the money and demand a conveyance; and this is what the law will not

permit. But besides that, if the lessees should think fit not to pay the money, could the owner file a bill to compel them to do so? I apprehend, clearly not; for there is nothing in the agreement to make it obligatory on the lessees to pay the money. It is impossible to put such a construction on the words. "At the expiration of three months" must mean, not at any time after such expiration, but on the day on which the three months expire.

This case is not open to the argument which might arise in ordinary cases between vendor and purchaser, that the investigation of the title would occupy some time, inasmuch as the agreement provides that the lessees shall accept the title; so that there was nothing to be done but the conveyance. Unfortunately for the plaintiffs, they have allowed the time limited for the payment of the money to elapse, and therefore they are not entitled to a conveyance.

Bill dismissed, with costs.

QUESTIONS:

1. Was "time of the essence" of this contract in equity?
2. Was payment of £210 by a fixed date an express condition precedent to the seller's duty to convey? Cf. *Xanthakey v. Hayes*, 107 Conn. 459, 140 A. 808 (1928).
3. Was the contract bilateral in character?
4. Could the seller have maintained an action of debt for £210, or an action of assumpsit for damages, without tendering conveyance?
5. Does the decision result in an unjust forfeiture?

WINDERS et al. v. KENAN et al.

Supreme Court of North Carolina, 1913. 161 N.C. 628, 77 S.E. 687.

Action by J. B. Winders and others against J. G. Kenan and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

This is an action to compel specific performance, based upon the following instrument:

"This agreement, executed this 17th day of January, 1905, by and between Jas. G. Kenan and heirs of O. R. Kenan, of the county of Duplin and state of North Carolina, of the first part, and J. B. Winders and L. F. Hall of the second part, witnesseth: That said party of the first part for and in consideration of the sum of five hundred dollars to him in hand paid by the said party of the second part, the receipt whereof is hereby fully acknowledged, doth agree that upon the payment of ten thousand (\$10,000.00) dollars, two thousand of which is to be paid the 1st day of April, 1905, and the remainder in four annual payments

with interest at 6 per cent., to give, grant, sell and convey by proper deed with full warranty, and assure to the said party of the second part, his heirs and assigns, all the trees on the following described tract of land, * * *

"In witness whereof the said party of the first part hath hereunto set their hands and seal the day and year first written above.

"James G. Kenan. [Seal.]"

[and several others.]

The probate of this instrument was not complete until April 25, 1905, and it was registered on May 1, 1905. About the 1st of April, 1905, one of the plaintiffs and James G. Kenan, who represented the other makers of the instrument, met in Kenansville for the purpose of having a deed prepared, and a deed was prepared in accordance with said writing, and at that time the said plaintiff told the said Kenan that he would be ready to make the first payment when the deed was delivered. The probate of the deed was complete about April 10, 1905, and the plaintiffs were notified thereof during the month of April, and not later than April 27th.

The plaintiff offered evidence tending to prove that between March 6 and March 10, 1905, they told the said Kenan that they would take the timber, and for him to prepare a deed, and that the money was ready, and that the said Kenan said that he would have to have a little time, as the parties did not live close together, and that a few days would not make any difference as to the execution of the deed or as to the payment of the money; that on May 30, 1905, the plaintiff tendered to the defendant the sum of \$1,500, which the defendants refused to accept, and declared the contract at an end; that in the fall of 1905 or the spring of 1906 the plaintiffs tendered to the defendants two checks, one in the sum of \$2,500 and the other in the sum of \$9,220, which were refused; that on February 28, 1908, the plaintiffs tendered to the defendants \$2,240, which was refused; that in March, 1909, the plaintiff tendered to the defendants the sum of \$2,120, which was refused; that during the last of March or the 1st of April, 1909, the plaintiffs tendered to the defendants \$9,500 and four years interest thereon, which was refused.

There was no other evidence upon the part of the plaintiffs of the tender of any part of the purchase money, but they did offer evidence that they were at all times ready, able, and willing to pay the purchase price, but they contended that the \$500 first recited in said instrument was a part of the purchase price, and that the balance due was \$9,500, instead of \$10,000. They also offered evidence tending to prove that after the deed was written on April 1, 1905, material changes were made therein, so that it did not conform to said instrument, and that they declined to accept it on that ground. At the conclusion of the

whole evidence, his honor entered judgment of nonsuit, and the plaintiffs excepted and appealed.

ALLEN, J. In bilateral contracts there are reciprocal promises, so that there is something to be done or forborne on both sides, while in a unilateral contract there is a promise on one side only, the consideration on the other side being executed. 9 Cyc. 244. An option belongs to the latter class. It is a contract to give another the right to buy, and not a contract to sell, and it is because of the fact that the other party is not compelled to buy that it is spoken of as an offer. In *Black v. Maddox*, 104 Ga. 157, 30 S.E. 723, approved in *Trodden v. Williams*, 144 N.C. 199, 56 S.E. 868, 10 L.R.A.,N.S., 867, it is defined to be "the obligation by which one binds himself to sell and leaves it discretionary with the other party to buy, which is simply a contract by which the owner of property agrees with another person that he shall have the right to buy the property at a fixed price within a certain time."

If not based on a valuable consideration, the right to buy may be withdrawn at any time before acceptance (*Paddock v. Davenport*, 107 N.C. 710, 12 S.E. 464), but, if there is a valuable consideration to support it, the right continues during the period fixed in the option. *Cummins v. Beavers*, 103 Va. 230, 48 S.E. 891, 106 Am.St.Rep. 881, 1 Ann.Cas. 986. In this case the court said: "The distinction between an option given without a consideration and an option given for a valuable consideration is that in the first case it is simply an offer to sell, and can be withdrawn at any time before acceptance upon notice to the vendee; but in the second, where a consideration is paid for the option, it cannot be withdrawn by the vendor before the expiration of the time specified in the option."

If no conditions are imposed upon the prospective purchaser, and it is a simple proposition giving the right to buy, upon notice of acceptance, it becomes a contract of sale and is obligatory on both parties, and it is then the duty of the seller to tender his deed and of the purchaser to pay according to its terms. *Hardy v. Ward*, 150 N.C. 393, 64 S.E. 171. The maker has, however, the right to impose conditions which must be performed precedent to the exercise of the right to buy, and among these is the payment of the agreed price. *Weaver v. Burr*, 31 W.Va. 736, 8 S.E. 743, 3 L.R.A. 94; *Pollock v. Brookover*, 60 W.Va. 75, 53 S.E. 795, 6 L.R.A.,N.S., 403; *Trodden v. Williams*, 144 N.C. 201, 56 S.E. 865, 10 L.R.A.,N.S., 867. In the *Trodden Case* the language in the contract was: "If they shall, within the time hereinafter specified, elect to purchase said land, then and in that event they shall pay one-half cash and the balance in twelve months, to be secured by mortgage." And the court held that "payment of one half the purchase money and securing the other half constitute the method of electing to purchase," and quoted with approval the following ex-

cerpt from *Weaver v. Burr*, supra: "The period of 60 days from 7th June, 1883, mentioned in the option, within which plaintiff had the privilege of buying the land, * * * expired on the 6th day of August, 1883. During the whole of that period and during the whole of the 6th of August plaintiffs had the privilege of converting the offer of John Burr into a valid and binding contract by an unconditional acceptance of and compliance with the terms thereof. They could not do so by any other manner than by actual payment or tender of the whole price of the land before the sixty days expired. Neither could they withhold the payment or tender of payment until a proper deed was executed or survey could be made and the excess number of acres ascertained." Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to performance, and is under no obligation to buy, and it is generally held that time is of the essence of such a contract, and that the conditions imposed must be performed in order to convert the right to buy into a contract of sale.

The acceptance must be according to the terms of the contract, and if these require the payment of the purchase money or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy or that the party will take the property does not change the relations of the parties. * * * Applying these principles to the facts, we are of opinion that the plaintiffs are not entitled to specific performance.

The paper writing does not purport to be a contract to convey, is unilateral, and is what is designated as an option. * * * In the writing before us the makers, in consideration of \$500 paid, agree upon the payment of \$10,000, of which \$2,000 was to be paid the 1st day of April, 1905, and the remainder in four annual installments at 6 per cent. interest, to give, grant, sell, and convey by proper deed, etc., which if we adopt a liberal and not a strict construction, can mean no more than that the \$500 was paid for the right to buy, and that this right could not be exercised, nor were the makers under any obligation to convey until payment or tender of the purchase money.

If this is the correct interpretation of the writing, the notice given by the plaintiffs in March, 1905, that they would take the timber, did not change the relations of the parties and convert the writing into a contract to sell, because the writing imposed the further condition of payment of the purchase money. Nor can the conversation at the time the deed was written have this effect, as no money was presented or tendered, and it amounted to no more than an expression of readiness to make the first payment of \$2,000 upon delivery of the deed. It may be conceded, as contended by the plaintiffs, for the purposes of this appeal, and not otherwise, that the conversation with one of the defendants in March, the delay in the execution of the writing sued on

and in the execution of the deed work a waiver of the right to demand payment on the 1st day of April, 1905, but it appears from the record that the paper writing was complete on April 25, 1905, and was registered on May 1st thereafter, and the plaintiffs were notified on April 27, 1905, that the deed was ready for delivery. After notice of the execution of the writing and of the deed, there was no excuse for further delay, and it was then incumbent on the plaintiffs to pay or tender the sum of \$2,000 at least promptly. They did not do this, but on the contrary, waited until May 30, 1905, before they offered to pay any amount, and then only the sum of \$1,500, which was not in compliance with the writing upon which they sue in time or amount. The defendants refused to accept, and declared the contract at an end, as they had the right to do, and it could not be revived without their consent by subsequent offers to pay. In the view of the case we have adopted, the alteration of the deed after it was written is not material, as the correspondence shows that, while the defendants wished some modification of the option, they did not refuse to execute a deed in accordance with its terms until the plaintiffs had by delay lost their right to demand it. If, under the writing, the plaintiffs had been required to do no more than give notice of acceptance, they would have had the right to delay payment until a deed was tendered conforming to the writing, but they were required to pay before they were entitled to demand a deed of any kind, and had not placed themselves in position to criticize the one offered.

We have discussed the case in the light most favorable to the plaintiffs upon the assumption that they could have demanded a deed upon the payment of \$2,000, but we do not so decide, as the writing says upon the payment of \$10,000, of which \$2,000 was to be paid on the 1st of April, 1905, and the remainder in four annual installments, the makers agree to sell and convey.

For the reasons given, we are of opinion there was no error in entering the judgment of nonsuit.

Affirmed.

QUESTIONS:

1. Was the document signed by Kenan a contract (unilateral or bilateral), or a revocable offer?
2. Was the plaintiff's notice about March 6 a fact having legal operation?
3. Could the defendant have compelled the plaintiff to pay the balance?
4. Was "time of the essence" in equity?

NOTE

An "option" contract is usually unilateral, the consideration for the option giver's promise being a payment made or other performance rendered. It may, however, be bilateral, as where in return for the option giver's promise the option holder gives his promissory note instead of cash. In the above case, in return for an executed consideration, the defendant made a promise to sell and convey on condition of the making of certain payments. This was a binding and irrevocable promise, properly described as a "conditional contract to sell." There was no "contract of purchase and sale," however, because the plaintiff made no promise to buy prior to March 6.

When an option holder gives notice of his acceptance, it is generally held that this turns the transaction into a bilateral contract, enforceable against the buyer as well as against the seller. An option contract may be so worded, however, that the holder's power can be exercised only by making a tender of actual payment (or other performance that may be specified) and not by merely giving a notice. Even if it is so worded that the option holder has power of acceptance by giving a notice, the option giver's promise may still be conditional (expressly or constructively) on some payment or other performance to be rendered. Whether or not it is thus conditional is to be determined just as in the case of other bilateral contracts. The making of this payment by a stated time may or may not be such a condition.

If the maker of an ordinary revocable offer specifies a time limit for acceptance, the offeree's power terminates when that limit arrives. "Time is of the essence" in such a matter. The same rule is followed in regard to the exercise of an irrevocable power created by an option contract. *Schaefer v. Thompson*, 237 N.Y. 55, 142 N.E. 351 (1923). This is because the executed consideration was given for a power with a fixed life period. That power has been enjoyed just as agreed, and strict enforcement of the time limit usually causes no forfeiture whatever. So where a sale was to become absolute in absence of a notice to the contrary by a fixed time, the power to terminate the conditional duty ended on the exact day. *Mackey Wall Plaster Co. v. United States Gypsum Co.*, 244 F. 275 (1917, D.C.); *Berg Co. v. Thomas & Son Co.*, 256 Pa. 584, 100 A. 951 (1917).

Where an option to buy is given to the lessee as a part of a long term lease, to be exercised by giving notice by a specified time, and the lessee after making valuable improvements forgets to give the notice on time, a notice given a few days late has been held to be effective. See *Xanthakey v. Hayes*, 107 Conn. 459, 140 A. 808 (1928). This is justified for the reason that the improvements would otherwise be forfeited to the lessor to his unjust enrichment. A different holding would not be unreasonable if the lessor is ready and willing to pay for the improvements.

See Corbin, "Option Contracts," 23 Yale L.J. 641 (1914), revised in *Selected Readings on Contracts*, 228.

A number of cases involving an "option" are contained in this volume. Among them are *Los Angeles Traction Co. v. Wilshire*, p. 164; *Gurfein v. Werbelovsky*, p. 267; *Koehler & H. Merc. Co. v. Ill. Glass Co.*, p. 271; *Vickrey v. Maier*, p. 274; *Scott v. Moragues Lbr. Co.*, p. 499; *St. Regis Paper Co. v. Santa Clara Lbr. Co.*, p. 581; *Poussard v. Spiers*, p. 600.

(G) CONTRACTS OF SERVICE

POUSSARD v. SPIERS & POND.

Queen's Bench Division of High Court of Justice, 1876. 1 Q.B.Div. 410.

Declaration on an agreement by the defendants to employ the plaintiff's wife to sing and play in an opera at the defendants' theatre. Breach, that the defendants refused to allow the plaintiff's wife to perform according to the agreement.

Pleas: 1. That defendants did not agree as alleged. 2. That plaintiff's wife was not ready and willing to perform. 3. That plaintiff rescinded the contract before breach. Issue joined.

At the trial before Field, J., at the Middlesex Michaelmas sittings, 1875, judgment was entered for the defendants, with leave to move to enter judgment for the plaintiff for £83.

A notice of motion was given accordingly, and a cross order was obtained by the defendants for a new trial, on the ground that the verdict was against the weight of evidence, and that the damages were excessive.

The facts proved and the course of the trial are fully given in the judgment of the Court.

April 25. The judgment of the Court (BLACKBURN, QUAIN, and FIELD, JJ.) was delivered by

BLACKBURN, J. This was an action for the dismissal of the plaintiff's wife from a theatrical engagement. On the trial before my Brother Field it appeared that the defendants, Messrs. Spiers & Pond, had taken the Criterion Theatre, and were about to bring out a French opera, which was to be produced simultaneously in London and Paris. Their manager, Mr. Hingston, by their authority, made a contract with the plaintiff's wife, which was reduced to writing in the following letter:

"Criterion Theatre, Oct. 16th, 1874.

"To Madame Poussard.

"On behalf of Messrs. Spiers & Pond I engage you to sing and play at the Criterion Theatre on the following terms:

"You to play the part of Friquette in Lecocq's opera of *Les Pres Saint Gervais*, commencing on or about the fourteenth of November next, at a weekly salary of eleven pounds (£11), and to continue on at that sum for a period of three months, providing the opera shall run for that period. Then, at the expiration of the said three months, I shall be at liberty to re-engage you at my option, on terms then to be arranged, and not to exceed fourteen pounds per week for another period of three months. Dresses and tights requisite for the part to be provided by the management, and the engagement to be subject to the ordinary rules and regulations of the theatre.

"Ratified:

E. P. Hingston, Manager.

"Spiers & Pond.

"Madame Poussard, 46, Gunter Grove, Chelsea."

The first performance of the piece was announced for Saturday, the 28th of November. No objection was raised on either side as to this delay, and Madame Poussard attended rehearsals, and such attendance, though not expressed in the written engagement, was an implied part of it. Owing to delays on the part of the composer, the music of the latter part of the piece was not in the hands of the defendants till a few days before that announced for the production of the piece, and the latter and final rehearsals did not take place till the week on the Saturday of which the performance was announced. Madame Poussard was unfortunately taken ill, and though she struggled to attend the rehearsals, she was obliged on Monday, the 23d of November, to leave the rehearsal, go home and go to bed, and call in medical attendance. In the course of the next day or two an interview took place between the plaintiff and Mr. Leonard (Madame Poussard's medical attendant) and Mrs. Liston, who was the defendants' stage manager, in reference to Madame Poussard's ability to attend and undertake her part, and there was a conflict of testimony as to what took place. According to the defendants' version Mrs. Liston requested to know as soon as possible what was the prospect of Madame Poussard's recovery, as it would be very difficult on such short notice to obtain a substitute; and that in the result the plaintiff wrote stating that his wife's health was such that she could not play on the Saturday night, and that Mrs. Liston had better, therefore, engage a young lady to play the part; and this, if believed to be accurate, amounted to a rescission of the contract. According to the evidence of the plaintiff and the doctor, Mrs. Liston told them that Madame Poussard was to take care of herself and not come out till quite well, as she, Mrs. Liston, had procured, or would procure, a temporary sub-

stitute; and Madame Poussard could resume her place as soon as she was well. This, it was contended by the plaintiff, amounted to a waiver by the defendants of a breach of the condition precedent if there was one.

The jury found that the plaintiff did not rescind the contract, and that Mrs. Liston, if she did waive the condition precedent (as to which they were not agreed) had no authority from the defendants so to do.

These findings, if they stand, dispose of those two questions.

There was no substantial conflict as to what was in fact done by Mrs. Liston. Upon learning, on the Wednesday (the 25th of November) the possibility that Madame Poussard might be prevented by illness from fulfilling her engagement, she sent to a theatrical agent to inquire what artistes of position were disengaged, and learning that Miss Lewis had no engagement till the 25th of December, she made a provisional arrangement with her, by which Miss Lewis undertook to study the part and be ready on Saturday to take the part, in case Madame Poussard was not then recovered so far as to be ready to perform. If it should turn out that this labour was thrown away, Miss Lewis was to have a *douceur* for her trouble. If Miss Lewis was called on to perform, she was to be engaged at £15 a week up to the 25th of December, if the piece ran so long. Madame Poussard continued in bed and ill, and unable to attend either the subsequent rehearsals or the first night of the performance on the Saturday, and Miss Lewis' engagement became absolute, and she performed the part on Saturday, Monday, Tuesday, Wednesday, and up to the close of her engagement, the 25th of December. The piece proved a success, and in fact ran for more than three months.

On Thursday, the 4th of December, Madame Poussard, having recovered, offered to take her place, but was refused, and for this refusal the action was brought.

On the 2d of January Madame Poussard left England.

My Brother Field, at the trial expressed his opinion that the failure of Madame Poussard to be ready to perform, under the circumstances, went so much to the root of the consideration as to discharge the defendants, and that he should therefore enter judgment for the defendants; but he asked the jury five questions.

The first three related to the supposed rescission and waiver. The other questions were in writing and were: 4. Whether the non-attendance on the night of the opening was of such material consequence to the defendants as to entitle them to rescind the contract? To which the jury said, "No." And, 5, was it of such consequence as to render it reasonable for the defendants to employ another artiste, and whether the engagement of Miss Lewis, as made, was reasonable; to which

the jury said "Yes." Lastly, he left the question of damages, which the jury assessed at £83.

On these answers he reserved leave to the plaintiff to move to enter judgment for £83.

A cross rule was obtained on the ground that the verdict was against evidence and that the damages were excessive.

We think that, from the nature of the engagement to take a leading, and, indeed, the principal female part (for the prima donna sang her part in male costume as the Prince de Conti) in a new opera which (as appears from the terms of the engagement) it was known might run for a longer or shorter time, and so be a profitable or losing concern to the defendants, we can, without the aid of the jury, see that it must have been of great importance to the defendants that the piece should start well, and consequently that the failure of the plaintiff's wife to be able to perform on the opening and early performances was a very serious detriment to them.

This inability having been occasioned by sickness was not any breach of contract by the plaintiff, and no action can lie against him for the failure thus occasioned. But the damage to the defendants and the consequent failure of consideration is just as great as if it had been occasioned by the plaintiff's fault, instead of by his wife's misfortune. The analogy is complete between this case and that of a charter party in the ordinary terms, where the ship is to proceed in ballast (the act of God, &c., excepted) to a port and there load a cargo. If the delay is occasioned by excepted perils, the shipowner is excused. But if it is so great as to go to the root of the matter, it frees the charterer from his obligation to furnish a cargo. See per Bramwell, B., delivering the judgment of the majority of the Court of Exchequer Chamber in *Jackson v. Union Marine Insurance Co.*, Law Rep. 10 C.P. at page 141.

And we think that the question, whether the failure of a skilled and capable artiste to perform in a new piece through serious illness is so important as to go to the root of the consideration, must to some extent depend on the evidence; and is a mixed question of law and fact. Theoretically, the facts should be left to and found separately by the jury, it being for the judge or the Court to say whether they, being so found, shew a breach of a condition precedent or not. But this course is often (if not generally) impracticable; and if we can see that the proper facts have been found, we should act on these without regard to the form of the questions.

Now, in the present case, we must consider what were the courses open to the defendants under the circumstances. They might, it was said on the argument before us (though not on the trial), have postponed the bringing out of the piece till the recovery of Madame Pousard, and if her illness had been a temporary hoarseness incapacitating

her from singing on Saturday, but sure to be removed by the Monday, that might have been a proper course to pursue. But the illness here was a serious one, of uncertain duration, and if the plaintiff had at the trial suggested that this was the proper course, it would no doubt, have been shewn that it would have been a ruinous course; and that it would have been much better to have abandoned the piece altogether than to have postponed it from day to day for an uncertain time during which the theatre would have been a heavy loss.

The remaining alternatives were to employ a temporary substitute until such time as the plaintiff's wife should recover; and if a temporary substitute capable of performing the part adequately could have been obtained upon such a precarious engagement on any reasonable terms, that would have been a right course to pursue; but if no substitute capable of performing the part adequately could be obtained, except on the terms that she should be permanently engaged at higher pay than the plaintiff's wife, in our opinion it follows, as a matter of law, that the failure on the plaintiff's part went to the root of the matter and discharged the defendants.

We think, therefore, that the fifth question put to the jury, and answered by them in favour of the defendants, does find all the facts necessary to enable us to decide as a matter of law that the defendants are discharged.

The fourth question is, no doubt, found by the jury for the plaintiff; but we think in finding it they must have made a mistake in law as to what was a sufficient failure of consideration to set the defendants at liberty, which was not a question for them.

This view taken by us renders it unnecessary to decide anything on the cross rule for a new trial.

The motion must be refused with costs.

Motion refused with costs.

QUESTIONS:

1. Did Madame Poussard commit a breach of contract?
2. If the defendants had not yet employed Miss Lewis, would the plaintiff have won this case? See Restatement, Contracts, § 282.
3. Is nonperformance of a "condition" always a breach of contract? See Restatement, Contracts, § 274(2).
4. Did the "option to re-engage" have any legal operation?
5. Was the materiality of the delay a question of fact or a question of law? Consider the rules in Restatement, Contracts, §§ 275, 276.

BETTINI v. GYE, 1 Q.B.D. 183 (1876). A contract was made by the plaintiff, a professional singer, and the defendant, the director of the Royal Italian Opera, whereby for a salary of £150 per month the former promised "to fill the part of primo tenor assoluto in theatres, halls, and drawing-rooms" in Great Britain beginning March 30, 1875, not to sing within 50 miles of London for a period of three months preceding that date, and "to be in London without fail at least six days before the commencement of his engagement, for the purpose of rehearsals." Because of temporary illness the plaintiff was delayed, arriving in London on March 28, 1875. The defendant thereupon refused to employ the plaintiff. The court held that the refusal was not justified, arrival six days before March 30 not being a condition precedent to the defendant's duty. In the course of his opinion **BLACKBURN, J.**, said:

"Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfillment of such a thing a condition precedent, it will be one; or they may think that the performance of some matter, apparently of essential importance and prima facie a condition precedent, is not really vital, and may be compensated for in damages, and if they sufficiently expressed such an intention, it will not be a condition precedent. * * * And in the absence of such an express declaration, we think that we are to look to the whole contract and see whether the particular stipulation goes to the root of the matter, so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent.

"If the plaintiff's engagement had been only to sing in operas at the theatre, it might very well be that previous attendance at rehearsals with the actors in company with whom he was to perform was essential. And if the engagement had been only for a few performances, or for a short time, it would afford a strong argument that attendance for the purpose of rehearsals during the six days immediately before the commencement of the engagement was a vital part of the agreement. But we find, on looking to the agreement, that the plaintiff was to sing in theatres, halls, and drawing-rooms, both public and private, from March 30th to July 13th, 1875, and that he was to sing in concerts as well as in operas, and was not to sing anywhere out of the theatre in Great Britain or Ireland from January 1st to December 31st, 1875, without the written permission of the defendant, except at a distance of more than fifty miles from London.

"The plaintiff, therefore, has, in consequence of this agreement, been deprived of the power of earning anything in London from Jan-

uary 1st to March 30th; and though the defendant has, perhaps, not received any benefit from this, so as to preclude him from any longer treating as a condition precedent what had originally been one, we think this at least affords a strong argument for saying that subsequent stipulations are not intended to be conditions precedent, unless the nature of the thing strongly shows they must be so.

"And as far as we can see, the failure to attend at rehearsals during the six days immediately before March 30th could only affect the theatrical performances and, perhaps, the singing in duets or concerted pieces during the first week or fortnight of this engagement, which is to sing in theatres, halls, and drawing-rooms, and concerts for fifteen weeks.

"We think, therefore, that it does not go to the root of the matter so as to require us to consider it a condition precedent.

"The defendant must therefore, we think, seek redress by a cross-action for damages."

NOTE

Space limitations prevent a more extended presentation of the law applicable to service contracts with respect to the degree and kind of performance by the employee that constitute a condition of the employer's duty to employ and pay. The problem must now be studied in the light of modern statutory provisions and circumstances of employment, especially with respect to union labor and the collective bargain. It is now a far cry from the days of the old law of master and servant at the time of the Statute of Laborers. This relationship was once one of "status" rather than of "contract;" and it seems to be again tending in the direction of "status," but for different reasons and with a new approach. Wages and salaries are still normally paid at the end of a specified period of service, so that the rendition of that service is a condition precedent to the employer's duty of payment (See Restatement, Contracts, §§ 269, 270); but this rule does not get us far in determining when and whether wages are collectible. An employee's duty to render service is no doubt conditional on the employer's ability and willingness to pay wages when due and on the maintenance of the agreed or customary working conditions; but even if the employer performs his part with exactitude, the enforcement of the employee's duty to render service may be practically impossible.

The value of a contract right and the burden of the correlative duty of the other party are directly dependent upon the effectiveness of the judicial remedies that are available. The remedy in equity known as a decree for specific performance is almost never available against one who has contracted to render personal service, although an employee's promise not to serve a competitor of his employer may be enforced by injunction if irreparable injury will be caused by breach of the promise. A judgment for money damages was the common law remedy for breach; but it is nearly worthless against a contract breaker who has no assets that are subject to execution.

An employee who has committed a wilful breach by abandoning service before the end of the agreed period was formerly generally held to have no right to any wages for that period. This resulted in a heavy forfeiture in case the abandonment occurred only a short time before the end of a comparatively long period of service. In a minority of cases it was held that such an employee could get judgment for the reasonable value of the service actually rendered, never exceeding the agreed wage, diminished by the damages caused to the employer by his breach. See *Britton v. Turner*, 6 N.H. 481 (1834). Such a remedy in favor of a plaintiff who is himself guilty of a "total" breach is now described as "quasi contractual." It is not the contract duty of the defendant that is being enforced. That the minority view, represented by the case just cited, would now be generally followed seems highly probable.

(H) CONSTRUCTION CONTRACTS—CERTIFICATE OF ARCHITECT, ENGINEER OR OTHER EXPERT

SECOND NAT. BANK OF CINCINNATI, OHIO, v. PAN-AMERICAN BRIDGE CO.

Circuit Court of Appeals of the United States, 1910.
183 F. 391, 105 C.C.A. 611.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

Action at law by the Pan-American Bridge Company against the Second National Bank of Cincinnati, Ohio. Judgment for plaintiff, and defendant brings error. Reversed.

KNAPPEN, Circuit Judge. The defendant in error (plaintiff below, and hereafter called the plaintiff) recovered verdict and judgment against plaintiff in error (hereafter called the defendant) for \$2,723.-49, being the balance of the contract price for certain structural steel work furnished by plaintiff, under written contract with defendant, for the construction of the latter's bank building, together with the value of certain extras furnished. The questions presented on this review lie within a comparatively narrow compass. The facts material to their understanding are these:

The contract provides that plaintiff shall furnish and erect the work "agreeably to the drawings and plans prepared by" the architects for the owner, and that the work shall be performed "under the direction, and to the satisfaction of" the architects or the authorized representative of the owner; also that payments under the contract should be

made "upon a certificate of the architect or other authorized representative of the owner," 15 per cent being retained from the amount of each certificate and to be paid within 30 days after the final completion of the work "and the acceptance of the same by the architects of the owner, or its duly authorized agent." Payments were made from time to time by the defendant as the work progressed, aggregating full payment of the contract price except the sum of \$2,062.89. Plaintiff furnished extras amounting to \$660.60. It is for the sum of these two items that recovery was permitted. There is no dispute over the extras. The only dispute over the merits of the other item arises upon the claim of defendant that it should be allowed \$2,370.84, as the expense of making certain changes in the work claimed to have been made necessary by plaintiff's failure to comply with the specifications in one respect only, which is this: The specifications provide that "the connection of beams and columns will be standard." They also provide that the contractor shall furnish to the architect, for his approval, triplicate copies of detail drawings, and that the work shall be executed "in strict accordance with such approved drawings," there being the further provision that "the architect, in approving these drawings, approves them in a general manner as being in or out of conformance with the general requirements of his drawings and specifications and does not relieve the contractor of responsibility for the correctness of the work shown by them."

The contractor made detail drawings of the connections of beams and columns, plainly showing 8 holes for each connection; that is to say, in splice-plates, angle irons, columns, and beams. These drawings were approved in writing by the architect. Construction in accordance therewith proceeded to at least the sixth story, without objection by the owner or the architect to the manner of these connections. Objection was then made that good workmanship and standard connection required 10 rivets instead of 8 for each connection. The record indicates that this objection was first made by the public building inspector. There is testimony tending to show that the architect, after construction had progressed to at least the height before stated, insisted that new 10-rivet connections be furnished in place of the 8-rivet connections. Upon plaintiff's refusal or failure to make the changes, they were made by defendant at a cost of \$2,370.84. The architect was satisfied with and accepted the material and workmanship furnished by plaintiff with the single exception of the connections in question. He refused to finally accept plaintiff's work as a performance of the contract and to give a certificate of such performance, basing his refusal upon the failure of plaintiff to make the proper connections or to allow defendant for the cost of the changes made therein. The plaintiff's work has not been accepted by defendant, or by any one on its behalf, as a complete performance of the contract,

the defendant, however, being in the occupancy and use of the building. By its plea it offered to confess judgment for \$352.69, as the difference between the plaintiff's claim and the amount paid by the defendant for making the new connections.

Upon the trial there was a conflict of testimony as to whether 8-rivet connections were standard or whether 10-rivets were required. The defendant, both by objection to testimony and by motion for a directed verdict at the close of the testimony, insisted that plaintiff was precluded from recovery by the architect's refusal to accept performance of the contract and to give his certificate thereof, and that plaintiff could have relief against such refusal only in a court of equity. The court instructed the jury that if plaintiff's work and material conformed to the contract recovery could be had, notwithstanding the lack of acceptance or certificate by the architect, provided the jury should find that such certificate was withheld "unreasonably and unfairly" or (as expressed at another time) "capriciously or arbitrarily." An instruction requested by defendant at the close of the general charge that "it is not sufficient to show that the architect is unreasonable and unfair," was refused. No exception was taken to the charge of the court as given, exception being, however, reserved to the refusal to give the request just referred to as well as to the refusal to direct verdict for defendant.

In our opinion the exception to the refusal of defendant's request just mentioned sufficiently raises for review the correctness of the charge in the respect mentioned. Indeed, no question of such sufficiency is raised in plaintiff's brief.

We cannot accede to the proposition that resort to equity is necessary in order to avoid the effect of failure to obtain the architect's certificate. The contention most strongly urged seems to be that the plaintiff must, as condition precedent to recovery on the contract, procure the setting aside of the contract provisions requiring such certificate, although the suggestion is also made that the architect's action needs reforming. Neither of those contentions is, in our opinion, maintainable. The plaintiff does not attack the validity of the contract provision requiring the architect's certificate as a condition precedent to recovery. Nor is there any certificate of the architect standing in the way and requiring reformation. The plaintiff's complaint in this respect is not that the contract is wrong, nor that any certificate of the architect is wrong. Its grievance is that the architect has improperly refused, as alleged, to accept the work and to certify accordingly. * * *

The right of a party to a building contract to show in an action at law thereon that the certificate required by the contract as a condition precedent to action was fraudulently withheld has been at least impliedly recognized in numerous cases, several of which are cited in

another branch of this opinion, and has never, so far as we have seen, been denied. But in our opinion the trial judge erred in holding that the architect's certificate could be dispensed with if the jury were satisfied that it was "unreasonably and unfairly" withheld. It is true that this instruction finds apparent support in several decisions of state courts cited in plaintiff's brief. But the rule is well settled in the federal courts that under contract provisions such as those existing here the certificate of acceptance is a condition precedent to recovery upon the contract in the absence of fraud or of mistake so gross as to imply bad faith; in other words, that the withholding of the certificate must have been in bad faith.

The jury could scarcely be expected to understand that the words "unreasonably and unfairly" meant "in bad faith," for the court charged that, "if their [the plaintiffs'] work and materials did conform to the plans and specifications made by the architect, then the refusal of the architects to accept such work and materials and to issue a certificate of acceptance is not fair and reasonable, and the plaintiffs may recover in excess of \$352.69."

In other words, the actual conformity of the work and materials to the plans and specifications was made the test of the bad faith which the law requires for setting aside the action of the architect. It is strongly insisted that the bad faith of the architect is clearly shown by his refusal to accept the plaintiff's work on account of defects apparent in the detail drawings approved by the architect. While the record was such as to justify submitting to the jury the question whether the architect acted in bad faith in refusing the certificate, and while it is possible that the defendant and the architect as well, in requiring the substituted connections, were influenced by a fear of criticism upon the sufficiency of the building, we cannot say, as a matter of law, that the admitted facts lead only to a conclusion of bad faith on the architect's part.

The error referred to requires a reversal of the judgment. The plaintiff should be permitted to make any amendment of its pleadings which may be necessary to meet the views we have expressed.

The conclusion we have reached makes it unnecessary to consider the propriety of the instruction that a "capricious and arbitrary" refusal to accept avoided the effect of the failure to obtain the certificate; and perhaps the record should not be construed as sufficiently raising that question. We content ourselves with the suggestion that, if the words referred to are to be used, it should be made clear that they involve either bad faith or a refusal or failure to exercise honest judgment.

Judgment reversed, and new trial ordered.

NOTE

A contract making the decision of an architect or engineer final and conclusive in disputes as to the quality or quantity of work done is generally enforced, in the absence of fraud or bad faith on his part or on that of the party maintaining the validity of his decision. Such a decision is not final when not so agreed and particularly when it is agreed that it shall not be. *Mercantile Trust Co. v. Hensey*, 205 U.S. 298, 27 S.Ct. 535, 51 L.Ed. 11, 10 Ann.Cas. 572 (1907).

The certificate of an architect is often made a condition precedent to the power of the owner to terminate the contract and to his right to charge the contractor with the cost of completing the work.

MARTINSBURG & P. R. CO. v. MARCH

Supreme Court of the United States, 1885.
114 U.S. 549, 5 S.Ct. 1035, 29 L.Ed. 255.

HARLAN, J. This case is within the principles announced in *Kihlberg v. U. S.*, 97 U.S. 398, 24 L.Ed. 1106, and *Sweeney v. U. S.*, 109 U.S. 618, 3 S.Ct. 344, 27 L.Ed. 1053. *Kihlberg* sued the United States upon a contract for the transportation of military, Indian, and government stores and supplies from points on the Kansas Pacific Railway to posts and stations in certain states and territories. The contract provided for payment for transportation "in all cases according to the distance from the place of departure to that of delivery, the distance to be ascertained and fixed by the chief quartermaster of the district of New Mexico, and in no case to exceed the distance by the usual and customary route." One of the issues in that case was as to the authority of that officer to fix, conclusively for the parties, the distances which should govern in the settlement of the contractor's accounts for transportation. There was neither allegation nor proof of fraud or bad faith upon the part of that officer in his discharge of the duty imposed upon him by the mutual assent of the parties. This court said: "In the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises is conclusive upon the appellant as well as upon the government." This principle was affirmed and applied in *Sweeney's Case*, in which he sought to recover from the United States the price of a wall built by him around a national cemetery. The contract provided that the wall should be received, and become the property of the United States, after an officer or civil engineer, to be designated by the government to inspect the work, should certify that it was in all respects such as the contractor agreed to construct. The officer designated for that purpose refused to so certify, on the ground that neither the material nor the workmanship was such as the contract required.

As the officer exercised an honest judgment in making his inspections, and as there was on his part neither fraud, nor such gross mistake as implied bad faith, it was adjudged that the contractor had no cause of action on the contract against the United States.

Those decisions control the determination of the claim arising out of the contract here in suit, whereby the defendant in error, who was plaintiff below, covenanted and agreed that he would furnish all the material required,—which should be sound, durable, and of good quality, and approved by the company's chief engineer,—and perform all the labor necessary to construct and finish, in every respect, in the most substantial and workman-like manner, the grading and masonry of a certain section of the Martinsburg & Potomac Railroad.

The contract provides that, to prevent all disputes, the engineer of the company "shall, in all cases, determine" the quantity of the several kinds of work to be paid for under the contract, and the amount of compensation that the appellee should earn at the rates therein specified; that he "shall, in all cases," decide every question which can or may arise relative to the execution of the contract, and "his estimate shall be final and conclusive"; that in order to enable the contractor to prosecute the work advantageously, the engineer "shall make an estimate from time to time, not oftener than once per month, as the work progresses of the work done," for which the company "will pay in current money within twenty per cent of the amount of said estimate on presentation"; that, in calculating the quantity of masonry, walling and excavation, the most rigid geometrical rules should be applied, any custom to the contrary notwithstanding; and that "whenever this contract shall be wholly completed on the part of the said contractor, and the said engineer shall have certified the same, they [the company] will pay for said work" the prices in the contract named. These stipulations were emphasized by this additional provision in the agreement: "And it is further agreed that whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due."

The plaintiff, in his declaration, which is in assumpsit, sets out the written contract in full, and counts specially upon its various provisions. The other count is the ordinary one of indebitatus assumpsit. A general demurrer by the company to the whole declaration, and to each count, was overruled. This action of the court below cannot be upheld without disregarding the express conditions of the written agreement; for it does not appear from the declaration that the engineer ever certified in writing the complete performance of the con-

tract by the plaintiff, together with an estimate of the work done, and the amount of compensation due him according to the prices established by the parties. Until after the expiration of 30 days from the receipt of such a certificate, the company did not, by the terms of the agreement come under a liability to pay the plaintiff the balance, if any, due to him under the contract. Nor does the declaration state any facts entitling him to sue the company, on the contract, in the absence of such a certificate by the engineer, whose determination was made by the parties final or conclusive. And upon the supposition that the engineer made such a certificate as that provided by the contract, there is no allegation that entitled the plaintiff to go behind it; for there is no averment that the engineer had been guilty of fraud, or had made such gross mistake in his estimates as necessarily implied bad faith, or had failed to exercise an honest judgment in discharging the duty imposed upon him. The first count of the declaration was, therefore, defective for the want of proper averments showing plaintiff's right to sue on the contract, and the demurrer to that count should have been sustained.

As, for this reason, the case must be remanded for a new trial, it is proper to say that if the declaration had been good on demurrer, we should have been compelled to reverse the judgment for errors in the instructions given to the jury. Several instructions were asked by the defendant embodying the general proposition that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the evidence that, in respect thereto, he was guilty of fraud or intentional misconduct. These instructions were modified by the court by adding after the words "fraud or intentional misconduct" the words "or gross mistake." This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature, as necessarily implied bad faith upon the part of the engineer. We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part. They chose to risk his estimates, and to rely upon their right, which the law presumes they did not intend to waive, to demand that the engineer should, at all times, and in respect of every matter submitted to his determination, exercise an honest

judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith. * * *

Reversed.

COPLEW v. DURAND et al.

Supreme Court of California, 1908. 153 Cal. 278, 95 P. 38, 16 L.R.A.,N.S., 791.

Action by D. Coplew against A. W. Durand and another. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

HENSHAW, J. Plaintiff had entered into a contract with defendants to do the painting, polishing, enameling—in short the “finishing”—of the woodwork and floors of defendants’ house. By the terms of the contract progress payments were to be made, 75 per cent of the contract price to be paid on completion, and 25 per cent 36 days after final completion. The progress payments were made as in the contract provided, and this action is brought to recover the 25 per cent final payment, which defendants refused to make.

The contract provided that the work was to be “strictly first-class and to be done to the entire satisfaction of the owner and the architect”; as to the payments, “that in each of said cases a certificate be obtained and signed by the said architect.” Defendants’ refusal to pay was based upon the declaration of the architect that the work was not first-class and was not done to his satisfaction. Where work is to be done to the satisfaction of a person, evidenced by a certificate to that effect, the production of such a certificate is a condition precedent to a right of action upon the contract. This proposition is too well established to be questioned, and, indeed, is not questioned in this case. *Holmes v. Richet*, 56 Cal. 307, 38 Am.Rep. 54; *Loup v. California, etc., Co.*, 63 Cal. 97; *Cox v. McLaughlin*, 63 Cal. 196; *Tally v. Parsons*, 131 Cal. 516, 63 P. 833; *Kihlberg v. U. S.*, 97 U.S. 398, 24 L.Ed. 1106; *Wangler v. Swift*, 90 N.Y. 38; 9 Cyc. 618.

To make his case, in the absence of such certificate, the contractor pleaded and the court found that the work was done to the entire satisfaction of the owner and the architect, and that the refusal to issue the completion certificate was wrongful and was due to plaintiff’s refusal to do certain repair work which was not required of him by the contract. The evidence, while conflicting, established to the satisfaction of the trial court the following facts: Under the terms of the contract plaintiff was to be paid \$2,165. The work consisted of the finishing of the woodwork of the doors and walls and the finishing of the hardwood floors. The hardwood floors were naturally the last woodwork to be put in place and the last to be finished by the contractor. The contractor proceeded with his work upon the doors and walls, receiving

partial payments. In the early part of August he had completed all this work, and nothing remained for him to do under his contract but to finish the floors, which were not as yet ready for him. The architect asked the plaintiff what would be the value of the work which he had yet to do upon the floors, and plaintiff replied, "About \$200." The architect then stated that he would allow him the full 75 per cent of the contract price, deducting the value of the separate work yet to be done upon the floors, and did so; the architect himself testifying that he knew that he had paid precisely 75 per cent of the entire contract price, excepting \$200, the cost or the value of the work upon the floors. It is in evidence on behalf of the plaintiff that at the time of the completion of all this woodwork, excepting the floors, the architect and owner both expressed themselves satisfied with it. This condition of affairs obtained from August 8, 1904, when the last payment, amounting to 75 per cent was made, until January 22, 1905, when plaintiff finally completed the work upon the floors. The delay was through no fault of his. Meantime decorators had been called in, and in doing their work they had injured the work done by plaintiff. This is not disputed, and a separate contract was entered into by defendants with plaintiff to repair the damage so occasioned by the decorators. This work, in turn, he did to the apparent satisfaction of the defendants. At least he was paid in full therefor. It is not satisfactorily explained why at this time he should have been employed at a special price to do this repair work, if, as defendants' architect contends, he was at that time insisting that the original work was incomplete, unsatisfactory, and poor. The floors were done by plaintiff, as the court finds, in a satisfactory and workmanlike manner. Then, when in due course plaintiff demanded his final payment, the architect refused to give him a final certificate, stating that the woodwork had been damaged by water, panels and joists were cracked, and would have to be replaced, and that he looked to the plaintiff to finish these damaged panels and joists, to which plaintiff replied that he could not be expected to do the work twice, when he was paid but once for it. In fact it was necessary to replace panels to the number of about 60, and those panels in turn had to be "finished."

Appellants, however, contend that, notwithstanding these progress payments which had been made, and notwithstanding the fact that the woodwork had been completed to the satisfaction of the architect and owners, and evidence of that completion given by the payment of the 75 per cent, still the owners and architect retained a right under the contract to exercise a later judgment, and were not legally required to pass final judgment until the contractor was ready to turn over to them his work as complete. *Haynes v. Second Baptist Church*, 88 Mo. 285, 57 Am.Rep. 413. In this connection it is pointed out that the very finding of the court, while to the effect that the work had

been performed to the satisfaction of the architect and owner, declared also that it was not performed in a good and workmanlike manner, so that, whatever payments the owners and architect might choose to make during the progress, they still had the right to refuse the certificate for the final payment if at that time the work had not been performed to their satisfaction under the terms of the contract. This undoubtedly is true. Where, from the nature of the work, there might be latent defects, not discoverable at the time of completion, but becoming patent after the lapse of time, it might be important that the architect should not exercise final judgment until after the lapse of the 36 days; or where, as the architect contends in this case, the defects were apparent, and he frequently called the contractor's attention to them, and paid the 75 per cent under repeated promises of the contractor to repair the defects before the work was finally turned over for acceptance. Under such circumstances it would unhesitatingly be held that there was reserved to the architect the right of final approval or rejection at the expiration of the time named. This was the position of the defendants in this case, and that position was supported by the testimony of the architect. But the difficulty which confronts appellants lies in the fact that the court did not accept their version. Its direct finding that the work was done to the satisfaction of the architect impliedly, but positively, negatives the contention that he was, during all of that time, insisting that the work was imperfect and incomplete.

The case which is thus presented is one where the work has been completed to the satisfaction of the owner and architect, and the latter thereafter and without warrant refuses to issue his certificate for the final payment. The refusal under these circumstances being unreasonable, the necessity for the production of the certificate is dispensed with. *Katz v. Bedford*, 77 Cal. 322, 19 P. 523, 1 L.R.A. 826; *Nolan v. Whitney*, 88 N.Y. 649; *Phillips, etc., Co. v. Seymour*, 91 U.S. 646, 23 L.Ed. 341.

For these reasons, the judgment and order appealed from are affirmed.

NOTE

For general rules as to "Excuse of Condition of Expert's Certificate," see Restatement, Contracts, § 303.

VAN IDERSTINE CO. v. BARNET LEATHER CO.

Court of Appeals of New York, 1926. 242 N.Y. 425, 152 N.E. 250, 46 A.L.R. 858.

LEHMAN, J. On or about August 12, 1920, the plaintiff and the defendant entered into a contract for the sale of 15,000 vealskins delivery thereof to be made "beginning week of August 16th." The con-

tract was made upon condition that the skins were "to be received by Jules Star & Co.'s representative subject to their approval." On September 10, 1920, the parties entered into another contract for the sale of 6,000 vealskins, delivery to be made in September, "to be received by Jules Star & Co. subject to their approval." On or about August 16th a representative of Jules Star & Co. examined 15,000 vealskins tendered by the plaintiff in performance of its contract of sale of August 12th, and rejected 3,500 of such skins. It is not disputed that such rejection was justified. In October the plaintiff notified the defendant that it was ready to deliver 3,500 skins in substitution for those previously rejected. The defendant refused to accept or even examine the same on the ground that the time for delivery had expired. About the same time, Jules Star & Co. rejected the entire quantity of 6,000 skins which the plaintiff tendered in attempted performance of its contract of September 10, 1920, and defendant refused to accept them.

The plaintiff has brought this action to recover damages suffered because of the defendant's refusal to accept the skins which plaintiff offered to deliver. In the first cause of action for failure to accept the 3,500 skins under the contract of August 12, 1920, the plaintiff alleges that at or about the time of the delivery to defendant of 11,500 skins in August "it was mutually agreed between the plaintiff and defendant that the time for delivery of the remaining 3,500 vealskins called for by said Exhibit A should be extended until such time as plaintiff, in the usual course of its business, should have collected that number of its skins." In the second cause of action as amended at the trial the plaintiff alleged that any condition for approval by a representative of Jules Star & Co. of the skins to be delivered under the contract of September 10th was waived and excused because the approval was unreasonably withheld, and because defendant prevented Jules Star & Co. from giving such approval, and "because defendant and said Jules Star & Co. wrongfully and knowingly colluded to withhold that approval, with intent to avoid defendant's having to accept the said skins." The issues raised by the denial to these allegations were submitted to the jury and decided in favor of the plaintiff. * * *

Even though evidence was properly admitted as to the alleged conversation in regard to the delivery of the 3,500 skins which constitute the subject-matter of the first cause of action, there must be a new trial because in other respects error has crept into the record. We have pointed out that under both contracts sued upon the seller agreed to make delivery subject to the approval of Jules Star & Co. The parties chose to stipulate that such approval must be given. It constitutes a condition which, unless waived or excused, must be fulfilled before the buyer can be compelled to accept skins that are tendered. Concededly, approval of Jules Star & Co. has not been given. The condition was as matter of law waived by the buyer in regard to the 3,500 skins

referred to in the first cause of action, when the buyer refused to accept any skins even if approved by Jules Star & Co. Of course, the condition was waived also in regard to the contract which forms the basis of the second cause of action if refusal of approval by Jules Star & Co. was the result of bad faith on the part of Jules Star & Co. in which the defendant had some share. If by its own interference and wrong the defendant prevented the plaintiff from obtaining the stipulated approval, then the plaintiff may recover without it. We have pointed out that in the second cause of action the plaintiff has pleaded that the condition was waived and excused, not only because of wrongful act on the part of the defendant, but because approval was "unreasonably withheld," and the serious question raised upon this appeal is whether the plaintiff may recover under its contract upon proof that it offered to deliver skins which in quality complied with the contract requirements, and that the representative of Jules Star & Co. unreasonably withheld its approval of these skins.

The trial judge charged that if "approval was unreasonably withheld, whether Barnet had any thing to do with it or not, the plaintiff could recover. Star must have acted honestly. If he showed an honest judgment the defendant is entitled to a verdict." Though the parties have stipulated that the approval of Jules Star & Co. must be obtained for any skins delivered under the contract, under the rule laid down in the charge the plaintiff [buyer] may become liable for damages if he insists upon this stipulation being carried out. It places upon the buyer the risk of determining whether Jules Star & Co. have acted reasonably; it makes the buyer determine whether approval should reasonably have been given though not he but Jules Star & Co. were to approve of the quality of the skins. In effect it makes the buyer a guarantor of both the honesty and the good judgment of Jules Star & Co.

It is said that authority for the rule laid down in the charge may be found in many cases in this and other jurisdictions where the courts have considered the effect of unreasonable or dishonest refusal of architect or engineer to approve of work done or materials furnished under building contracts when such approval was made a condition precedent to payment. *Bowery National Bank v. Mayor, etc.*, 63 N.Y. 336; *MacKnight Flintic Stone Co. v. Mayor, etc.*, 160 N.Y. 72, 54 N.E. 661. In those cases it must be remembered that, by the nature of the contracts, if failure to obtain approval deprived the contractor of right to recover the agreed compensation, the result would be that the benefit of work actually performed and materials actually furnished could be appropriated by the owner without payment, though in other respects the contractor had fully complied with his contract. It would cause forfeiture of agreed price for agreed service without any fault on the contractor's part. In the same manner as the courts have evolved the rule that under contracts of that nature there may be recovery for

substantial performance, they have evolved a rule which permits recovery without stipulated certificate of approval where the certificate has been wrongfully or unreasonably refused. *Nolan v. Whitney*, 88 N.Y. 648. So, too, in some cases, where the contract shows that the person whose approval is required under the contract is merely an agent of a buyer selected by the buyer to pass upon the goods in the buyer's place, wrong on the part of the agent is imputed to the principal. *Lynn v. Baltimore, etc., R. R. Co.*, 60 Md. 404, 45 Am.Rep. 741. Here the contract is of different nature. The parties agree that a designated broker acting as expert and not simply as the buyer's agent must pass upon the goods, and delivery must be made subject to the expert's approval. Refusal to approve by the expert does not enable the buyer to obtain property from the seller without payment. According to the terms of the contract it merely permits him to refuse to accept the goods because he stipulated, not merely for goods of a certain quality, but for goods of that quality approved by a particular expert. To compel him to accept and pay for the goods without such approval is to impose liability upon him which he had not agreed to assume, and gives compensation to the seller for goods not delivered in full compliance with contract. The theoretical soundness of the rule applied to building contracts has not escaped criticism. It rests upon the basis that enforcement of the contract according to its strict terms would cause forfeiture of compensation for work done or materials furnished. The rule should not be extended by analogy where the reason for the rule fails. See *Williston on Contracts*, §§ 794-797. Unless the certificate has been withheld dishonestly and in bad faith, and the defendant is a party to that bad faith through control of the expert or collusion with him, there may be no recovery under the second cause of action.

There are cases where parties stipulate for the approval or certificate of a third person, not as part of the contractual obligation of either party to the contract, but rather as machinery for avoiding dispute between the parties as to whether these obligations have been properly performed. Question may then arise as to whether the stipulated approval or certificate constitutes in full sense a condition precedent to recovery, or whether there may be recovery based on substantial performance upon proof that in other respects the contract has been fully complied with. Such question we do not now decide. Doubtless there are cases where much hardship would be imposed upon a party who performs work or manufactures goods at the special instance of another if payment were withheld merely because approval is wrongfully refused; the argument may well be made that such result was not intended by the parties. Here we have no such circumstances. The plaintiff's obligation is only to deliver certain goods, and by express stipulation there may be no delivery without approval of a third party. It has done nothing for which it might legally or equitably expect compensa-

tion until delivery is made. If approval is withheld, the plaintiff cannot perform; it loses the profit which it might have otherwise made by delivery of goods at a contract price higher than the then prevailing market price. It assumed this risk. It still retains the goods and may sell them at market price. The defendant should not be required to pay the contract price unless the plaintiff performs according to contract, "subject to the approval" of the third party. • • •

The judgments should be reversed and a new trial granted, with costs to abide the event.

CARDOZO, POUND, and ANDREWS, JJ., concur.

HISCOCK, C. J., and McLAUGHLIN and CRANE, JJ., dissent.

(I) CONSTRUCTION CONTRACTS—SUBSTANTIAL PERFORMANCE

NOLAN et al. v. WHITNEY.

Court of Appeals of New York, 1882. 88 N.Y. 648.

In July, 1877, Michael Nolan, the plaintiffs' testator, entered into an agreement with the defendant to do the mason work in the erection of two buildings in the city of Brooklyn for the sum of \$11,700, to be paid to him by her in instalments as the work progressed. The last instalment of \$2,700 was to be paid thirty days after the completion and acceptance of the work. The work was to be performed to the satisfaction and under the direction of M. J. Morrill, architect, to be testified by his certificate, and that was to be obtained before any payment could be required to be made. As the work progressed, all the instalments were paid except the last, and Nolan, claiming that he had fully performed his agreement, commenced this action to recover that instalment. The defendant defended the action upon the ground that Nolan had not fully performed his agreement according to its terms and requirements, and also upon the ground that he had not obtained the architect's certificate as required by the agreement.

Upon the trial the defendant gave evidence tending to show that much of the work was imperfectly done, and that the agreement had not been fully kept and performed on the part of Nolan; the latter gave evidence tending to show that the work was properly done, that he had fairly and substantially performed his agreement, and that the architect had refused to give him the certificate, which, by the terms of his agreement, would entitle him to the final payment. The referee

found that Nolan completed the mason work required by the agreement according to its terms; that he in good faith intended to comply with, and did substantially comply with, and perform the requirements of his agreement; but that there were trivial defects in the plastering for which a deduction of \$200 should be made from the last instalment, and he ordered judgment in favor of Nolan for the last instalment, less \$200.

The Court say: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon performance; but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform, acting in good faith, and intending and attempting to perform his contract, does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in performance, for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court. *Smith v. Brady*, 17 N.Y. 189, 72 Am.Dec. 442; *Thomas v. Fleury*, 26 N.Y. 26; *Glacius v. Black*, 50 N.Y. 145, 10 Am.Rep. 449; *Johnson v. DePeyster*, 50 N.Y. 666; *Phillip v. Gallant*, 62 N.Y. 256; *Bowery Nat. Bank v. The Mayor*, 63 N.Y. 336. According to the authorities cited under an allegation of substantial performance upon the facts found by the referee, Nolan was entitled to recover unless he is barred because he failed to get the architect's certificate, which the referee found was unreasonably and improperly refused. But when he had substantially performed his contract, the architect was bound to give him the certificate, and his refusal to give it was unreasonable, and it is held that an unreasonable refusal on the part of an architect in such a case to give the certificate dispenses with its necessity."

EARL, J., reads for affirmance. All concur.

Judgment affirmed.

QUESTIONS:

1. Did the court disregard an express condition precedent?
2. Does the decision, if adhered to, limit "freedom of contract"?
3. Is there any difference between "substantial preformance of a contract" and "substantial performance of a condition"? To which one of these do the rules in Restatement, Contracts, §§ 268, 274, apply?
4. Was it necessary to disregard an express condition in this case in order to avoid an unjust forfeiture? See Restatement, Contracts, § 302.

NOTE

In a bilateral contract for an agreed exchange of the promised performances, can the party whose performance is to be rendered first ever maintain an action for breach of the other party's promise without performing his own part in full and exactly according to the contract? Is such full and exact performance a condition precedent to the other party's duty to pay the agreed price? Or is "substantial performance" the condition, the fulfilment of which is sufficient to enable the plaintiff to maintain his action, subject to a counterclaim by the defendant for a minor breach?

These questions, in this form, are more often asked with respect to contracts for building and other construction work than with respect to other kinds of contracts; but they are applicable to all kinds alike, to contracts for services or the sale of goods as well as to building contracts. We have already been dealing with these questions in the previous subdivisions of this chapter. If the performance rendered by the plaintiff, though less than full and complete, is such that the purposes for which the defendant contracted are "substantially" attained, it is obvious that the plaintiff's nonperformance is only a "partial failure of consideration" and is a "minor" breach. It does not "go to the essence;" and it can be compensated in damages.

In answering these questions and in stating the law, however, it is necessary to distinguish between two classes of cases: (1) contracts in which the defendant has taken care to make full and complete performance in all details an *express condition* of his own duty to pay (or render the return performance whatever it may be); (2) contracts in which there is no such express condition although the plaintiff has *expressly promised* to render full and complete performance. If the contract is of the first class, and yet "substantial" performance by the plaintiff is held to be enough to enable him to maintain his suit for damages for breach by the defendant, the court is disregarding the express condition. If the contract is of the second class, the early courts of common law would have held that the defendant's promise is independent and unconditional. The modern courts, in holding that the defendant's legal duty is conditional on "substantial" performance by the plaintiff, are doing more for the defendant than he did for himself in drafting the contract. Substantial performance is a "constructive" condition, declared to be such by the court because modern notions of justice so require.

If this distinction were made, there would probably be less conflict in the decisions; but in fact the court opinions frequently make no reference to it and may deal with the case as if an express promise by the plaintiff were identical in effect with an express condition of the defendant's promise. There is no doubt that the contracting parties also frequently fail to make the distinction, the form of expression used in the contract being largely accidental.

How great may the plaintiff's nonperformance be, in extent or quality or degree, without preventing the court from holding that he has rendered

"substantial" performance entitling him to the contract price diminished only by a compensatory allowance? There is no mathematical or mechanically applicable rule by which this can be determined. The performance must be "substantial;" it must be such that the purposes for which the defendant contracted are "substantially" attained. It is easier to give an answer in a specific case than to construct a "working rule" that will work in all cases; and yet the justice of the answer in a specific case depends upon experience in like cases, experience that can be in some degree attained by a comparative study of reported cases (more than can be reprinted in a casebook). Study once more Restatement, Contracts, §§ 268-270, and 275, 276.

Even though the plaintiff's actual performance is less than "substantial," a court may be willing to give him a judgment for the reasonable value (*quantum meruit*) of what the defendant has received diminished by damages for the breach, instead of the contract price less such damages. For a rule as to this quasi-contractual remedy, restitutionary in character, see Restatement, Contracts, § 357.

JACOB & YOUNGS v. KENT.

Court of Appeals of New York, 1921. 230 N.Y. 239, 129 N.E. 889.

CARDOZO, J. The plaintiff built a country residence for the defendant at a cost of upwards of \$77,000, and now sues to recover a balance of \$3,483.46, remaining unpaid. The work of construction ceased in June, 1914, and the defendant then began to occupy the dwelling. There was no complaint of defective performance until March, 1915. One of the specifications for the plumbing work provides that "all wrought-iron pipe must be well galvanized, lap welded pipe of the grade known as 'standard pipe' of Reading manufacture."

The defendant learned in March, 1915, that some of the pipe, instead of being made in Reading, was the product of other factories. The plaintiff was accordingly directed by the architect to do the work anew. The plumbing was then encased within the walls except in a few places where it had to be exposed. Obedience to the order meant more than the substitution of other pipe. It meant the demolition at great expense of substantial parts of the completed structure. The plaintiff left the work untouched, and asked for a certificate that the final payment was due. Refusal of the certificate was followed by this suit.

The evidence sustains a finding that the omission of the prescribed brand of pipe was neither fraudulent nor wilful. It was the result of the oversight and inattention of the plaintiff's subcontractor. Reading pipe is distinguished from Cohoes pipe and other brands only by the name of the manufacturer stamped upon it at intervals of between six and seven feet. Even the defendant's architect, though he in-

spected the pipe upon arrival, failed to notice the discrepancy. The plaintiff tried to show that the brands installed, though made by other manufacturers, were the same in quality, in appearance, in market value, and in cost as the brand stated in the contract—that they were indeed, the same thing, though manufactured in another place. The evidence was excluded, and a verdict directed for the defendant. The Appellate Division reversed, and granted a new trial.

We think the evidence, if admitted, would have supplied some basis for the inference that the defect was insignificant in its relation to the project. The courts never say that one who makes a contract fills the measure of his duty by less than full performance. They do say, however, that an omission, both trivial and innocent, will sometimes be atoned for by allowance of the resulting damage, and will not always be the breach [nonperformance] of a condition to be followed by a forfeiture. *Spence v. Ham*, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238; *Woodward v. Fuller*, 80 N.Y. 312; *Glacius v. Black*, 67 N.Y. 563, 566; *Bowen v. Kimbell*, 203 Mass. 364, 370, 89 N.E. 542, 133 Am. St.Rep. 302. The distinction is akin to that between dependent and independent promises, or between promises and conditions. *Anson on Contracts* (Corbin's Ed.) § 367; 2 *Williston on Contracts*, § 842. Some promises are so plainly independent that they [their performance] can never by fair construction be conditions of one another. *Rosenthal Paper Co. v. Nat. Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766; *Bogardus v. N.Y. Life Ins. Co.*, 101 N.Y. 328, 4 N.E. 522. Others are so plainly dependent that they must always be conditions [conditional]. Others, though dependent and thus conditions [conditional] when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant. 2 *Williston on Contracts*, § 841, 842; *Eastern Forge Co. v. Corbin*, 182 Mass. 590, 592, 66 N.E. 419; *Robinson v. Mollett*, L.R., 7 Eng. & Ir.App. 802, 814; *Miller v. Benjamin*, 142 N.Y. 613, 37 N.E. 631.

Considerations partly of justice and partly of presumable intention are to tell us whether this or that promise shall be placed in one class or in another. The simple and the uniform will call for different remedies from the multifarious and the intricate. The margin of departure within the range of normal expectation upon a sale of common chattels will vary from the margin to be expected upon a contract for the construction of a mansion or a "skyscraper." There will be harshness sometimes and oppression in the implication of a condition when the thing upon which labor has been expended is incapable of surrender because united to the land, and equity and reason in the implication of a like condition when the subject-matter, if defective, is in shape to be returned. From the conclusion that promises may not be treated as dependent to the extent of their uttermost minutiae without a sacrifice of justice, the progress is a short one to the conclusion that they may not be so treated without a perversion of inten-

tion. Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification where the lines of division are so wavering and blurred. Something, doubtless, may be said on the score of consistency and certainty in favor of a stricter standard. The courts have balanced such considerations against those of equity and fairness, and found the latter to be the weightier. The decisions in this state commit us to the liberal view, which is making its way, nowadays, in jurisdictions slow to welcome it. *Dakin & Co. v. Lee*, 1916, 1 K.B. 566, 579. Where the line is to be drawn between the important and the trivial cannot be settled by a formula. "In the nature of the case precise boundaries are impossible." 2 Williston on Contracts, § 841. The same omission may take on one aspect or another according to its setting. Substitution of equivalents may not have the same significance in fields of art on the one side and in those of mere utility on the other. Nowhere will change be tolerated, however, if it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the contract. *Crouch v. Gutmann*, 134 N.Y. 45, 51, 31 N.E. 271, 30 Am.St.Rep. 608. There is no general license to install whatever, in the builder's judgment, may be regarded as "just as good." *Easthampton L. & C. Co., Ltd., v. Worthington*, 186 N.Y. 407, 412, 79 N.E. 323. The question is one of degree, to be answered, if there is doubt, by the triers of the facts (*Crouch v. Gutmann*; *Woodward v. Fuller*, *supra*), and, if the inferences are certain, by the judges of the law (*Easthampton L. & C. Co., Ltd., v. Worthington*, *supra*). We must weigh the purpose to be served, the desire to be gratified, the excuse for deviation from the letter, the cruelty of enforced adherence. Then only can we tell whether literal fulfillment is to be implied by law as a condition. This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The wilful transgressor must accept the penalty of his transgression. *Schultze v. Goodstein*, 180 N.Y. 248, 251, 73 N.E. 21; *Desmond-Dunne Co. v. Friedman-Doscher Co.*, 162 N.Y. 486, 490, 56 N.E. 995. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong. *Spence v. Ham*, *supra*.

In the circumstances of this case, we think the measure of the allowance is not the cost of replacement, which, would be great, but the difference in value, which would be either nominal or nothing. Some of the exposed sections might perhaps have been replaced at moderate expense. The defendant did not limit his demand to them, but treated the plumbing as a unit to be corrected from cellar to roof. In point of fact, the plaintiff never reached the stage at which evidence of the extent of the allowance became necessary. The trial court had excluded evidence that the defect was unsubstantial, and in view of that ruling there was no occasion for the plaintiff to go farther with an offer of proof. We think, however, that the offer, if it had been made, would not of necessity have been defective because directed to difference in value. It is true that in most cases the cost of replacement is the measure. *Spence v. Ham*, *supra*. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained. When that is true, the measure is the difference in value. Specifications call, let us say, for a foundation built of granite quarried in Vermont. On the completion of the building, the owner learns that through the blunder of a subcontractor part of the foundation has been built of granite of the same quality quarried in New Hampshire. The measure of allowance is not the cost of reconstruction. "There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable." *Handy v. Bliss*, 204 Mass. 513, 519, 90 N.E. 864, 134 Am.St.Rep, 673. Cf. *Foeller v. Heintz*, 137 Wis. 169, 178, 118 N.W. 543, 24 L.R.A.,N.S., 321; *Oberlies v. Bullinger*, 132 N.Y. 598, 601, 30 N.E. 999; 2 Williston on Contracts, § 805, p. 1541. The rule that gives a remedy in cases of substantial performance with compensation for defects of trivial or inappreciable importance has been developed by the courts as an instrument of justice. The measure of the allowance must be shaped to the same end.

The order should be affirmed, and judgment absolute directed in favor of the plaintiff upon the stipulation, with costs in all courts.

(Dissenting opinion omitted. The court divided 4 to 3.)

QUESTIONS:

1. Did the court disregard an express condition in this case, made so by "apt and certain words"?
2. Did the plaintiff commit a breach of contract?
3. Compare the court's reasoning with Restatement, Contracts, § 275.

HANDY v. BLISS.

Supreme Judicial Court of Massachusetts, 1910. 204 Mass. 513, 90 N.E. 864.

Action by Herman P. Handy against Nancy E. Bliss. Verdict for plaintiff, and defendant excepted. Exceptions sustained.

KNOWLTON, C. J. This is an action to recover a balance due a contractor for the construction of a building. One of the counts was upon an account annexed, which opened to the plaintiff the right of recovery upon a quantum meruit for labor and materials. The defendant requested, among others, the following instructions:

"(1) That if the jury believe that pages 1 and 2 of the specifications, entitled 'General Conditions,' were a part of the contract, there could be no recovery on the ground of substantial performance.

"(2) If the jury shall be of the opinion that pages 1 and 2 of the specifications, entitled 'General Conditions,' were not a part of the original contract, then that where a payment is due only on the completion of the contract as here, the plaintiff must show substantial completion; that is, if the plaintiff knowingly omitted to do certain things required by the contract, and they are of such a nature that the work is complete in all material respects, then the contractor may recover the contract price, less what it would necessarily cost to complete the work; but the performance, so far as it goes, must be in exact compliance with the terms of the contract; that to constitute substantial performance, a general adherence to the plans and specifications is not sufficient, the builder not being entitled to wilfully or carelessly depart from minute details, or to leave his work incomplete in any material respect; that the builder is not entitled to make changes that are so substantial that an allowance out of the contract price will not give the owner substantially what he contracted for, or to omit work that cannot be done by the owner except at great expense or with great risk to the building.

"(3) That this doctrine of substantial performance does not apply where omissions by the builder were intentional, or where the contract is to be performed to the satisfaction of the owner."

The law relative to the matters mentioned in these requests has been considered in different cases, and it was discussed at length in *Bowen v. Kimbell*, 203 Mass. 364, 89 N.E. 542, 133 Am.St.Rep. 302. To entitle the plaintiff to recover in a case of this kind there must be an honest intention to perform the contract and an attempt to perform it. There must be such an approximation to complete performance that the owner obtains substantially what was called for by the contract, although it may not be the same in every particular, and although there may be omissions and imperfections on account of which there should be a deduction from the contract price. It is not necessary that the

work should be complete in all material respects, nor that there should be no omissions of work that cannot be done by the owner except at great expense or with great risk to the building. There may be omissions of that which could not afterwards be supplied exactly as called for by the contract without taking down the building to its foundations, and at the same time the omission may not affect the value of the building for use or otherwise, except so slightly as to be hardly appreciable. Notwithstanding such an omission, there might be a substantial performance of the contract.

There is no reason why the doctrine of substantial performance should not apply where the contract is to be performed to the satisfaction of the owner, according to the usual meaning of this expression as applied to contracts of this kind, namely, to his satisfaction, so far as he is acting reasonably in considering the work in connection with the contract. This doctrine does not apply where the builder intends not to perform the contract. But an intentional omission to do certain things called for by the contract, if he believes that they are not called for, and intends in good faith to do all that he has agreed to do, does not prevent the application of the doctrine. These requests for rulings were rightly refused.

Another request, numbered 3, relates to the requirements that the work should be done "to the entire satisfaction and approval of the owner." The question is whether this language means that the owner must act reasonably in determining whether the work is satisfactory, or whether, if he acts in good faith, he may decline to be satisfied and refuse his approval upon a whimsical and unreasonable exercise of personal taste or prejudice. Sometimes it is difficult to determine which construction should be given to a contract of this kind. Cases in which the language has been given the former meaning are: *Hawkins v. Graham*, 149 Mass. 284, 21 N.E. 312, 14 Am.St.Rep. 422; *Noyes v. Eastern Accident Ass'n*, 190 Mass. 171, 76 N.E. 665; *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N.E. 420. See *C. W. Hunt & Co. v. Boston Elev. Ry. Co.*, 199 Mass. 227, 85 N.E. 446; *Cashman v. Proctor*, 200 Mass. 272, 86 N.E. 284; *Webber v. Cambridge Sav. Bank*, 186 Mass. 314, 71 N.E. 567. Contracts which are given the latter meaning are found in *Williams Mfg. Co. v. Standard Brass Co.*, 173 Mass. 356, 53 N.E. 862; *White v. Randall*, 153 Mass. 394, 26 N.E. 1071; *Whittemore v. New York, New Haven & Hartford R. R.*, 191 Mass. 392, 77 N.E. 717.

Where the subject-matter of the contract seems to involve questions of personal taste or prejudice, and especially when in such a case no benefit will pass under the contract unless the work is accepted, there is more reason for giving such language the latter construction. But as was said in *Hawkins v. Graham*, *ubi supra*, "when the consideration furnished is of such a nature that its value will be lost to the plaintiff,

either wholly or in great part unless paid for, a just hesitation must be felt and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies of the interested party. In different cases, courts have been inclined to construe agreements of this class as agreements to do the thing in such a way as reasonably ought to satisfy the defendant."

The erection of a building upon real estate ordinarily confers a benefit upon the owner, and he should not be permitted to escape payment for it on account of a personal idiosyncrasy. Indeed, under the law of Massachusetts, this question is usually of little practical application to contracts for buildings upon real estate; for if the contract is not performed by reason of the failure of the owner to be satisfied with that which ought to satisfy him, there can be a recovery upon a quantum meruit; and in most cases the deduction that would be made from the contract price, for the difference between the literal performance of the contract and that which would have been a complete performance if the owner had acted reasonably and accepted the work, would be little if anything. This request for an instruction was rightly refused. * * *

Exceptions sustained.

QUESTIONS:

1. Is the court's use of the terms "material" omissions and "substantial" performance in harmony with that found in Restatement, Contracts, §§ 274-276, and 268(2)?
2. Is there a difference between "intentional omission" and "wilful breach"?
3. Can a builder who wilfully refuses to drive the last nail recover nothing on the contract? See Restatement, Contracts, § 275.

NOTE

In *Smith v. Mathews Const. Co.*, 179 Cal. 797, 179 P. 205, 207 (1919), the court said: "Appellants insist that the deviations from the strict letter of the contract (such, for example, as the failure in each room to carry the "scratch coat" clear to the floor at that part of the wall subsequently concealed by the baseboard) were intentional, wilful violations of the agreement necessarily involving bad faith, and that the doctrine of substantial performance has no application. They also assert that such doctrine may only be invoked by pleading and where, as here, plaintiff alleged full performance and the court found that there were any deviations, however slight, from strict performance on the part of the lien claimant, the judgment must be against him. In support of the point last stated, appellants cite such cases as *Herdal v. Sheehy*, 173 Cal. 163, 159 P. 422 (1916), and *Daley v. Russ*, 86 Cal. 114, 24 P. 867 (1890), which hold, in effect, that where one seeks to recover for the value of

work done or material furnished in the partial performance of a contract, full performance of which has been prevented by the other party to the agreement, he must plead the excuse for failure of full performance. Undoubtedly, if the omissions on the part of the plaintiff were material and substantial failures to complete his contract, the pleading was not sufficient to support a cause of action based upon the quantum meruit. But the court held that there was a substantial performance of the contract, and the real question is whether or not that ruling was justified. It is not true, as appellants contend, that any conscious deviation from the absolute terms of the agreement causes a failure of performance."

MANITOWOC STEAM BOILER WORKS v. MANITOWOC GLUE CO.

Supreme Court of Wisconsin, 1903. 120 Wis. 1, 97 N.W. 515.

Action by the Manitowoc Steam Boiler Works against the Manitowoc Glue Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Action to recover the contract price and enforce a lien for supplying a steam boiler to the defendant. The evidence disclosed that the defendant operated a glue factory, requiring a large amount of steam, not only for power, but also for heating and drying; that it had an old tubular boiler, which had been manufactured by the plaintiff, and with which and its use the plaintiff was entirely familiar; and in such situation the parties negotiated for a new boiler, the defendant stating to the plaintiff that the old boiler was inadequate—that it had a commercial rating of about 80 horse power, and that one was needed of about 100 horse power. The plaintiff's manager counselled one still larger, namely, to rate about 125 horse power, as compared with the old one, 80 horse power. The agreement finally reached was that the new one should be substantially of 50 per cent more capacity than the old, but was to be of the Scotch type, instead of the tubular type. Plaintiff constructed a boiler of the Scotch type, put it in place in a building and upon brick foundation constructed by the defendant for that purpose. After it was connected up, it was found disappointing in capacity, and not up to the old boiler, but was used, in connection with the old one, to furnish the steam necessary for the factory, while efforts were made both by plaintiff and defendant to make it work more efficiently. These efforts being still unsatisfactory, the defendant complained of the boiler as not satisfying the contract, and, as the defendant's manager testifies, desired to have it taken away. The plaintiff's manager testifies that thereupon he proposed to have a test made, and, if it did not satisfy the contract, he would either take it out and put in a new one, or enlarge it so as to make it of the necessary capacity. That test was made, the plaintiff contending that it showed the boiler to satisfy the contract, the defendant contending that it did

not, but meanwhile using the boiler to supply in part the steam needed to keep its factory running. * * * Thereupon the court made findings that the plaintiff had substantially performed its contract, except that, instead of a boiler 50 per cent greater than the old one, it had supplied one of about 20 per cent less capacity; that defendant had accepted the boiler; and that the reasonable value thereof was the original contract price of \$2,035, for which, less the payments, judgment was rendered, from which the defendant brings this appeal.

DODGE, J. (after stating the facts). The result of this action, whereby the defendant is required to pay the full contract price for a boiler of only about one-half the capacity or value of that for which it agreed to pay, is somewhat startling, especially in view of the consideration, understood by both parties, that its only reason for buying a new boiler at all was that the operation of the factory required more steam than the old one could supply. Before reaching such a result, a court should pause to re-examine the rules of law or processes of reasoning upon which it is based. If the law warrants it, the force or value of a contract seems to have vanished. The contractor receives the same compensation for nonperformance as for performance. The general rule of law is firmly established that he who makes an entire contract can recover no pay unless he performs it entirely and according to its terms. *Moritz v. Larsen*, 70 Wis. 569, 36 N.W. 331; *Cohn v. Plumer*, 88 Wis. 622, 60 N.W. 1000; *Widman v. Gay*, 104 Wis. 277, 80 N.W. 450. This general rule has, with considerable hesitation, been relaxed for equitable considerations in certain exceptional situations where it is believed to work hardship:

First, in favor of laborers who contract to perform personal services, and without fault of either party fail of complete performance (*Diefenback v. Stark*, 56 Wis. 462, 466, 14 N.W. 621, 43 Am.Rep. 719; *Walsh v. Fisher*, 102 Wis. 172, 78 N.W. 437, 43 L.R.A. 810, 72 Am.St.Rep. 865; *Hildebrand v. Amer. F. A. Co.*, 109 Wis. 171, 85 N.W. 268, 53 L.R.A. 826); secondly, in building contracts, where the contractor constructs something on the land of another which by oversight, but in good-faith effort to perform fails to entirely satisfy the contract, but is so substantially in compliance therewith that the structure fully accomplishes the purpose of that contracted for, and the other party voluntarily accepts the benefit thereof, or where the failure is mere inconsiderable incompleteness, and the expense of completion is easy of ascertainment (*Malbon v. Birney*, 11 Wis. 107; *Fuller, etc., Co. v. Shurts*, 95 Wis. 606, 70 N.W. 683; *Williams v. Thrall*, 101 Wis. 337, 76 N.W. 599; *Laycock v. Parker*, 103 Wis. 161, 79 N.W. 327; *Pritzlaff Co. v. Berghoefer*, 103 Wis. 359, 79 N.W. 564; *Taft v. Montague*, 14 Mass. 282, 7 Am.Dec. 215; *Smith v. School Dist.*, 20 Conn. 312; *Bozarth v. Dudley*, 44 N.J.L., 304, 43 Am.Rep. 373; *Smith v. Brady*, 17 N.Y. 173, 72 Am.Dec. 442; *Dermott v. Jones*, 2 Wall. 1,

17 L.Ed. 762; and, thirdly, where the contractor supplies an article different from or inferior to that promised, and the recipient, having full opportunity to reject without loss or injury, decides to accept and retain the thing furnished.

This third phase is hardly an exception, for such voluntary acceptance may well be deemed the making of a new contract to take and pay reasonably for the article which does not satisfy the original contract. *Fuller, etc., Co., v. Shurts, supra*; *Williams v. Thrall, supra*. In case of either of these exceptions, great caution is due in order that the innocent purchaser shall not suffer. If loss must fall anywhere, it should rest on him who breaks the contract. As said in *Allen v. McKibbin*, 5 Mich. 449, 455, and quoted approvingly in *Walsh v. Fisher, supra*, "the party in default can never gain by his default, and the other party can never be permitted to lose by it." *Bishop v. Price*, 24 Wis. 480. The question, therefore, in such cases, is never what will reasonably compensate the contractor, but what can the purchaser pay without being put in worse position than if the contract had been performed? The recovery is quantum valebat from the innocent purchaser's point of view.

Proceeding to ascertain how far these principles are applicable to the situation at bar, we are confronted by the fact that substantial performance of the express contract is wholly wanting. The finding is that the boiler furnished was about 82 per cent of the capacity of the old one, instead of 150 per cent, and that the increase of capacity was the vital and essential part of the contract. This is in no sense substantial performance. The boiler does not serve at all the purpose which the larger one would have served, and for which it was purchased. Defendant can obtain that for which it contracted, and for which it agreed to pay \$2,035, and which is necessary to the purpose which induced the contract, in only one of two ways: either it can remove this boiler from its premises at large expense, if plaintiff does not remove it, and purchase and put in place another of the required size; or it can retain it, and put in another of substantially equal capacity as auxiliary to it, and at a cost equal to or greater than the original contract price, and probably necessitating reconstruction of his boiler house. One in such predicament cannot be said to have received in substance that for which he contracted. *Malbon v. Birney, supra*; *Fuller, etc., Co. v. Shurts, supra*. Neither do we discover either finding or proof that defendant had accepted the boiler, had decided to keep it, and use it so far as it will go toward supplying the needed steam. True, the trial court argues that it would be inequitable to allow defendant to keep the boiler and pay nothing for it, but does not find that it has elected to do so. The only finding is that it is not shown by a preponderance of the evidence that defendant rejected the boiler, or demanded its removal, though he did protest that

it did not satisfy the contract. The evidence is that defendant never in words ordered plaintiff to remove the boiler, but from the testimony of the same witness (plaintiff's manager) it appears that defendant, at the time of protesting the insufficiency, did convey to the plaintiff its wish and expectation that it be removed. That witness testified that upon such protest he agreed that he would remove the boiler if on test it did not come up to contract requirement. The test was made, the capacity ascertained, but the plaintiff's contention thereafter was that the contract was other than it is now found to have been, and for that reason did not remove it. This testimony fully confirms that of defendant's manager that he desired to have the boiler removed, and negatives any inference that it remained on defendant's premises pursuant to an election on its part to keep it. * * * Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. * * *

The result is that at the close of the trial there was no evidence to support a recovery on the contract, and the court should have rendered judgment dismissing the complaint. Neither was there evidence to support a cause of action quantum meruit, to accord with which amendment by the court is authorized by section 2830, Rev.St.1898. True, the court might conceive that acts subsequent to those disclosed by the proofs might take place, and might constitute acceptance; but could that justify an entire change of issues? The real controversy had been as to the capacity of the boiler contracted for. That issue being decided against it, different courses were open both to plaintiff and defendant. The former might decide to take it away and replace it by one up to the contract requirement, as it had promised to do; or perhaps it might enlarge this particular boiler, as suggested by the evidence; or it might take it away entirely, and stand its liability for damages for entire breach of the contract. The defendant might consent to any of these steps, or it might resist them in such a way as to effectively work an acceptance so as to be liable quantum meruit. Indeed, so far as the record discloses, these options are still open to the parties, if not foreclosed by the judgment appealed from. * * *

Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.

ROWE v. GERRY et al.

Supreme Court of New York, Appellate Division, 1906.
112 App.Div. 358, 98 N.Y.S. 380.

Action by Edward Rowe against Isabel H. Gerry and others. From a judgment for plaintiff, defendant Gerry appeals. Affirmed.

PER CURIAM. This case has been here twice on appeal from judgments for the plaintiff. 86 App.Div. 349, 83 N.Y.S. 740; 109 App. Div. 153, 95 N.Y.S. 857. The complaint was to recover the final balance due on a building contract; i. e., it was for performance of the contract. The first judgment was reversed for the reason that performance was not shown by the plaintiff, but nonperformance, and excuse therefor, whereas a recovery could be had under the complaint only for performance. The second judgment was affirmed, because substantial performance, which is performance, was shown and found by the trial court. A reargument was ordered.

The learned counsel for the appellant understands that the second judgment should have been reversed, because it was for substantial performance, which he understands from our two former opinions to be not performance, but nonperformance. We do not wish to leave any such impression as that. There is a wide difference. Substantial performance is performance, and entitles the plaintiff to recover under a complaint for performance; and especially is that so under building contracts, where some of the infinite details may be easily overlooked. *Glacius v. Black*, 50 N.Y. 145, 10 Am.Rep. 449; *Spence v. Ham*, 163 N.Y. 220, 57 N.E. 412, 51 L.R.A. 238. It may well even happen that the plaintiff may not know of existing omissions when he draws his complaint for performance. When such omissions are proved by the defendant, the plaintiff may recover on his complaint for performance, if they be unsubstantial, and not wilful, but the cost of supplying them has to be deducted.

The judgment is affirmed.

QUESTIONS:

1. If a contractor is sued for damages for breach of his contract, does he establish a complete defense by proving "substantial performance"?
2. Can one who has rendered "substantial performance" (but not full and complete) maintain an action of debt for the agreed price, or must he sue in *indebitatus assumpsit* for *quantum meruit*?
3. Is *quantum meruit* identical with the contract price less damages measured by the harm done by the minor breach?
4. If the defendant promised to convey Blackacre as the agreed exchange for building a house, can the builder who has rendered

- only "substantial performance" get a decree for specific conveyance of Blackacre? See Restatement, Contracts, §§ 374, 375.
5. Does the defendant bear the burden of alleging and proving the minor breach by the plaintiff and the amount of harm caused?
 6. Can a builder get judgment for *quantum meruit* if his performance is less than "substantial performance" and yet has a net value to the defendant above the harm suffered by breach? See Restatement, Contracts, § 357. See Id. § 346, for measure of damages for breach of a construction contract.
 7. If the builder has rendered "substantial performance" only, how much must the owner tender in payment in order to avoid being in breach himself?
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(J) CONDITION OF PERSONAL SATISFACTION

GIBSON v. CRANAGE.

Supreme Court of Michigan, 1878. 39 Mich. 49, 33 Am.Rep. 351.

MARSTON, J. Plaintiff in error brought assumpsit to recover the contract price for the making and execution of the portrait of the deceased daughter of defendant. It appeared from the testimony of the plaintiff that he at a certain time called upon the defendant and solicited the privilege of making an enlarged picture of his deceased daughter. He says: "I was to make an enlarged picture that he would like, a large one from a small one, and one that he would like and recognize as a good picture of his little girl, and he was to pay me."

The defendant testifies that the plaintiff was to take the small photograph and send it away to be finished, "and when returned if it was not perfectly satisfactory to me in every particular, I need not take it or pay for it. I still objected and he urged me to do so. There was no risk about it; if it was not perfectly satisfactory to me I need not take it or pay for it."

There was little if any dispute as to what the agreement was. After the picture was finished it was shown to defendant who was dissatisfied with it and refused to accept it. Plaintiff endeavored to ascertain what the objections were, but says he was unable to ascertain clearly, and he then sent the picture away to the artist to have it changed.

On the next day he received a letter from the defendant reciting the original agreement, stating that the picture shown him the previous day was not satisfactory and that he declined to take it or any

other similar picture, and countermanded the order. A further correspondence was had, but it was not very material and did not change the aspect of the case. When the picture was afterwards received by the plaintiff from the artist, he went to see the defendant and to have him examine it. This defendant declined to do, or to look at it, and did not until during the trial, when he examined and found the same objections still existing.

We do not consider it necessary to examine the charge in detail, as we are satisfied it was as favorable to plaintiff as the agreement would warrant.

The contract (if it can be considered such) was an express one. The plaintiff agreed that the picture when finished should be satisfactory to the defendant, and his own evidence showed that the contract in this important particular had not been performed. It may be that the picture was an excellent one and that the defendant ought to have been satisfied with it and accepted it, but under the agreement the defendant was the only person who had the right to decide this question. Where parties thus deliberately enter into an agreement which violates no rule of public policy, and which is free from all taint of fraud or mistake, there is no hardship whatever in holding them bound by it.

Artists or third parties might consider a portrait an excellent one, and yet it prove very unsatisfactory to the person who ordered it and who might be unable to point out with clearness the defects or objections. And if the person giving the order stipulates that the portrait when finished must be satisfactory to him or else he will not accept or pay for it, and this is agreed to, he may insist upon his right as given him by the contract. *McCarren v. McNulty*, 7 Gray (Mass.) 141; *Brown v. Foster*, 113 Mass. 136, 18 Am.Rep. 463 [suit of clothes].

The judgment must be affirmed with costs.

QUESTIONS:

1. Is there any material difference in the testimony of the two parties as to the terms of this agreement?
2. Was the defendant's promise "illusory" in character?
3. Did the plaintiff commit a breach of contract?
4. Did he have a right to *quantum meruit* for the work he did? See Restatement, Contracts, §§ 348, 357.

NOTE

Where a contract is to be performed to the satisfaction of some third person more or less disinterested, the cases dealing with certificates of architects and engineers are applicable. In such cases the courts are much more likely (though not quite certain) to hold that personal sat-

isfaction is a condition. See *Webb & Co. v. Board of Trustees of Morgan-ton Graded School Dist.*, 143 N.C. 299, 55 S.E. 719 (1906), contract to buy bonds "when legally issued to the satisfaction of our attorney"; *Church v. Shanklin*, 95 Cal. 626, 30 P. 789, 17 L.R.A. 207 (1892), condition of perfecting title to land to the satisfaction of an attorney; *Grafton v. Eastern Co. R. Co.*, 8 Exch. 699 (1853), coke to be supplied "to the satisfaction of the railway company's inspecting officer."

KENDALL v. WEST.

Supreme Court of Illinois, 1902. 196 Ill. 221, 63 N.E. 683, 89 Am.St.Rep. 317.

Action by Erza Kendall against William H. West. From a judgment of the appellate court (98 Ill.App. 116) affirming a judgment for defendant, plaintiff appeals. Affirmed.

HAND, J. This is an action of assumpsit brought in the circuit court of Cook county by the appellant against the appellee to recover damages in the sum of \$10,000 for the breach of a contract in writing whereby the appellee, a theatrical manager, engaged the appellant, a specialist in monologue, to perform for appellee at such places and theaters in the United States and Canada as appellee might require, for the theatrical season of 1898 and 1899; the season to begin on or about August 15, 1898, and continue for not less than 30 weeks. Appellant agreed to "render satisfactory services," and appellee agreed to pay for "satisfactory services" the sum of \$250 per week. Appellant entered upon his engagement on August 15, and continued until November 5, 1898, when the contract was terminated by appellee. Appellant was paid for his services in full up to and including November 5th. The case was tried by the court and a jury. At the close of all the evidence the court peremptorily instructed the jury to find for the defendant, and a motion for a new trial having been overruled, and judgment rendered on the verdict, the appellant perfected an appeal to the appellate court for the First district, where the judgment of the circuit court was affirmed, and a further appeal has been prosecuted to this court.

The question presented for decision is, did the circuit court err in taking the case from the jury? There was no conflict in the evidence, and, the facts being admitted, it was the duty of the court to direct the jury as to whether or not such facts, in law, amounted to a legal justification for the discharge of the appellant. The company managed by appellee was a minstrel company. The appellant was requested by appellee a number of times to shorten the time of his performance, and to try his part in black face, with both of which requests he positively declined to comply. Wood, in his work on *Master and Servant* (section 119), says: "Refusing to obey the rea-

sonable orders of the master is a good ground for discharge from service, for in every contract of hiring there is an implied contract on the part of the servant that he will obey the lawful and reasonable commands of his master." The appellee was the proprietor of the company, and had the right to direct its management; and, if appellant refused to comply with his reasonable request, the appellee had the right to discharge him. We do not think the court erred in holding, as a matter of law, that the request made of appellant to shorten the time of his performance, and to try his part in black face, under the circumstances shown by the undisputed testimony, was not unreasonable, arbitrary, or capricious, and that he was bound to comply therewith, and, upon a refusal so to do, that the appellee had the right to discharge him and terminate the contract. The contract of employment provided that appellant should render "satisfactory services," for which he was to receive the sum of \$250 per week. It contained no provision in any manner limiting the appellee in the exercise of his judgment as to what should be deemed "satisfactory services." The appellant did not undertake to render services which should satisfy a court or jury, but undertook to satisfy the taste, fancy, interest, and judgment of appellee. It was the appellee who was to be satisfied, and, if dissatisfied, he had the right to discharge the appellant at any time for any reason, of which he was the sole judge. *Goodrich v. Van Nortwick*, 43 Ill. 445; *Crawford v. Publishing Co.*, 163 N.Y. 404, 57 N.E. 616. In the *Goodrich Case* the plaintiff purchased and paid for a fanning mill, with the agreement that, if it did not suit him and answer his purpose, he might return it within 30 days. It was held that the mill must answer both requirements, and, if it did not suit the purchaser, he had the right to return it and recover back the purchase price, and that he was the sole judge of whether or not he was suited. In the *Crawford Case* the plaintiff made a contract to write for the defendant's newspaper for two years, provided his services should be satisfactory to the publisher; and it was held that the defendant had the right to discharge the plaintiff at any time if his services were unsatisfactory, of which fact the defendant was the sole judge.

We find no reversible error in this record. The judgment of the appellate court will therefore be affirmed. Judgment affirmed.

QUESTIONS:

1. Was the personal satisfaction of the defendant an express condition precedent to his duty to employ and pay?
2. Is the decision in accord with Restatement, Contracts, § 265?

NOTE

Compare *BRIDGEFORD & Co. v. MEAGHER*, 144 Ky. 479, 139 S.W. 750 (1911), where the defendant promised the plaintiff a position "for a term of three years or as long as he performs his duties in a successful or satisfactory manner, provided B & Co. are in existence." It was held proper to instruct the jury that the plaintiff should be awarded damages for wrongful discharge if he had performed the services (as a foreman in the molding shop) "in a good, efficient, and workmanlike manner."

The construction and operation of a contract of employment can not now be determined without giving close attention to federal and state statutes respecting labor unions and collective bargaining. The climate of opinion represented by those statutes will materially affect the decision of cases between an employer and an individual employee even though the statutes are not themselves applicable.

An employer's satisfaction that work has been performed as agreed is fulfillment of the condition of his duty to pay even though he is not satisfied with the results achieved. In *McCartney v. Badovinac*, 62 Colo. 76, 160 P. 190, L.R.A.1917A, 1146 (1916), M's wife was charged with theft of a diamond. He hired B., a detective, to determine the facts, promising to pay \$500 to B. "in the event that he shall determine the above questions to the satisfaction of said M." B. clearly proved the wife guilty, and she confessed and fled the state. This was not to M.'s satisfaction. B. got judgment.

GERISCH v. HEROLD.

Court of Errors and Appeals of New Jersey, 1912.

82 N.J.L., 605, 83 A. 892, Ann.Cas.1913D, 627.

Action by John C. Gerisch against Rudolph Herold. Judgment for plaintiff (81 N.J.L., 171, 79 A. 1028), and defendant brings error. Reversed, and venire de novo awarded.

The plaintiff agreed to erect and finish a house in a good workmanlike and substantial manner under the direction of Joseph Turck, architect, to be testified by a writing or certificate under the hand of Turck, and also to find and provide good, proper, and sufficient materials for completing and finishing all the work. The defendant agreed to pay for the same in four payments, the last of which, \$3,000, was to be made when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative. The contract also provided in the ordinary form that, should any dispute arise respecting the true construction or meaning of the drawings or specifications, it should be decided by Joseph Turck, and his decision should be final and conclusive. This suit is for the last payment. One plea averred that the plaintiff did not complete all the work to the satisfaction of the owner or his representative. The replication to the

plea averred that the owner fraudulently withheld his satisfaction, and on this issue was joined. This issue was not submitted to the jury, and the defendant did not request its submission. He relied upon a motion to nonsuit for failure of the plaintiff to prove that the work was done to the satisfaction of the owner or his representative. The architect had certified that the plaintiff was entitled to the payment of \$3,000 by the terms of the contract.

SWAYZE, J. (after stating the facts as above). Contracts requiring the work to be satisfactory to the employer are valid. *Gwynne v. Hitchner*, 66 N.J.L. 97, 48 A. 571. This decision has been approved in this court in a suit involving the same contract. *Gwynne v. Hitchner*, 67 N.J.L. 654, 52 A. 997. A distinction is sometimes made between cases where the fancy, taste, sensibility, or judgment of the promisor are involved, and cases where only operative fitness or mechanical utility is involved. 9 Cyc. 618, ff. *Gwynne v. Hitchner* was a case of the former class, and, although the case of a building contract is somewhat different, we see no reason to doubt that the mere taste or fancy of the owner may be an important element in a dwelling house at least. The Supreme Court has applied the rule to that situation, and we do not question the soundness of its decision. *Welch v. Hubschmitt Co.*, 61 N.J.L. 57, 38 A. 824. In the present case the parties made a clear distinction between the workmanship and the materials. The character of the former was to be testified to by Turck's certificate. The only provision as to the latter is that they should be good, proper, and sufficient for completing the work. The workmanship might well be left to the judgment of another while the owner to gratify his own taste might well desire to retain control of the latter himself.

No doubt it is true, as Justice Holmes said in *Hawkins v. Graham*, 149 Mass. 284, 21 N.E. 312, 14 Am.St.Rep. 422: "When the consideration furnished is of such a nature that its value will be lost to the plaintiff either wholly or in great part unless paid for, a just hesitation must be felt, and clear language required before deciding that payment is left to the will, or even to the idiosyncrasies of the interested party." The court in that case seized upon the words, "or the work demonstrated," as offering an alternative to the owner's acknowledgment. In a later case the same court drew a distinction between cases in which the decision of a particular person is referred to, and a case where machinery was guaranteed to work in a satisfactory manner, and held that the latter case involved a "result to be passed upon in a reasonable way in accordance with a standard stated in words." *Lockwood Mfg. Co. v. Mason Regulator Co.*, 183 Mass. 25, 66 N.E. 420. The present case is one where the decision of a particular person (the owner or his representative) is referred to, a class of cases in which the Massachusetts courts recognize that the dissatisfaction of

the promisor need not be a reasonable dissatisfaction to bar recovery by the promisee. The decision of the New York Court of Appeals seems to be to the contrary. *Doll v. Noble*, 116 N.Y. 230, 22 N.E. 406, 5 L.R.A. 554, 15 Am.St.Rep. 398. The case is entitled to less weight for the reason that the learned judge failed to distinguish between a case where the owner withheld satisfaction unreasonably and one where he withheld it in bad faith. All the cases recognize that the owner must act in good faith. The reasoning of Chief Justice Beasley in *Chism v. Schipper*, 51 N.J.L. 1, 16 A. 316, 2 L.R.A. 544, 14 Am.St.Rep. 668, applies with greater force to such a case as the present, where it is the owner himself who is to be satisfied. Of course, he cannot avail himself of his own fraud to escape liability on his contract.

The motion to nonsuit would have been properly denied if there was evidence of bad faith on the part of the owner. We are not called upon to decide whether the jury in a proper case might be permitted to infer fraud from the fact that the owner was not satisfied with the architect's certificate. The case was not tried on that theory. If it had been, the defendants should have been allowed to ask the question of the plaintiff that was excluded—whether Turck did not tell him at the time he received the certificate that he (Turck) had been discharged as architect. Not only was the case not tried on the theory that the owner acted in bad faith, but no inference of bad faith could be drawn from his refusal to be satisfied by the architect's certificate, since by the terms of the contract that certificate covered only the execution of the contract in a good workmanlike and substantial manner, and the plaintiff specifically contracted to furnish good, proper, and sufficient materials to complete the work, with no provision authorizing or requiring the architect to certify whether he had in fact done so or not. The distinction is pointed out by Justice Fort in *Newark v. New Jersey Asphalt Co.*, 68 N.J.L. 458, 463, 53 A. 294. The contract, it is true, made the architect's decision final as to some things, but it was only as to the true construction or meaning of the drawings or specifications. The learned trial judge fell into error in thinking that the architect's certificate covered, not only these points, but also the question whether the payment was due. His charge as to the finality of the architect's certificate would have been correct if he had limited it to the points to which the parties limited it by their contract. They contracted that the final payments should be due when all the work was completed according to the plans and specifications to the satisfaction of the owner or his representative provided that in case of each payment a certificate should be obtained and signed by Turck. Thus they made for the final payment a double condition (1) a certificate by the architect; (2) satisfaction of the owner or his representative.

The case differs from *Welch v. Hubschmitt Co.* because in that case satisfaction of the owner and architect was required; here only that of the owner or his representative. The question remains whether Turck was the representative of the owner. Our reason for thinking he was not is threefold. (1) It was unnecessary to require his certificate for the final payment if the payment was to be made upon his being satisfied. By requiring satisfaction of the owner or his representative in one clause and a certificate from Turck in a proviso immediately following, the parties seem to have had two different persons in view. (2) Turck had already been designated as the architect, and the word "architect" would have been more natural in this clause than the word "representative" if he had been meant. (3) He was made by the contract the judge between the parties as to the most important portions of the contract, which were likely to lead to controversy between builder and owner. To have made him the representative of the owner would have deprived him of the judicial position in which the parties meant him to stand, and thereby have deprived his certificate of that conclusive character against the builder which was given to it by the express terms of the contract.

We think for these reasons that there was error, and that the judgment must be reversed that a *venire de novo* may be awarded.

NOTE

In a building contract or one for personal employment, in order to make the personal satisfaction of the owner or employer a condition of his duty to pay the agreed compensation is it sufficient that the contract contains an express promise by the builder or employee to do the work to the satisfaction of the owner or employer?

In many cases a decision has been made similar to that in the case above: *Adams Radiator & Boiler Works v. Schnader*, 155 Pa. 394, 26 A. 745, 35 Am.St.Rep. 893 (1893), steam heating apparatus—"We guarantee this apparatus to give entire satisfaction in its operation, and, should it prove unsatisfactory after a thorough and reasonable trial, we will remove it at our expense"; *Hawken v. Daley*, 85 Conn. 16, 81 A. 1053 (1911), building contract; *Barnett v. Beggs*, 208 F. 255, 125 C.C.A. 455 (1913), house plans to be drawn by architect; *Singerly v. Thayer*, 108 Pa. 291, 2 A. 230, 56 Am.Rep. 207 (1885), elevator to be installed warranted to be satisfactory; *Jones v. Lanier*, 198 Ala. 363, 73 So. 535 (1916), coal to be supplied.

If rejection of the work is honest but unreasonable, much should depend on whether the defendant has received and retains pecuniary benefits therefrom. His retention of benefits that can readily be returned may be held to operate as a "waiver" of the condition. If they are of a sort that can not be returned, the defendant may be bound at the least by a quasi-contractual duty to pay reasonable value with due allowance for defects in the performance.

Merchandise is often bought with the "privilege of return" in case the buyer is dissatisfied with it. The purpose of such a provision is to overcome the sales resistance of hesitant buyers; and ordinarily its effect is similar to that of an offer to repurchase at the option of the buyer. As in the case of other "option" contracts, the option-holder is given a legal power to be exercised or not in accordance with his own will and desire. A contract of sale with "privilege of return if it does not work" is not the same as one with "privilege of return within ten days if you are not satisfied with it."

WILLIAMS MFG. CO. v. STANDARD BRASS CO.

Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 356, 53 N.E. 862.

Action by the Williams Manufacturing Company against the Standard Brass Company. There was a judgment in favor of plaintiff, and defendant brings exceptions. Sustained.

HOLMES, J. This is an action upon a contract under which the plaintiff constructed an equipment for melting brass for the defendant. The contract was in writing. By one clause of it the plaintiff agrees "to place the above-named outfit in operation for sixty days' trial for the approval of the second party, and if the results obtained after the trial are in accordance with the specifications above, and satisfactory to the second party, the second party further agrees to pay for the above-named equipment the sum of \$550." Upon the findings of the jury, it must be taken that the work was done in accordance with the specifications of the contract, and in such a way as to be satisfactory to a reasonable man. The defendant, however, was not satisfied, and stopped the experiment before the 60 days had elapsed.

The questions raised by the exceptions are whether the defendant's liability was conditioned upon actual satisfaction, even if the dissatisfaction was unreasonable, so long as it really was felt, and, perhaps, whether the defendant was bound to let the experiments continue for 60 days. We are of opinion that the defendant did not lose its right to insist upon its fundamental defense by the course of the trial. We are of opinion, also, with some slight hesitation on my part, that the defendant's liability was conditioned as above suggested, and that bona fide, even if unreasonable, dissatisfaction of the defendant is an answer to the plaintiff's claim. The plaintiff undertakes to put in the work "for the approval of the" defendant, and the defendant undertakes to pay only if the results are in accordance with the specifications "and satisfactory" to it. The exceptions state the substance of the evidence, but it does not appear to be material, except so far as it shows that putting in the proposed equipment involved a considerable change in the defendant's business, and that it seems to have been regarded as more or less of an experiment, which facts confirm and give

a reason for the interpretation which we adopt. Furthermore, the contract does not provide a test alternative to satisfaction, as was the case in *Hawkins v. Graham*, 149 Mass. 284, 21 N.E. 312, 14 Am.St. Rep. 422, where the money was to be paid after acknowledgment of satisfaction by the defendant "or the work demonstrated." It almost follows from our interpretation that, as soon as the defendant was convinced that the work was unsatisfactory, it had a right to stop it. The provision for 60 days' trial was an undertaking of the plaintiff for the defendant's advantage, to insure it whatever knowledge it wanted in order to decide.

We have assumed without discussion that the defendant was bound to good faith in deciding and in expressing its decision, and that such an arrangement limited its absolute freedom to do as it chose sufficiently to be entitled to the name of a contract.

Exceptions sustained.

DUPLEX SAFETY BOILER CO. v. GARDEN.

Court of Appeals of New York, 1886. 101 N.Y. 387, 4 N.E. 749, 54 Am.Rep. 709.

DANFORTH, J. The plaintiff sued to recover \$700, the agreed price, as it alleged, for materials furnished and work done for the defendants, at their request, upon certain boilers belonging to them. The defense set up was that the work was done under a written contract for the alteration of the boilers, and to be paid for only when the defendants "were satisfied that the boilers, as changed, were a success." Upon the trial it appeared that the agreement between the parties was contained in letters, by the first of which the defendants said to plaintiff:

"You may alter our boilers, changing all the old sections for your new pattern, changing our fire front, raising both boilers enough to give ample fire space; you doing all disconnecting and connecting, also all necessary mason work, and turning boilers over to us ready to steam up. Work to be done by tenth of May next. For above changes we are to pay you seven hundred dollars as soon as we are satisfied that the boilers, as changed, are a success, and will not leak under a pressure of 100 pounds of steam."

The plaintiff answered, "accepting the proposition," and as the evidence tended to show, and as the jury has found, completed the required work in all particulars by the tenth of May 1881, at which time the defendants began and thereafter continued the use of the boilers.

The contention on the part of the appellant is that the plaintiff was entitled to no compensation, unless the defendants "were satisfied that the boilers, as repaired, were a success, and that this question was for the defendants alone to determine"; thus making their obligation de-

pend upon the mental condition of the defendants, which they alone could disclose. Performance must, of course, accord with the terms of the contract; but if the defendants are at liberty to determine for themselves when they are satisfied, there would be no obligation, and consequently no agreement which could be enforced. It cannot be presumed that the plaintiff entered upon its work with this understanding, nor that the defendants supposed they were to be the sole judge in their own cause. On the contrary, not only does the law presume that for services rendered remuneration shall be paid, but here the parties have so agreed. The amount and manner of compensation are fixed; time of payment is alone uncertain. The boilers were changed. Were they, as changed, satisfactory to the defendants? In *Folliard v. Wallace*, 2 Johns. 395, W. covenanted that, in case the title to a lot of land conveyed to him by F. should prove good and sufficient in law against all other claims, he would pay to F. \$150, three months after he should be "well satisfied" that the title was undisputed. Upon suit brought the defendant set up that he was "not satisfied," and the plea was held bad, the court saying: "A simple allegation of dissatisfaction, without some good reason assigned for it, might be a mere pretext, and cannot be regarded." This decision was followed in *City of Brooklyn v. Brooklyn City R. R.*, 47 N.Y. 475, 7 Am.Rep. 469, and *Miesell v. Insurance Co.*, 76 N.Y. 115.

In the case before us, the work required to be done was specified, and was completed. The defendant made it available, and continued to use the boilers without objection or complaint. If there was full performance on the plaintiff's part, nothing more could be required, and the time for payment had arrived; for, according to the doctrine of the above cases, "that which the law will say a contracting party ought in reason to be satisfied with, that the law will say he is satisfied with."

Another rule has prevailed where the object of a contract was to gratify taste, serve personal convenience, or satisfy individual preference. In either of these cases the person for whom the article is made or the work done, may properly determine for himself—if the other party so agree—whether it shall be accepted. Such instances are cited by the appellant. One who makes a suit of clothes (*Brown v. Foster*, 113 Mass. 136, 18 Am.Rep. 463), or undertakes to fill a particular place as agent (*Tyler v. Ames*, 6 Lans. 280), mould a bust (*Zaleski v. Clark*, 44 Conn. 218, 26 Am.Rep. 446), or paint a portrait (*Gibson v. Cranage*, 39 Mich. 49, 33 Am.Rep. 351; *Hoffman v. Gallaher*, 6 Daly, 42), may not unreasonably be expected to be bound by the opinion of his employer, honestly entertained. A different case is before us, and in regard to it no error has been shown.

The judgment appealed from should be affirmed.

WILLIAMS v. HIRSHORN.

Supreme Court of New Jersey, 1918. 91 N.J.L. 419, 103 A. 23.

Action by Lewis Williams against Jacob Hirshorn. Judgment for plaintiff, and defendant appeals. Affirmed.

TRENCHARD, J. The plaintiff below sued to recover the balance alleged to be due on his contract with the defendant wherein the plaintiff agreed to make the walls of the defendant's cellars waterproof, and the latter agreed to pay \$50 upon completion, "the balance (\$50) to be paid after a rain and a satisfactory test has been made."

We are of the opinion that the judgment for the plaintiff rendered by the trial judge, sitting without a jury, must be affirmed. We think the motion to nonsuit was properly denied, and that a jury question was presented at the end of the case. It was admitted that the work was done by the plaintiff, and that the balance sued for had not been paid. It was also admitted that after the work was finished there had been "a rain." The controversy turned upon the question: Had "a satisfactory test" been made?

When by the terms of a contract work is to be paid for after "a satisfactory test has been made," it must be satisfactory to the one who is to pay for it, if, as here, the contract is silent as to the person to whom the work shall be satisfactory. *Singerly v. Thayer*, 108 Pa. 291, 2 A. 230, 56 Am.Rep. 207; *Campbell Printing Press Co. v. Thorp* (C.C.) 36 F. 414, 1 L.R.A. 645. The trial judge found that, if there had not been a "satisfactory test," there could not be one, and that was so through no fault of the plaintiff. The defendant always expressed himself as dissatisfied, giving as a reason that after a heavy rainfall there was considerable water in the cellars. It is true that there was, but the trial judge found that it came in the cellar windows, with which the plaintiff's contract had nothing to do, and over which he had no control, and there was abundant evidence to support that finding. Indeed, the proven statements and conduct of the defendant indicated that he himself thought that the water came in the windows, but the evidence tends to show that he never corrected that trouble.

Now, the rule of law is that, where a promisor agrees to pay for work or goods provided he is satisfied with them, he must act honestly and in good faith. To escape liability his dissatisfaction must be actual, and not feigned; real, and not merely pretended. It is only the actual existence, not the mere expression, of dissatisfaction that can have this effect. He must, if a test is necessary to determine fitness, give that test or permit it to be made. Where good faith is in issue, and the evidence is conflicting, a jury question is presented. *Gwynn v. Hitchner*, 67 N.J.L. 654, 52 A. 997; *Gerisch v. Herold*, 82 N.J.L. 605, 83 A. 892, Ann.Cas.1913D, 627. See, also, cases collected in 9 Cyc. 624.

Whether in the case at bar the defendant acted in good faith in expressing his dissatisfaction with plaintiff's work upon the walls, when the testimony tended to show that the water came through the windows, for which the defendant and not the plaintiff was responsible, was at least a jury question.

The judgment below will be affirmed, with costs.

(K) CONDITION OF NOTICE

MELLES & CO. v. HOLME.

In the King's Bench Division, 1918. 119 Law T.(N.S.) 191.

SALTER, J. This is an action for damages for breach of covenant to repair. The facts are that the defendants on the 24th June 1915 demised to the plaintiffs certain rooms in a house of the defendants by a lease dated the 24th June 1915. Other portions of the house were let to other persons. In particular, rooms above those demised to the plaintiffs were let to persons who carried on a boot manufacturing business. The lease to the plaintiffs contains a covenant by the lessors that they will keep the outside walls and roof of the demised premises in good and tenantable condition. The roof—including in the expression the gutters and rain-water pipes—appears to have been kept in perfectly good repair. The landlords employed a person to inspect every three months, and he appears to have done his duty; but by some means one of the rain-water pipes became choked within a few feet of the top. There was evidence to the effect that ashes from the chimneys fell upon the roof, and that, because of this, the landlords took care to see to the gutters; but it also appeared from the evidence that refuse from the rooms where the boot manufacture was carried on was wont to accumulate on the roof. In the result, the rain lying in the gutters came through the roof and down the walls to the rooms occupied by the plaintiffs. It is material to observe that their lease expressly provided that they should use the rooms only for exhibition or storage of certain perishable wares.

In an action for damages for breach of covenant a learned County Court judge has found for the defendants. He held that there was no want of care on the part of the landlords, and that, in the absence of notice of want of repair, and assuming that it was a breach of covenant to allow the pipes to become stopped up, the action could not be maintained. In my view that judgment cannot be supported. The mat-

ter turns upon the covenant to which I have referred. I do not think it is necessary to consider any implied term. No implied term could be wider—even if it were as wide—as the express term which is to be found in the lease. It has been contended, however, that the plaintiffs cannot enforce the performance of this covenant—even if it was broken—because they gave no notice of want of repair. The rule that in some cases there must be read into a landlord's covenant to repair an implied condition that notice of a defect shall be given to him depends in the first instance in *Makin v. Watkinson*, 23 L.T.Rep. 592; L.R. 6 Ex. 25, and the principle of the rule is there enunciated. It is that where the circumstances are that the landlord does not and could not know of the existence of the defect unless the tenant informs him, or where he has no right to enter upon the premises, then in such circumstances it is reasonable and in accordance with common sense to imply that he shall have notice of want of repair. (See *per* Collins, M. R., in *Tredway v. Machin*, 91 L.T.Rep. 310, 311.) There must be a strong reason to justify our reading into a covenant words which are not there. Here, having regard to the plain intention of the parties, there is no such reason. The roof was in the possession and under the control of the landlords. It was not in the possession of nor was it under the control of the tenant, and the landlords were in a better position than he was to know of the condition.

The question remains—On the facts was there a breach? I am of opinion that the covenant must be read as applying to the roof, in so far as it covered these premises, which were in fact a set of rooms. As it was the expressed intention that the obligation of the defendants under the covenant included the scouring of the gutter and the keeping of the passage of the down-flow pipe at all times free, as they failed to do that they were guilty of a breach of covenant, and the judgment should have been for the plaintiffs for the amount of the damages found by the judge.

ROCHE, J. I agree.

Appeal allowed.

NOTE

If in a contract one party promises to render a performance on the occurrence of some uncertain future event, is he guilty of an actionable breach by failing to perform because he does not know that the event has occurred? Is his duty to render the performance constructively conditional on the giving by the promisee of notice that the event has occurred? From very early times it was held that no such notice was necessary if the event was one of which the promisor had actual knowledge or one the occurrence of which he could discover for himself as easily as could the promisee. Such was the holding where the defendant promised to pay such a sum of money as an auditor or an arbitrator might find to be due on an account, *Anonymous*, Y.B. 18 Edw. IV, p. 18, pl. 23. It is otherwise

if the event is peculiarly within the knowledge of the promisee and impossible or difficult for the promisor to find out. If a surety promises to pay the debt of a third person in case the latter makes default, there has been a continuing conflict in the cases as to the necessity of the creditor's giving notice of the principal debtor's default. In the early case of *Somersall v. Barneby*, Cro.Jac. 287 (1611), it was held that action would lie in case of default without first giving notice thereof to the surety. See works on Suretyship. Standard suretyship contracts often expressly provide that notice shall not be necessary.

In *VYSE v. WAKEFIELD*, 6 M. & W. 442 (1840), the defendant having sold a certain life annuity to the plaintiff for a large sum, agreed that the plaintiff might insure the defendant's life in any one of a large number of insurance companies in England and promised further that he would never do anything that would invalidate the policy so taken out. The plaintiff took out a policy on the defendant's life in a certain company, and later the defendant invalidated it by going to Canada. To a declaration for damages for breach of defendant's promise the defendant demurred on the ground that there was no averment that the plaintiff had given notice to the defendant of the fact that a policy had been issued or of the fact that it was conditional on the defendant's not going across the ocean. The demurrer was sustained, and Parke, B., thus classified the cases: (1) "Where a party contracts to do something, but the act on which the right to demand payment is to arise is perfectly indefinite"; here notice must be given. (2) "No notice is requisite when a specific act is to be done by a third party named, or even by the obligee himself." (3) "There is an intermediate class of cases" where the act to be done by the plaintiff is not wholly indefinite as to time or place; "Where any option at all remains to be exercised on the part of the plaintiff, notice of his having determined that option ought to be given."

In *COSTANTINO v. LODJODICE*, 93 Conn. 203, 105 A. 465 (1919), the court said that the requirement of notice as a condition precedent "must be found in the contract, or must arise as a matter of common fairness and equity from the circumstances of the case." Notice is not necessary where the parties have substantially equivalent sources of information.

(L) CONDITIONS IN ALEATORY CONTRACTS

MARTINDALE v. FISHER.

In the Court of King's Bench, 1745. 1 Wils. 88.

This is a special action upon the case, wherein the plaintiff sets forth in his declaration that an horse-race was agreed to be run between an horse of the plaintiff and one of Sir Marmaduke Wyvill's.

and that in consideration that the plaintiff had agreed to deliver to the defendant three yards and one-eighth of cloth, the defendant agreed to pay to the plaintiff £5 12s. 6d. in case Sir Marmaduke Wyvill's horse should beat the plaintiff's horse, but if the plaintiff's horse beat Sir M. W.'s, then defendant to pay nothing for the cloth; and avers, that Sir M. W.'s horse won the race. Upon the general issue there was a verdict for the plaintiff. It was now moved in arrest of judgment, and the exception taken to the declaration by Serjeant Bootle was, that it is not averred in the declaration that the cloth was delivered to the defendant. But to this it was answered by Mr. Ford, and resolved by the Court, that this was an action founded on mutual promises, and that here was only promise for promise, and therefore it was not necessary for the plaintiff to make an averment in his declaration of the delivery of the cloth: and the Court said, the case of *Nichols and Raynbred*, Hob. 88, is in point.

Dennison, J., said, that where a plaintiff declares, that in consideration he the said plaintiff would deliver to the defendant a piece of cloth to the defendant, that the defendant should pay such a sum of money for it, in that case an averment of the delivery of the cloth is necessary; but if the plaintiff states an agreement, and then lays it that in consideration of such a promise or agreement, &c. there is no need of an averment. So N. B. the difference. And the postea was ordered to be delivered to the plaintiff. Vide Hob. 106. Yelv. 136.7 Lev. 293. Hard. 103.

QUESTIONS:

1. Was the contract for an agreed exchange of the cloth for £5 12s. 6d. as matters equivalent to each other in value? See Restatement, Contracts, §§ 266, 292.
2. If A promises to deliver all the potatoes to be raised on his farm and B promises to pay \$1 per bushel therefor, are the promises aleatory?

NOTE

Illegal wagering bargains are aleatory in character; but there are many aleatory bargains that are not illegal. See *Seward v. Mitchell*, ante, p. 257.

In *LOSECCO v. GREGORY*, 108 La. 648, 32 So. 985 (1902), plaintiff contracted to buy all the oranges that defendant's grove might produce in 1899 and 1900, for \$8,000 payable half in advance, "purchaser assumes all risks." An unprecedented freeze killed every orange tree on the place. Buyer sued to recover \$4,000 paid in advance. The court allowed three arguments and decided in three different ways by variable majorities; the final decision being that the contract was aleatory and that the plaintiff must pay the balance of the price to the defendant, for which he had counterclaimed.

CHRISTIE v. BORELLY.

In the Court of Common Pleas, 1860. 29 L.J.Com.Pl. 153.

The first count of the declaration stated that, in consideration that the plaintiff guaranteed to the defendant that two bills of exchange, of £100 and £62, both drawn by Messrs. C. W. Oliver & Co. upon Messrs. Owen & Co., 75 Lower Thames Street, and both due on January 23d, 1859, would be paid and retired by the said Messrs. Owen & Co. when due, the defendant, in return, engaged and guaranteed to the plaintiff the repayment of the sum of £300 towards the payment of Scotch whiskies, as follows: Six puncheons, 5 hhds., 4 qr. casks, Auchtertool, 2 puncheons, 5 hhds., 8 qr. casks, Anderton, which Mr. B. Fisse, of Norris Street, had ordered, and was about to receive from the plaintiff. Averment, by the plaintiff, that he had performed all things on his part to be done and performed, in pursuance of the said agreement, to entitle him to the due performance by the defendant of his, the defendant's, part of the said agreement; and that the said two bills of exchange of £100 and £62 were duly paid and retired by the said Messrs. Owen & Co. when the same became and were due and payable; and that he, the plaintiff, delivered to the said Mr. B. Fisse, the said Scotch whisky, in the said agreement hereinbefore mentioned, and that the said Mr. B. Fisse, although requested to pay the said amount of £300 toward the payment of the said Scotch whiskies, had not paid for the said Scotch whiskies, nor the said sum of £300 or any part thereof, and the same still remained wholly due and unpaid; yet that the defendant had disregarded and broken his said promise in this, that he had not paid, or caused to be paid, to the plaintiff the said sum of £300, or any part thereof, but, on the contrary thereof, wholly neglected and refused so to do.

The defendant pleaded (*inter alia*), secondly, to the first count, that, although the said debt and sum of £300, in the said first count mentioned, repayment whereof the defendant engaged and guaranteed to the plaintiff, was not payable, and, by the terms of the said order of the said Mr. B. Fisse, was not payable until after the said two bills drawn by Messrs. C. W. Olivier upon Messrs. Owen & Co., and guaranteed by the plaintiff, became due and payable, as the plaintiff and the defendant, at the time of the making of the said mutual agreement and guarantees, well knew; yet the said two bills of exchange of £100 and £62, in the said first count mentioned, were not duly or at any time paid or retired by the said Messrs. Owen, of which the plaintiff had due notice, but never at any time paid or retired the said bills. Issue thereon.

The defendant having, at the trial, obtained a verdict in his favor on the issue taken on the second plea, the Court, in Michaelmas Term

last, on the application of Edward James, granted a rule nisi to enter judgment for the plaintiff on such issue non obstante veredicto, on the ground that the said second plea was no answer to the action.

ERLE, C. J. I am of opinion that this rule should be made absolute, and that the plaintiff is entitled to have judgment entered for him non obstante veredicto. The real question is, whether the promises are independent promises, or whether they are mutual promises, their performance being mutually the consideration for each other. It appears to me that they are independent promises. The defendant guarantees the repayment of £300 toward the payment of certain whisky being paid for when due; and the plaintiff guarantees that two bills of exchange of £100 and £62 shall be paid when due. It, therefore, appears that the damages in respect of the breach on one side must be very different from the damages arising from the breach on the other side; on the one side they would be £300, and on the other only £162; it is consequently apparent, on the face of the contract itself, that it was not intended by the parties that performance of the one stipulation should be a condition precedent to performance of the other. The question is, to my mind, one entirely of fact—namely, what was the intention of the parties to this contract? The rules of law are agreed on by both sides, and it is only a question of construction. On the construction of this contract, I am of opinion that the performance of the plaintiff's promise was not a condition precedent, and, therefore, that the second plea is no answer, and consequently that the rule ought to be made absolute.

WILLIAMS, J. The rules of law are now well established, and the object is to discover in each case what is the intention of the parties. If it had appeared from the contract in the present case, that the undertaking of the plaintiff had been to pay absolutely when the bills became due, the case would have been a very different one from what it is. What, however, the plaintiff undertakes is, only to pay if Messrs. Owen do not retire the bills; therefore, the compensation to be paid by the plaintiff, in consequence of such third party not doing their duty, is a matter which must have to be afterward ascertained; and is it likely that it was the intention of the parties to this contract that the defendant's performance was not to take place until after such amount of compensation had been ascertained? It is, I think, obvious that such could not have been the intention of the parties; for Messrs. Owen might have retired the bills when due, and so there would have been nothing at all payable by the plaintiff.

Rule absolute.

SMITH v. COMPTON et al.

Supreme Court of California, 1856. 6 Cal. 24.

The plaintiff brought his action on a tripartite agreement (not under seal) dated Nov. 22, 1853, between Wm. A. Richardson of the first part, Chas. S. Compton and D. Davidson (the defendants) of the second part, and Wm. Smith (the plaintiff) of the third part; which recites that Smith had recovered a judgment for \$3,913, besides costs, the whole bearing interest, against Richardson, under which he had levied on property of Richardson in Marin County; and contains the following agreements: Richardson agrees that the interest shall be compounded, and bear interest with the principal. Compton and Davidson agree that the property levied on shall not be removed, and shall remain subject to the levy, and also guarantee the payment of the judgment and costs. Smith agrees to suspend all proceedings under the judgment for four months, and to assign the judgment, on a week's notice, to Compton and Davidson, on their paying him the amount due at any time previous to the expiration of the four months. A payment of \$300 on account of the judgment in Smith v. Richardson, was admitted. The performance by plaintiff of his portion of the contract is put in special issue by the pleadings.

On the trial of the cause, the defendants (plaintiff) introduced the contract in evidence, and then rested his case. The defendants then moved for a non-suit, upon the ground, among others, that the plaintiff had not proved a compliance with his agreement to suspend proceedings.

The motion for a nonsuit was overruled, and the plaintiff (defendants) then introduced testimony to the effect that the levy was made on Richardson's property under plaintiff's judgment, on Nov. 10, 1853, and a portion of the property sold under the orders of plaintiff, March 6, 1854, the remainder being claimed by other parties and found to be their property by a sheriff's jury. The plaintiff then proved that the defendants assented to the sale being made prior to the expiration of the four months, and actively assisted therein, and the jury so found under the instructions of the Court. The Court instructed the jury if they found for the plaintiff, to give a verdict for the amount of the judgment against Richardson, less the amount paid, with simple interest at three per cent.

The jury found a verdict for plaintiff for \$3,912.55. Judgment accordingly. Defendants moved for a new trial, which was denied by the Court, and defendants appealed.

Mr. Justice TERRY delivered the opinion of the Court. Mr. Justice HEYDENFELDT concurred.

The [performance of the] promise on the part of plaintiff to stay proceedings under his judgment against Richardson, was a condition precedent to the guaranty sued on, and performance on his part should have been alleged and proven, to entitle him to recover against defendants.

This was not done in the opening, and defendant was entitled to a judgment of non-suit.

The defendant, however, after his motion was denied, introduced evidence which enabled plaintiff to supply the defect in his case, and by so doing, waived the objection. See *Ringgold v. Haven*, 1 Cal. 108.

From the whole record, the right of plaintiff to recover clearly appears; and we will not disturb a judgment, when it is evident that a new trial must be attended with the same result.

The judgment is affirmed with costs.

QUESTIONS:

1. Was either promise aleatory in character?
2. Was suspension of proceedings against R for four months the agreed exchange for the payment of \$3,913 and costs by Compton and Davidson, the guarantors?
3. Did the plaintiff's failure to perform his promise increase the hazard that C and D would have to perform their guaranty?

NOTE ON ALEATORY CONTRACTS

Aleatory contracts are dealt with in *Restatement, Contracts*, §§ 291-293.

It is clear that the two promised performances in a bilateral contract are not agreed equivalents when one of the promises is conditional on an uncertain future event and the other is not. The aleatory promise made by an insurance company or by a commercial surety is generally made expressly conditional on actual payment of a premium; but this premium is not the equivalent of the amount that the insurer or surety promises conditionally to pay. If an insurer accepts the insured's promissory note for the first premium, his duty to pay as promised in the insurance policy is not conditional on payment of the premium note, in the absence of an express provision to that effect. As against the amount that the insurer must pay he can merely counterclaim for the unpaid premium.

Although the rules as to constructive conditions (or as to mutual dependency) that are applied to ordinary bilateral agreements ought not to be applied to aleatory contracts, it is believed that the decisions justify the suggestion of the following rule with respect to these con-

tracts: A promise in an aleatory contract is constructively conditional on the absence of unjustified action by the promisee that substantially increases the risk that the promisor has assumed. This rule can be stated in terms of discharge as follows: A promisor in an aleatory contract is discharged by any unjustified action by the other party that substantially increases the promisor's risk of having to render his promised performance. Such a rationalization as this would support the many decisions that a surety is discharged if the creditor gives a binding extension of time to the principal debtor without the surety's consent. It would be applicable without the necessity of finding by process of "implication" that there was a promise not to increase the risk by such harmful action.

If an aleatory contract is bilateral and the repudiation or other breach of one promise is such that it will substantially increase the risk assumed by the other party, the rule stated above would be applicable. If it would not increase the risk, the rule would not be applicable. If the harmful action is a breach of a promise, express or implied, it would certainly be "unjustified." In *Christie v. Borelly*, ante, a breach by the plaintiff of his promise to guarantee payment of the bills of exchange would in no way affect the risk of the defendant that he would have to pay the whisky bill of B. Fisse.

In *Griggs v. Moors*, 168 Mass. 354, 47 N.E. 128 (1897), the defendant became surety for another's debt, and in return the creditor promised to assign certain securities to the surety. In such a case the creditor can maintain no action against the surety unless he assigned the securities as agreed. The same result obtains where the creditor has promised to do other acts for the surety's protection.

In *Guy-Pell v. Foster* [1930] 2 Ch. 169, the plaintiff bought certain bonds at the defendant's urging. The defendant promised to indemnify the plaintiff against loss on the investment in return for the plaintiff's promise to pay to the defendant one fourth of the profits thereon. The plaintiff sold the bonds at a heavy loss before maturity, over the defendant's objection. The court held that this made the defendant's promise of indemnity unenforceable, even though the plaintiff afterwards bought the bonds again and held them to maturity. The court said nothing as to the aleatory character of this contract. It held that selling the bonds was a breach of an "implied" promise by the plaintiff to hold the bonds, a breach that went "to the whole of the consideration." Lord Warrington had thought that the continued holding of the bonds was merely an "implied condition" of the defendant's duty to indemnify. The sale of the bonds at a loss probably increased the defendant's risk, both that he would receive no profits and that he would have to pay a loss. This may support the decision, even though there is no "implication" of a promise; and without it the decision is not to be supported even if the "implication" is made.

In *People's Trust & S. Bank v. Wassersteen*, 226 Wis. 249, 276 N.W. 330 (1937), the defendant took over her husband's business and in writing guaranteed payment to the bank of her husband's debt for \$8,000, in return for the bank's oral promise to lend her \$15,000 to finance the business. Refusal of the bank to make the loan was held to be a good defense in its action on the guaranty. The court cites Restatement, Contracts, § 275, but does not mention Aleatory contracts.

The fact that a contract is aleatory may be a good reason for refusing to hold that performance or tender by one party is a constructive condition of the duty of the other party to render his promised performance; it is also a good reason for paying strict regard to an express condition. One who has promised to pay if Alpha beats Omega should not be compelled to pay if the race is a dead heat. In *Colbath v. Stebbins Lbr. Co.* 127 Me. 406, 144 A. 1 (1929), in making a compromise settlement of an uncompleted transaction it was provided: If by December 31, 1921, it proves that Colbath now has cut and in Squa Pan Lake * * * logs in excess of 4,590,666, we will pay you an amount equal to \$10. a thousand on such excess. * * * If it should prove by December 31, 1921, that the amount of logs now cut is less than 4,590,666, Colbath agrees to pay an amount equal to \$10. a thousand on such shortage. The court held that determination of the number of logs by December 31 was an express condition of the defendant's duty to pay, time being of the essence. The two promises were exactly alike in aleatory character, just as they are in a bet on a horse race; and the court should not vary the risk assumed by either party.

Southern Surety Co. v. MacMillan Co., 58 F.2d 541 (1932, C.C.A.), is a difficult case holding that the failure by the obligee in a surety bond to give notice of the principal's default within 60 days did not discharge the surety in the absence of an affirmative showing that the surety's risk of loss was materially increased by the failure to give notice. It interpreted the words of the bond respecting notice as merely a *promise* by the obligee that it would give notice within 60 days and not as making the giving of such notice an express condition of the surety's duty to pay losses. It does this in spite of the fact that the bond containing the words so interpreted was executed solely by the surety, not by the obligee. The court quoted in full Restatement, Contracts, § 293, on aleatory contracts, without analysing the rules there stated or showing clearly how they were applicable.² The dissenting

² With respect to this section, it has been said: "The theory of rescission set forth in the Restatement, § 293 (2) and in Williston, Contracts, § 889, seems a pure intellectual construct having practically no support in the precedents and

having implications which contradict the supposed independence of the promises." Patterson, "Constructive Conditions in Contracts," 42 Col.L.Rev. 903, 916 (1942).

judge denied the interpretation given by the court to the provision in the bond with respect to the notice of default. He argued that the provision was one making the giving of such notice an express condition of the surety's promise to pay losses and was not a mere promise by the obligee. His argument is the more convincing, both because of the form of the provision and because the bond was executed by the surety, not by the *obligee*. The latter neither signed nor delivered the bond, although it received and held the bond and assented to its terms as giving the security it desired.

SECTION 3.—CONDITIONS SUBSEQUENT—PLEADING AND BURDEN OF PROOF OF CONDITIONS

INTRODUCTORY NOTE

As soon as it is agreed that a "condition" is not a term or group of words in a contract but is instead an operative fact or event that affects the legal relations of two parties, it should be obvious that such a fact or event is always subsequent in time to the legal relation that it displaces and is always precedent in time to the legal relation that it helps to create. Therefore, it is both logically meaningless and extremely confusing to describe a condition as being either precedent or subsequent without first designating the legal relationship to which it is being related in point of time. Restatement, Contracts, sec. 250, gives us a proper definition of "condition", if we omit the last 15 words (these having been injudiciously inserted to satisfy some objectors who preferred a double usage). It is believed that the term "condition" is never used in Chapter 10 of the Restatement in the alternative sense expressed in those 15 words.

A "condition precedent", as there defined, is "a fact that must exist or occur before a duty of immediate performance of a promise arises;" and a "condition subsequent", as there defined, is "a fact that will extinguish a duty to make compensation for breach of contract after the breach has occurred."

It may be helpful at this point to say once more that a bargaining transaction is a series of acts and events often covering a considerable period of time. At one point in this series, when the parties have expressed mutual assent and the other requisites of a "valid contract" exist, we say that a contract has been made, that a "legal obligation" now exists, involving legal rights and duties. Any of these "requisites"—that is, any of the facts or events that must exist or occur before

there is a "valid contract" or "legal obligation"—is a condition precedent to that complex relationship that is called "contract" or "obligation." Also, any fact or event occurring thereafter that terminates or effects some change in that contract or obligation may properly be called a condition subsequent *to the contract or obligation*.

But, according to universal usage of the terms, "contract" and "obligation" may exist long before the time when immediate performance of a promise is due. Additional facts and events must exist or occur before there is any duty of immediate performance, before there is any "breach" of duty, and before one party can properly complain to a court of the other party's nonperformance. Any of these additional facts and events, subsequent in time though they are to the "contract" or the primary "obligation", are conditions precedent *to the duty of immediate performance*, to any *breach* of contractual duty by the promisor, and to any duty on his part *to make compensation* for disappointment and harm suffered. Not until such a "breach" has occurred, with its instantly arising duty to make reparation to the promisee, does any remedial "right of action" exist—any just and enforceable claim to a compensatory remedy. This right and duty with respect to reparation for breach is sometimes called "secondary obligation."

Not until a contractor has committed a "breach" of his duty can the other party maintain an action for a compensatory remedy. It is not enough for a plaintiff to show that a contract has been made; it must also appear to the court that it has been broken. All the facts and events that are necessary to show that the defendant's duty became one of immediate performance and that he has failed in its performance are parts of the plaintiff's "cause of action." They are conditions precedent to that legal relationship that constitutes the issue that is litigated in court. Any fact or event that occurs subsequently to this relationship, this right and duty to make compensation for a breach, and that is legally operative to extinguish it, is called by the American Law Institute in its Restatement a "condition subsequent." It is subsequent to the duty of immediate performance of a promise and to the duty to make compensation for a breach thereof.

It might well be supposed that a plaintiff who asks a court for a compensatory remedy must allege the existence and occurrence of all the conditions precedent to his right to compensation and to bear the burden of proving their existence and occurrence if his allegations are denied by the defendant. In a general way this supposition is correct; but there are various factors that make it seem just to a court to require the defendant to allege or to bear the burden of proving the nonexistence or nonoccurrence of some of the conditions precedent to the right to compensation. One of these factors is sometimes a mental confusion as to the logical character of the condition that is in

question or as to the legal relationship to which the fact or event is being related. In some cases, however, judicial convenience may be served by assuming the conditions to exist unless the defendant denies them; in other cases the situation of the parties may be such as to make it fair to require the defendant to proceed first with evidence as to the disputed issue or even to bear the burden of persuading the court and jury that some fact necessary to the plaintiff's right to compensation does not exist. Problems of pleading and procedure, though constantly involved in all cases, can not be given special and thorough attention here. Further, the student must expect to find the terms condition, condition precedent, and condition subsequent used in judicial opinions with what he may feel is a very trying lack of uniformity. There is no rule of language or of law that requires a court or a law writer to accept the analytical system of the Law Institute or to follow its terminology.

Certain judicial remedies are at times available to a contractor even though a breach has not yet occurred. On a showing that a breach is threatened and that it will cause an injury that money damages can not fully repair, the court (formerly the Court of Chancery) may issue an order called an *Injunction* or enter a decree for the Specific Performance of the defendant's promise. In most cases such a remedy has been granted after a breach has already occurred, in order to prevent its injurious continuance. If there is as yet no breach, although one is threatened, and some condition precedent to the defendant's duty has not yet occurred, the court's order or decree will be a conditional one, requiring performance by the defendant if and when the condition precedent shall occur.

GRAY v. GARDNER.

Supreme Judicial Court of Massachusetts, 1821. 17 Mass. 183.

Assumpsit on a written promise to pay the plaintiff \$5,198.87, with the following condition annexed—viz., "On the condition that if a greater quantity of sperm oil should arrive in whaling vessels at Nantucket and New Bedford, on or between the first day of April and the first day of October of the present year, both inclusive, than arrived at said places, in whaling vessels, on or within the same term of time the last year, then this obligation to be void." Dated April 14th, 1819.

The consideration of the promise was a quantity of oil sold by the plaintiff to the defendants. On the same day another note unconditional had been given by the defendants, for the value of the oil estimated at 60 cents per gallon; and the note in suit was given to secure the residue of the price estimated at 85 cents, to depend on the contingency mentioned in the said condition.

At the trial before the Chief Justice the case depended upon the question whether a certain vessel, called the *Lady Adams*, with a cargo of oil, arrived at Nantucket on October 1st, 1819, about which fact the evidence was contradictory. The judge ruled that the burden of proving the arrival within the time was on the defendants, and further that, although the vessel might have, within the time, gotten within the space which might be called Nantucket Roads, yet it was necessary that she should have come to anchor, or have been moored, somewhere within that space before the hour of twelve following the first day of October in order to have arrived within the meaning of the contract.

The opinion of the Chief Justice on both these points was objected to by the defendants, and the questions were saved. If it was wrong on either point, a new trial was to be had, otherwise judgment was to be rendered on the verdict, which was found for the plaintiff.

Whitman for the defendants. As the evidence at the trial was contradictory, the question on whom the burden of proof rested became important. We hold that it was on the plaintiff. This was a condition precedent. Until it should happen, the promise did not take effect. On the non-occurrence of a certain contingent event, the promise was to be binding, and not otherwise. To entitle himself to enforce the promise, the plaintiff must show that the contingent event has not actually occurred. * * *

PARKER, C. J. The very words of the contract show that there was a promise to pay, which was to be defeated by the happening of an event—viz., the arrival of a certain quantity of oil at the specified places in a given time. It is like a bond with a condition; if the obligor would avoid the bond, he must show performance of the condition. The defendants in this case promise to pay a certain sum of money on condition that the promise shall be void on the happening of an event. It is plain that the burden of proof is upon them, and if they fail to show that the event has happened, the promise remains good.

The other point is equally clear for the plaintiff. Oil is to arrive at a given place before 12 o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink or take fire, and never arrive, however near she may be to her port. It is so in contracts of insurance, and the same reason applies to a case of this sort. Both parties put themselves upon a nice point in this contract; it was a kind of wager as to the quantity of oil which should arrive at the ports mentioned before a certain period. They must be held strictly to their contract, there being no equity to interfere with the terms of it.

Judgment on the verdict.

QUESTIONS:

1. Was the buyer under a "duty of immediate performance" of the note for \$5,198 prior to October 2?
2. Was the nonarrival of the *Lady Adams* with her load of oil by midnight of October 1 a necessary fact to make the note immediately payable?
3. Can the arrival of a larger amount of oil before October 2 be a condition subsequent to the "primary obligation" of the note, and yet the nonarrival of such oil be a condition precedent to the duty of immediate payment?
4. Is burden of proof determined by public policy or by mere logical distinctions between precedent and subsequent?
5. Was it of any importance which party had the burden of proof?

NOTE

In *Loyatt v. Hamilton*, 5 M. & W. 639 (1839), a suit was brought for nondelivery of oil; the contract providing: "We have this day sold you 50 tons of palm oil, to arrive per *Mansfield*. * * * In case of non-arrival, or the vessel's not having so much in, * * * this contract to be void." The *Mansfield* arrived with only 7 tons. It was held that the arrival of the oil in the *Mansfield* was a condition precedent to the seller's duty to make delivery.

CHAMBERS v. ATLAS INS. CO.

Supreme Court of Errors of Connecticut, 1883. 51 Conn. 17, 50 Am.Rep. 1.

PARDEE, J. The plaintiffs took from the defendant a policy of insurance against loss by fire, to be in force from January 1st to December 31st, 1881. On September 1st of that year the property covered by it was injured by fire. The plaintiffs instituted this suit for the recovery of damages. The defendant demurred and had judgment; the plaintiffs appeal.

The policy contains the following provisions:—"Payment of losses shall be due in sixty days after the proofs required by this company shall have been received at this office, and the loss shall have been satisfactorily ascertained and proved as required by the foregoing provisions of this policy. It is furthermore hereby expressly provided that no suit or action of any kind against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court, unless such suit or action shall be commenced within the term of twelve months next after any loss or damage shall occur; and in case any such suit or action shall be commenced against this company after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be en-

forced. * * * This policy is made and accepted upon the above express conditions; no part thereof can be waived except in writing signed by the secretary."

Proof of loss was made on September 14th, 1881. This suit was instituted on November 11th, 1882. It is the claim of the plaintiffs that they may institute their suit within the twelve months next after the expiration of sixty days from proof of loss, that is, next after November 14th, 1881. It is the claim of the defendant that they must institute it within the twelve months next after the fire.

This limitation is lawful and reasonable. In words in common use and of plain meaning an event is referred to as a starting point; that is, the destruction of, or injury to, the plaintiffs' property by fire. It is certain that they intended to surrender a very large portion of the time allowed them by the law; and there is nothing either in the structure or subject-matter of the contract indicating their unwillingness to make the day of that occurrence the point of departure, and to agree that the period of twelve months therefrom should cover the making of the proofs, the sixty days of grace to the defendant, and the institution of a suit.

The contract keeps the day upon which a fire shall occur entirely distinct from the day upon which the right to sue for indemnity accrues; each is described in plain and appropriate language. We find no reason for the assumption that when the first is mentioned the last is intended; and it is not for us, by construction, to give the plaintiffs what they failed to secure by agreement.

There is no error in the judgment complained of.

In this opinion the other judges concurred.

QUESTIONS:

1. On what date did the plaintiff's right to immediate payment (and the defendant's duty to make such payment) first accrue?
2. Were there any conditions precedent to such right (and duty) that did not occur?
3. Was there a condition subsequent as defined in Restatement, Contracts, §§ 250, 259?

NOTE

A similar case is *SEMMEs v. HARTFORD INS. CO.*, 13 Wall. 158. 20 L.Ed. 490 (1871), where it was further held that the breaking out of the Civil War, making the bringing of a suit within the 12 months almost impossible, nullified the condition altogether. Observe that the condition subsequent, terminating the insurer's duty to pay, was the not bringing of the suit in 12 months. This was rendered inevitable, not impossible, by the war. The same was held in *Scovill v. McMahon*, 62 Conn. 378, 26 A. 479, 21 L.R.A. 58, 36 Am.St.Rep. 350 (1892), where land was conveyed

on condition to revert to the grantor when no longer used as a cemetery, and later the Legislature forbade its use for that purpose.

In *NORTHWESTERN NAT. LIFE INS. CO. v. WARD*, 56 Okl. 188, 155 P. 524 (1916), where a life insurance policy provided that "No suit at law or action in equity shall be brought to recover on this policy after one year from the actual date of the death of the insured," the court said: "A condition precedent of a contract is one which calls for the performance of some act or the happening of some event after the contract is entered into and upon the performance or happening of which its obligations are made to depend. R.C.L. title, Contracts, § 290, p. 904.

"A condition subsequent of a contract is one which follows the performance [breach] of the contract and operates to defeat or annul it upon the subsequent failure of either party to comply with the condition. R.C.L. title, Contracts, § 291, p. 906.

"The stipulation or condition of the policy sued on in this case that an action could not be brought to recover on the policy after one year from the actual date of the death of the insured was one which, in its very nature, could not prevent the accrual of a right to recover on the policy, and consequently was not a condition precedent of the policy, but was a limitation on the beneficiary's right to sue at law or in equity after her right to do so had accrued, and was in the nature of a condition subsequent, although not strictly so, which did not defeat or annul the policy, but placed a time limitation on the right to enforce payment of any amount to come due on the same, in the absence of a waiver or estoppel.

"The clause in question, which prohibited suit on the policy being brought after a year from the date of the death of the insured, was not averred in the petition or set out in the exhibit thereto, and it was not necessary for the plaintiff to do so to state a cause of action, for while it was a part of the contract, it was a provision which in no way affected the liability, but related only to the enforcement. It was one wholly for the benefit of the insurer, and could be waived, and, if not waived and suit was brought to recover on the policy after the expiration of the time limit, that fact could have been and was pleaded in defense of the action, and the plaintiff's plea of facts, by way of reply, which tended to establish a waiver or an estoppel, was a proper plea and did not constitute a departure."

The court held that the defendant was estopped from using the condition subsequent as a defense by reason of its conduct in the continued negotiations for a settlement. See Restatement, Contracts, § 308.

RAY v. THOMPSON.

Supreme Judicial Court of Massachusetts, 1853. 12 Cush. 281, 59 Am. Dec. 187.

Assumpsit for the price of a horse sold to the defendant. The defence was that the horse was sold under a conditional contract, with a right to return him within a specified time, if not satisfactory to the defendant, and that the defendant did so return him. At the trial in

the court of common pleas before Mellen, J., the plaintiff offered evidence tending to prove that during the time limited by the contract for the return of the horse, and while he was in the defendant's possession, the defendant misused and abused the horse, whereby he was materially injured and lessened in value, and that the plaintiff did not accept him in return; which evidence, the presiding judge, on objection by the defendant, rejected, and, the verdict being for the defendant, the plaintiff alleged exceptions to the ruling.

PER CURIAM. The evidence offered by the plaintiff ought to have been admitted, to prove, if he could, that the horse had been abused and injured by the defendant, and so to show that the defendant had put it out of his power to comply with the condition, by returning the horse. The sale was on a condition subsequent; that is, on condition, he did not elect to keep the horse, to return him within the time limited. Being on a condition subsequent, the property vested presently in the vendee, defeasible only on the performance of the condition. If the defendant, in the meantime, disabled himself from performing the condition,—and if the horse was substantially injured by the defendant by such abuse, he would be so disabled,—then the sale became absolute, the obligation to pay the price became unconditional, and the plaintiff might declare as upon an indebitatus assumpsit, without setting out the conditional contract. *Moss v. Sweet*, 3 Eng.Law & Eq. 311, 16 Adol. & E. 493.

New trial ordered.

NOTE

The court does not tell us whether by the contract the price was made payable before the "specified time" for trial of the horse expired. If it was so payable an action would have been maintainable for breach on non-payment. The return of the horse in good condition within the "specified time" would have operated as a condition subsequent to the duty to pay extinguishing it. If, as was probably the case, the price was payable only at the expiration of the "specified time," failure to return the horse in good condition within that time was a condition precedent to the buyer's duty to pay.

If, as the court assumes, the "title" or ownership of the horse passed to the buyer on the first delivery, the return of the horse in good condition within the time would operate as a "condition subsequent" to *such title or ownership*.

The distinction between a condition precedent and a condition subsequent, as well as that between a condition and a promise or covenant, has been largely dealt with in the law of property. There too the condition is an operative fact, but the legal relations to which it is precedent or subsequent in time are those which constitute ownership or "title." (The analysis of these relations should be made in the course on property.) If the fact is a condition precedent, it must exist before title will

vest in the grantee; if it is a condition subsequent, upon its coming into existence a title that has already vested in the grantee will be divested.

In *Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac*, 290 Ill. 133, 124 N.E. 793, 7 A.L.R. 1422 (1919), a church lot was conveyed "on condition that the said church be and remain connected with the Hauges Lutheran Synod." Disconnection with the Synod was held to be a condition subsequent, and the clause in the conveyance was not a mere covenant. The court said, "It must be conceded that the words 'on condition,' in a deed, are apt words to create a condition; yet such words have often been construed, in view of the context, as creating a covenant rather than a condition. * * * It has been held that a covenant or condition may be created by the same words. The chief distinction between a condition subsequent and a covenant pertains to the remedy in the event of a breach, which in the former subjects the estate to a forfeiture and in the latter is merely a ground for recovery of damages."

SECTION 4.—EXCUSE OF CONDITIONS

INTRODUCTORY NOTE

When a party's legal duty to render his promised performance is expressly or constructively conditional on some fact or event, that duty may become unconditional by reason of subsequently arising circumstances. This is what is meant by saying that performance of the condition is "excused." Subsequent events may have this excusing effect either because the parties so agreed or because courts are convinced that justice so requires. The problem dealt with in the present Section is to determine what are the circumstances under which justice requires that a promissory duty that was originally conditional shall be enforceable even though the condition is not performed or does not occur. Restatement, *Contracts*, §§ 294-308, presents a number of rules by which this determination can be made, some of which may never have been stated before in their present form.

The elimination of a condition precedent to a contractor's duty of immediate performance enables the other party to maintain an action for an appropriate remedy; but the remedy varies with the facts. If the condition is a performance by the plaintiff which constitutes the whole or a substantial part of the bargained-for equivalent of the defendant's money (or other promised performance), he should not be able to get the full value promised by the defendant, either by an equitable decree for specific performance or by a judgment for full value in money. One who has been promised a sum of money for his lands

or his goods or his services will not be given judgment for that sum while he still retains his lands or goods or services. Yet he may be able to get judgment for damages properly estimated, or for a restitutionary remedy, without rendering or even tendering his performance. The law of Remedies can not be considered in any detail in this volume; but the Remedy given is a necessary element in any suit and must be considered in making the court's decision and in stating the Substantive Law by which that decision is explained and justified.

If the condition precedent that is eliminated constitutes no substantial part of the bargained-for exchange, it may be just and proper to require of the defendant the full performance that was promised by him, either in specie (specific performance) or in full money value.

Subsequently occurring events may eliminate a condition subsequent as well as a condition precedent; that is to say, the performance or happening of the condition subsequent, by which the defendant's duty of immediate performance or duty to make compensation for nonperformance would have been terminated, no longer has that effect.

(A) WAIVER OF CONDITIONS

CRAIG v. LANE.

Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 195, 98 N.E. 685.

Action by Frank H. Craig against John J. Lane. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of contract for the purchase of three cars of potatoes at 90 cents per bushel.

SHELDON, J. We see no ground on which the exceptions can be sustained. The ruling asked for by the defendant could not have been given; and that is the only question presented.

The defendant's contract was an entire one for the purchase of three cars of potatoes; and it was not severed by the fact that the plaintiff shipped them at different times and drew a separate draft for the alleged contents of each car at the agreed price. We assume without deciding that upon discovering the shortage which he claimed in the load of the first car he might have declined to accept it and rescinded his contract. But he chose not to do this. Instead of doing so he accepted that car load and sold it to a customer of his own, thus putting it beyond his power to return it to the plaintiff. He could not

then rescind the contract by reason of the shortage. He must seek his remedy under the contract by way of set-off or recoupment, or by an independent action. *Morse v. Brackett*, 98 Mass. 205; *Mansfield v. Trigg*, 113 Mass. 350; *Barrie v. Earle*, 143 Mass. 1, 8 N.E. 639, 58 Am.Rep. 126; *Obery v. Lander*, 179 Mass. 125, 130, 60 N.E. 378; *Fullam v. Wright & Colton Wire Cloth Co.*, 196 Mass. 474, 476, 82 N.E. 711.

Exceptions overruled.

QUESTIONS:

1. Would the decision have been the same if the agreed price had been a lump sum of \$4,000 for the three carloads?
2. How much did the defendant owe for the potatoes received?
3. Did the defendant have a good counterclaim for damages?

NOTE

Where payment or other performance by a certain time is a condition precedent, this may be waived by any voluntary statement to that effect or by continuing to receive or to urge performance. *Restatement, Contracts*, §§ 298, 299;

Where proof of loss within a fixed time is made a condition by an insurance policy, the condition may be waived, even after the expiration of the period fixed.

A waiver may be expressly conditional, and becomes operative only on fulfillment of the condition. *Thompson v. Postal Life Ins. Co.*, 226 N.Y. 363, 123 N.E. 750 (1919).

McKENNA v. VERNON.

Supreme Court of Pennsylvania, 1917. 258 Pa. 18, 101 A. 919.

Assumpsit by Bernard J. McKenna, trading as John McKenna & Son, against William J. Vernon. From a judgment for plaintiff, defendant appeals. Affirmed.

STEWART, J. This was an action to recover a balance alleged to be due on a building contract. By written agreement under date of January 20, 1914, the plaintiff undertook the erection and completion of a moving picture theater at 1526-28 Cumberland street in the city of Philadelphia, agreeably to certain plans and specifications which accompanied and were made part of the agreement, he to receive therefor, in full compensation, the sum of \$7,750, to be paid by the owner to the contractor wholly upon certificates of the architect as follows: Eighty per cent of the work set in place as the work proceeds, the first payment within 30 days after the completion of the work; all pay-

ments to be due when certificates of the same shall have been issued by the architect; the building to be completed by April 20, 1914, and the work to be done under the direction of the architect. A supplemental agreement was entered into by the parties March 24, 1914, which provided for an enlargement of the theater building, for which the contractor was to receive an additional \$1,000. The main provisions of this agreement were similar to those contained in the earlier. By the later agreement the work was to be completed on or before the 11th of May, 1914. From time to time, as the work progressed, the owner made several payments on account, amounting in all to \$6,000. Suit was brought, August 28, 1914, to recover the balance of \$2,750, with interest from June 30, 1914. Defense was made on several grounds: Failure of contractor to erect and complete the building in accordance with the plans and specifications, the substituting of inferior and cheaper materials, and inferior workmanship throughout, entailing, for the supply and correction of the same, if attempted, a large expenditure. Further, defendant claimed that the building was not completed within the time allowed by the contract, and demanded as a set-off a penalty of \$283.35. The trial resulted in a verdict for the plaintiff for \$2,500. At the conclusion of the evidence, the defendant asked for a compulsory nonsuit, which was refused.

The several assignments of error, in one form and another, relate directly or indirectly to this one feature of the case, and are all based on the theory that, in the absence of a certificate from the architect of the final completion of the building in accordance with plans and specifications, no right of action existed. Not only is there no express provision to this effect in the contract, but the contract itself shows that no distinction is there made between final payment and the payments on account of the 80 per cent of work in place. All payments were to be made only on certificate of the architect, and yet with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for. With such constant and repeated disregard on the part of the owner to exact compliance with this provision in the contract, it is too late now for him to insist that failure on the part of the plaintiff to secure such certificate before suit defeats his right of action. Furthermore, on the trial, the architect, called as a witness, testified that the plaintiff had performed substantial compliance with all the requirements of the contract, that he had not given the certificate to this effect only because it had not been asked for, and that whatever variations there were from the specifications were authorized and directed by him. The provision in the contract for written certificates from the architect is for the benefit and protection of the owner. If he waived it repeatedly, as he did here, during the progress of the work, he cannot complain if he be held to have waived it when he seeks to defend against a final payment for

work shown to have been honestly and substantially performed, especially when almost daily he has had the work under his own observation, without remonstrance or complaint at any time with respect to either the work done or materials employed. This being the situation, the court was entirely right in refusing the nonsuit.

For like reason, there was no error in refusing to give binding instructions for the defendant. If the court was right in these rulings, the other assignments of error necessarily fall.

The judgment is affirmed.

NOTE

The term "waiver" is frequently used in cases where there is really a new substituted agreement, modifying and discharging pro tanto the original contract. See Restatement, Contracts, § 296; *California Raisin Growers Assn. v. Abbott*, 160 Cal. 601, 606, 117 P. 767 (1911); *Mahoney v. Hartford Inv. Corp.*, 82 Conn. 280, 73 A. 766 (1909), new agreement for extras, but without the written order required originally. Distinguish sharply between substituted contract, estoppel, and voluntary waiver, both as to the operative facts themselves and as to their effect on the legal relations of the parties.

Cf. Restatement, Contracts, § 300.

In *O'Keefe v. St. Francis' Church*, 59 Conn. 551, 22 A. 325 (1890), the court said: "It devolved upon the plaintiff in each instance to procure a written order from the architect and to make his claim [for extra work] in writing. His failure to do so in one instance does not tend to prove a waiver by the defendant. Repeated failures add nothing. Ciphers added to ciphers indefinitely, the result is the same—nothing." No change of position by the plaintiff in reliance on the defendant's repeated payments was shown.

CLARK v. WEST.

Court of Appeals of New York, 1908. 193 N.Y. 349, 86 N.E. 1.

Action by William L. Clark against John B. West. From a judgment of the Appellate Division of the Supreme Court reversing an interlocutory judgment overruling a demurrer to the complaint and sustaining the demurrer (125 App.Div. 654, 110 N.Y.S. 110), plaintiff, by permission, appeals, and the Appellate Division certifies questions. Reversed, and interlocutory judgment affirmed.

On February 12, 1900, the plaintiff and defendant entered into a written contract, under which the former was to write and prepare for publication for the latter a series of law books, the compensation for which was provided in the contract. After the plaintiff had completed a three-volume work known as "*Clark & Marshall on Corporations*," the parties disagreed. The plaintiff claimed that the defendant

had broken the contract by causing the book to be copyrighted in the name of a corporation which was not a party to the contract, and he brought this action to recover what he claims to be due him, for an accounting and other relief. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The Special Term overruled the demurrer, but upon appeal to the Appellate Division that decision was reversed, and the demurrer sustained.

Those portions of the contract which are germane to the present stage of the controversy are as follows: The plaintiff agreed to write a series of books relating to specified legal subjects. The manuscript furnished by him was to be satisfactory to the defendant. The plaintiff was not to write or edit anything that would interfere with the sale of books to be written by him under the contract, and he was not to write any other books unless requested so to do by the defendant, in which latter event he was to be paid \$3,000 a year. The contract contained a clause which provided that "the first party (the plaintiff) agrees to totally abstain from the use of intoxicating liquors during the continuance of this contract, and that the payment to him in accordance with the terms of this contract of any money in excess of \$2 per page is dependent on the faithful performance of this as well as the other conditions of this contract. * * *" In a later paragraph it further recited that, "in consideration of the above promises of the first party (the plaintiff), the second party (the defendant) agrees to pay to the first party \$2 per page, * * * on each book prepared by the first party under this contract and accepted by the second party, and if said first party abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional \$4 per page in manner hereinbefore stated." This was followed by a specification of the method and times of payment. * * *

The plaintiff in his complaint alleges completion of the work on Corporations and publication thereof by the defendant, the sale of many copies thereof from which the defendant received large net receipts, the number of pages it contained (3,469), for which he had been paid at the rate of \$2 per page, amounting to \$6,938, and that defendant has refused to pay him any sum over and above that amount, or any sum in excess of \$2 per page. Full performance of the agreement on plaintiff's part is alleged, except that he "did not totally abstain from the use of intoxicating liquor during the continuance of said contract; but such use by the plaintiff was not excessive and did not prevent or interfere with the due and full performance by the plaintiff of all the other stipulations in said contract." The complaint further alleges a waiver on the part of the defendant of the plaintiff's stipulation to totally abstain from the use of intoxicating liquors, as follows: "(12)

That defendant waived plaintiff's breach of the stipulation to totally abstain from the use of intoxicating liquors during the continuance of said contract; that long prior to the completion of said manuscript on Corporations, and its delivery to and acceptance by the defendant, the defendant had full knowledge and well knew of plaintiff's said use of intoxicating liquor during the continuance of said contract, but nevertheless acquiesced in and failed to object thereto, and did not terminate the contract on account thereof; that with full knowledge of said breach by the plaintiff defendant continued to exact and require of the plaintiff performance of all the other stipulations and conditions of said contract, and treated the same as still in force, and continued to receive, and did receive, installments of manuscript under said contract, and continued to make and did make payments to plaintiff by way of advancements, and finally accepted and published said manuscript as aforesaid; that at no time during the performance of said contract by the plaintiff did the defendant notify or intimate to the plaintiff that defendant would insist upon strict compliance with said stipulation to totally abstain from the use of intoxicating liquor, or that defendant intended to take advantage of plaintiff's said breach, and on account and by reason thereof refuse to pay plaintiff the royalty stipulated in said contract; that, on the contrary, and with full knowledge of plaintiff's said use of intoxicating liquors, defendant repeatedly avowed and represented to the plaintiff that he was entitled to and would receive said royalty payment, and plaintiff believed and relied on said representation, and in reliance thereon continued in the performance of said contract until the time of the breach thereof by the defendant, as hereinafter specifically alleged, and at all times during the writing of said treatise on Corporations, and after as well as before publication thereof, as aforesaid, it was mutually understood, agreed, and intended by the parties hereto that, notwithstanding plaintiff's said use of intoxicating liquors, he was nevertheless entitled to receive and would receive said royalty as the same accrued under said contract." The defendant's breach of the contract is then alleged, which is claimed to consist in his having taken out a copyright upon the plaintiff's work on Corporations in the name of a publishing company which had no relation to the contract, and the relief asked for is that the defendant be compelled to account, and that the copyright be transferred to the plaintiff, or that he recover its value.

The appeal is by permission of the Appellate Division, and the following questions have been certified to us: (1) Does the complaint herein state facts sufficient to constitute a cause of action? (2) Under the terms of the contract alleged in the complaint, is the plaintiff's total abstinence from the use of intoxicating liquors a condition precedent which can be waived so as to render defendant liable upon the contract notwithstanding plaintiff's use of intoxicating liquors? (3)

Does the complaint herein allege facts constituting a valid and effective waiver of plaintiff's nonperformance of such condition precedent?

WERNER, J. * * * Briefly stated, the defendant's position is that the stipulation as to plaintiff's total abstinence is the consideration for the payment of the difference between \$2 and \$6 per page, and therefore could not be waived except by a new agreement to that effect based upon a good consideration; that the so-called waiver alleged by the plaintiff is not a waiver, but a modification of the contract in respect of its consideration. The plaintiff, on the other hand, argues that the stipulation for his total abstinence was merely a condition precedent, intended to work a forfeiture of the additional compensation in case of a breach, and that it could be waived without any formal agreement to that effect based upon a new consideration.

The subject-matter of the contract was the writing of books by the plaintiff for the defendant. The duration of the contract was the time necessary to complete them all. The work was to be done to the satisfaction of the defendant, and the plaintiff was not to write any other books except those covered by the contract, unless requested so to do by the defendant, in which latter event he was to be paid for that particular work by the year. The compensation for the work specified in the contract was to be \$6 per page, unless the plaintiff failed to totally abstain from the use of intoxicating liquors during the continuance of the contract, in which event he was to receive only \$2 per page. That is the obvious import of the contract construed in the light of the purpose for which it was made, and in accordance with the ordinary meaning of plain language. It is not a contract to write books in order that the plaintiff shall keep sober, but a contract containing a stipulation that he shall keep sober so that he may write satisfactory books. When we view the contract from this standpoint, it will readily be perceived that the particular stipulation is not the consideration for the contract, but simply one of its conditions which fits in with those relating to time and method of delivery of manuscript, revision of proof, citation of cases, assignment of copyright, keeping track of new cases and citations for new editions, and other details which might be waived by the defendant, if he saw fit to do so. This is made clear, it seems to us, by the provision that, "in consideration of the above promises," the defendant agrees to pay the plaintiff \$2 per page on each book prepared by him, and if he "abstains from the use of intoxicating liquor and otherwise fulfills his agreements as hereinbefore set forth, he shall be paid an additional \$4 per page in manner hereinbefore stated." The compensation of \$2 per page, not to exceed \$250 per month, was an advance or partial payment of the whole price of \$6 per page, and the payment of the two-thirds, which was to be withheld pending the performance of the contract, was simply made con-

tingent upon the plaintiff's total abstention from the use of intoxicants during the life of the contract. * * *

It is obvious that the parties thought that the plaintiff's normal work was worth \$6 per page. That was the sum to be paid for the work done by the plaintiff, and not for total abstinence. If the plaintiff did not keep to the condition as to total abstinence, he was to lose part of that sum. * * * This, we think, is the fair interpretation of the contract, and it follows that the stipulation as to the plaintiff's total abstinence was nothing more nor less than a condition precedent. If that conclusion is well founded, there can be no escape from the corollary that this condition could be waived; and, if it was waived, the defendant is clearly not in a position to insist upon the forfeiture which his waiver was intended to annihilate. The forfeiture must stand or fall with the condition. If the latter was waived, the former is no longer a part of the contract. Defendant still has the right to counterclaim for any damages which he may have sustained in consequence of the plaintiff's breach, but he cannot insist upon strict performance. *Dunn v. Steubing*, 120 N.Y. 232, 24 N.E. 315; *Parke v. Frano-American Trading Co.*, 120 N.Y. 51, 56, 23 N.E. 996; *Brady v. Cassidy*, 145 N.Y. 171, 39 N.E. 814.

This whole discussion is predicated, of course, upon the theory of an express waiver. We assume that no waiver could be implied from the defendant's mere acceptance of the books and his payment of the sum of \$2 per page without objection. It was the defendant's duty to pay that amount in any event after acceptance of the work. The plaintiff must stand upon his allegation of an express waiver, and if he fails to establish that he cannot maintain his action.

The theory upon which the defendant's attitude seems to be based is that, even if he has represented to the plaintiff that he would not insist upon the condition that the latter should observe total abstinence from intoxicants, he can still refuse to pay the full contract price for his work. The inequity of this position becomes apparent when we consider that this contract was to run for a period of years, during a large portion of which the plaintiff was to be entitled only to the advance payment of \$2 per page; that balance being contingent, among other things, upon publication of the books and returns from sales. Upon this theory the defendant might have waived the condition while the first book was in process of production, and yet, when the whole work was completed, he would still be in a position to insist upon the forfeiture because there had not been strict performance. Such a situation is possible in a case where the subject of the waiver is the very consideration of a contract (*Organ v. Stewart*, 60 N.Y. 413, 420), but not where the waiver relates to something that can be waived. In the case at bar, as we have seen, the waiver is not of the consideration or subject-matter, but of an incident to the method of

performance. The consideration remains the same. The defendant has had the work he bargained for, and it is alleged that he has waived one of the conditions as to the manner in which it was to have been done. He might have insisted upon literal performance, and then he could have stood upon the letter of his contract. If, however, he has waived that incidental condition, he has created a situation to which the doctrine of waiver very precisely applies.

The cases which present the most familiar phases of the doctrine of waiver are those which have arisen out of litigation over insurance policies where the defendants have claimed a forfeiture because of the breach of some condition in the contract (*Insurance Co. v. Norton*, 96 U.S. 234, 24 L.Ed. 689; *Titus v. Glens Falls Ins. Co.*, 81 N.Y. 410; *Kiernan v. Dutchess Co. Mut. Insurance Co.*, 150 N.Y. 190, 44 N.E. 698), but it is a doctrine of general application which is confined to no particular class of cases. A "waiver" has been defined to be the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage which the party waiving it might at its option have demanded or insisted upon (*Herman on Estoppel & Res Adjudicata*, vol. 2, p. 954; *Cowenhoven v. Ball*, 118 N.Y. 234, 23 N.E. 470), and this definition is supported by many cases in this and other states. In the recent case of *Draper v. Oswego Co. Fire R. Ass'n*, 190 N.Y. 12, 16, 82 N.E. 755, Chief Judge Cullens, in speaking for the court upon this subject, said: "While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A 'waiver' is the voluntary abandonment or relinquishment by a party of some right or advantage. As said by my Brother Vann in the *Kiernan Case*, 150 N.Y. 190, 44 N.E. 698: 'The law of waiver seems to be a technical doctrine, introduced and applied by the court for the purpose of defeating forfeitures. * * * While the principle may not be easily classified, it is well established that, if the words and acts of the insurer reasonably justify the conclusion that with full knowledge of all the facts it intended to abandon or not to insist upon the particular defense afterwards relied upon, a verdict or finding to that effect establishes a waiver, which, if it once exists, can never be revoked. The doctrine of equitable estoppel, or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment of another party who, entitled to rely on such conduct, has acted upon it. * * * As already said, the doctrine of waiver is to relieve against forfeiture. It requires no consideration for a waiver, nor any prejudice or injury to the other party.'" To the same effect, see *Knarston v. Manhattan Life Ins. Co.*, 140 Cal. 57, 73 P. 740.

It remains to be determined whether the plaintiff has alleged facts which, if proven, will be sufficient to establish his claim of an express

waiver by the defendant of the plaintiff's breach of the condition to observe total abstinence. In the 12th paragraph of the complaint, the plaintiff alleges facts and circumstances which we think, if established, would prove defendant's waiver of plaintiff's performance of that contract stipulation. • • •

The three questions certified should be answered in the affirmative, the order of the Appellate Division reversed, the interlocutory judgment of the Special Term affirmed, with costs in both courts, and the defendant be permitted to answer the complaint within 20 days upon payment of costs.

QUESTIONS:

1. Was Clark's promise to abstain a part of the consideration for West's promise to pay \$6 a page?
2. Was his actual abstention a part of the agreed exchange for the payment of \$6 a page?
3. Was the contract divisible; the promised performances being apportioned into pairs of agreed equivalents?
4. Was abstention an express condition precedent?
5. Was West's failure to discharge Clark, knowing that Clark was drinking, a "waiver" of the condition?
6. Was there any consideration for West's promise to pay in full and to waive the requirement of abstention? See Restatement, Contracts, § 297.
7. Did Clark commit a breach of contract?
8. Without the "waiver" would there have been a "forfeiture"?

NOTE

Since the "waiver" of an express condition of a contractual duty changes a conditional duty into an unconditional one, making enforcement possible when otherwise it would not be, it might be supposed that a "waiver" would not be effective unless given for a sufficient consideration or a substantial change of position has occurred in reliance on it; but such is not the case if the condition that is waived is such that its performance does not constitute a substantial part of the equivalent that was bargained for by the party who is "waiving" it. See Restatement, Contracts, § 88. It is otherwise if the condition that is waived is a performance that constitutes a substantial part of the agreed equivalent.

SHALLENBERGER v. STANDARD SANITARY MFG. CO.

Supreme Court of Pennsylvania, 1909. 223 Pa. 220, 72 A. 500.

Assumpsit for breach of contract by E. E. Shallenberger against the Standard Sanitary Manufacturing Company. Judgment for plaintiff, and defendant appeals. Affirmed.

STEWART, J. It is not correct to say that the contract here was incomplete and inoperative so long as the bond stipulated for had not been given by the contractor. With the sealing and delivery of the written agreement the contract at once became operative, and thereafter, for a breach by either of the parties in any of its terms, the other would have appropriate remedy. One of the terms required that the contractor should "furnish satisfactory trust company bond in the sum of twenty thousand dollars (\$20,000) for the faithful performance of all and singular his covenants, and for the protection of the parties of the first part against mechanics' liens, and all damages, losses, delays, or other injury sustained by reason of the failure of the said party of the second part to keep and perform all his covenants."

By the contract, executed April 27, 1905, plaintiff undertook, for a consideration of \$64,692, to remove from a certain lot in the city of Allegheny owned by defendant company the buildings then standing and occupied by the defendant company, and erect thereon a pattern shop and storage warehouse and a warehouse building, and complete the same by September 1st following. Without having given the bond required plaintiff was allowed to enter at once upon the work. He proceeded without delay to tear down and remove the old buildings, and prepare the ground for constructive work. The defendant would have been entirely within its rights had it denied possession of the premises until bond had been given, and, for a failure of the plaintiff to furnish the bond within a reasonable time, it would have been justified in rescinding the contract. But possession having been given, and the work having been entered upon, while the defendant's right to demand the bond thereafter continued, as well as its rights to rescind for default by the plaintiff, yet rescission could only be justified as proper regard was paid to the rights of the plaintiff under conditions existing at the time.

In a communication addressed to plaintiff, under date of May 19th, Mr. Reed, general manager for the defendant company, requested that the latter file his bond with either the secretary of the company or its architect. The day following the receipt of this letter the plaintiff testified that he called on Mr. Reed, and told him that he had made application to a trust company in West Virginia for a surety bond, but, because of the absence of a party whom he wished to see in connection with it, he was delayed; that he would get it as soon as possible,

and would not ask any money on the contract until the bond had been delivered to the company. To this representation Mr. Reed replied, "All right." The plaintiff thereafter continued his work under the contract. By June 5th he had the ground cleared, had 8 or 10 car loads of lumber on the ground, and was ready to proceed with the erection of the buildings. On that day defendant gave the plaintiff a written notice, which reads as follows: "Under the terms of the agreement dated April 27, 1905, prepared for construction of buildings in Allegheny city for S. S. M. Co., it is provided that you shall give a satisfactory bond in the sum of \$20,000 for the faithful performance of the work. As the contract cannot be closed till this is done, you are hereby notified that unless the bond is delivered by Thursday, June 8, 1905, by twelve o'clock noon, we shall let the work to another contractor."

If, as here asserted, the contract had not been closed, the defendant was under no obligation to the plaintiff with respect to it; it was nothing but an open negotiation from which either could withdraw at pleasure. This was a strange theory to adopt, and may explain in a measure the summary process attempted by the defendant. As we have said, the contract was an executed one, binding upon both parties, which neither could rescind except for justifying reasons. Treating the communication, however, as a notice that the company would rescind the contract, unless the bond were furnished by noon of June 8th—and the plaintiff so understood it—the one question is, Was the time allowed under the notice reasonable, in view of all the circumstances of the case?

The plaintiff testified that at the time the notice was received his application for a surety bond of the Citizens' Trust & Guarantee Company of Parkersburg, W. Va., had been approved by the company. Under date of June 8th—though it must have been the 9th—he wrote to the defendant advising that this bond had been executed by the trust company the day previous, June 8th, and would arrive by due course of mail. On either the next day or that following plaintiff tendered this bond to the defendant's general manager, Mr. Dawes, who replied, "Well, it is all right; but, as we have made the change now, we intend to do the work ourselves, and don't wish to make the change again." Thereupon, plaintiff was denied permission to proceed with his work on the premises. It is complained that the court submitted to the jury the question of reasonable notice to plaintiff of the intention to rescind, instead of deciding it as a matter of law. This assumes that there was no dispute as to the facts on which plaintiff relied to justify or excuse his delay in furnishing the bond. It would unduly extend this opinion if we were to refer in detail to the many and marked contradictions which appear in the testimony. Let a single instance suffice.

In determining whether a three-day limit for the filing of the bond was affording the plaintiff a reasonable time, what preceded the giving of the notice was as much for consideration as what followed. That the reasonableness of the time depended on the situation and circumstances of the parties at the time is true, but whatever in the conduct of either had contributed to the situation so far as concerned the other was proper matter of inquiry. The plaintiff, immediately after the first written request for a bond, had told the defendant's general manager that application had been made to the trust company in Parkersburg for a surety bond in the stipulated sum. If in that conversation the manager told plaintiff what the latter says he did, a waiver of the right to require prompt delivery of a bond, in consideration of plaintiff making no pressing demand for money or any payment on his contract before delivery of the bond, might well be inferred. If there were such waiver, then when the notice of June 5th was given, plaintiff could not be said to be in default. A three days' notice to one who in open disregard of his covenants, and in spite of repeated demands for compliance, was in default might well be regarded as reasonable; while such a requirement would be wholly unreasonable with respect to another whose delay had been with the acquiescence of the party having a right to the bond. Did the conversation occur as plaintiff says, or was it as the general manager testified? Certainly what passed between these parties was relevant, and it was wholly for the jury to determine what the conversation was, and its effect. So, too, in regard to other relevant facts. The facts being undetermined, a submission to the jury was unavoidable.

From what we have said as to the real and only issue in the case it results that no error was committed in rejecting defendant's offer to show plaintiff's financial condition. Whatever that condition was, it did not prevent plaintiff from procuring the required bond and tendering it to defendant on the day following defendant's rescission. The question was whether that was a reasonable compliance with defendant's demand. Nor was it error to refuse consideration of the fact that the bond tendered by plaintiff was a bond of a foreign corporation. Defendant did not put its refusal of acceptance on any such ground, but solely on the ground that the bond had not been tendered in time. Not only so, but when defendant, weeks before, was advised that plaintiff had applied to this company for a surety bond to meet the requirements of his contract, no such objection was made. This fact may not have required the company to accept such bond; but, if rejected finally for any such reason, the plaintiff would have been entitled to further time to procure another.

The measure of damages the jury were instructed to observe was a correct one. Plaintiff had made subcontracts for two-thirds of the material required for the construction of the building, and offered tes-

timony to show what additional expenditure would be required to complete the buildings in accordance with the contract. The appropriation of these subcontracts by the defendant company is conclusive as to the cost of the material embraced, and the testimony as to the additional cost required was convincing to the jury. They were instructed by the court to estimate from these data the value of plaintiff's contract, first ascertaining from the evidence what the entire cost of the building would be to the plaintiff, and deducting this sum from the contract price. If the defendant had no right to rescind the contract, plaintiff was entitled to compensation; and the measure of damages adopted was the only one, depending upon the sufficiency of the evidence, by which this could be determined.

The assignments of error are overruled.

Judgment affirmed. [Three judges dissented.]

QUESTIONS:

1. Was giving the bond a condition precedent to the defendant's duty to permit work to begin?
2. Was such a condition "waived"? See Restatement, Contracts, § 298.
3. Was personal satisfaction of the defendant a condition precedent?

NOTE

Where performance on time or in a certain manner has ceased to be a condition precedent by reason of a waiver, it can generally again be made a condition by express notice to that effect. In the absence of such notice it will no longer operate as a condition. The notice operates to end assent and also to prevent further estoppel by reliance on the previous waiver. See Restatement, Contracts, § 311.

One whose contractual duty is conditional upon a performance that has not been rendered is legally privileged to refuse to perform his own promise without giving any reason for his refusal. Suppose however, that he gives a reason that is not a legally sufficient one. Does he thereby "waive" the condition, thus making his refusal a breach of duty? Cases have sometimes held that he does. The more general rule is to the contrary except when the statement of reasons for the refusal leads the other party to believe reasonably that the unperformed condition is regarded as unimportant and to forbear to cure the deficiency as he might otherwise have done.

In *List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N.E. 120, 17 Ann.Cas. 61 (1909), the court said: "We do not deny that under some circumstances a refusal to accept goods for a stated reason may operate as a waiver of other objections, which might have been properly made. This may be so in cases where the silence of the purchaser and his conduct operate to mislead the seller and prevent him from protecting himself; in other words, where the conduct of the buyer would raise an estoppel against him. But when the buyer has absolutely rejected the goods, for whatever

reason, his silence as to other objections which would justify his refusal to accept, when unaccompanied by conduct which may have misled and prejudiced the vendor, cannot be construed as a waiver of the buyer's right to insist on his plea of nonperformance on those grounds. The reason which underlies this proposition is that a waiver must be voluntary—that is, intentional, with knowledge of the facts and of the party's rights—or it must be implied from conduct which amounts to estoppel." See Restatement, Contracts, § 304.

In *Nathan Miller v. Northern Ins. Co.*, 3 Terry (Del.) 523, 39 A.2d 23 (1944), the suit was on a policy of insurance against loss by sprinkler leakage, the insurer's promise to pay being expressly conditional on formal proofs of loss within 60 days. No such proofs were filed within that time. Thereafter, the defendant refused to pay, saying nothing as to the proofs of loss but asserting merely that the loss was caused by a boiler explosion and not by leakage. The court held that the condition of proof within 60 days was voluntarily waived, although there was no basis for an estoppel. The defendant had in no way induced the plaintiff to fail to make the proof on time; but its subsequent statement indicated that the time limit was not regarded as of importance.

CATHOLIC FOREIGN MISSION SOC. OF AMERICA, Inc. v.
OUSSANI et al.

Court of Appeals of New York, 1915.
215 N.Y. 1, 109 N.E. 80, Ann.Cas.1917A, 479.

Action by the Catholic Foreign Mission Society of America, Incorporated, against Joseph Oussani, impleaded with others. Judgment for plaintiff was modified and affirmed by the Appellate Division (157 App.Div. 893, 142 N.Y.S. 1111), and defendant Oussani appeals. Reversed, and new trial granted.

CARDOZO, J. The action is for specific performance. The defendant Oussani is the owner of a tract of land in Westchester county. He undertook to sell it to the plaintiff, a membership corporation. The plaintiff was represented by its president, Father Walsh. A memorandum of the terms of the agreement was put in writing, and signed. It is dated July 12, 1912. It calls for a conveyance of the land free from all incumbrances. In particular, it provides that a road known as the Longwood road, which ran through the land, shall be closed. Unless this change can be made within one week, the plaintiff is to be "in no way obliged." The price is to be \$45,000, of which \$15,000 is to be paid in cash, and \$30,000 by a purchase-money mortgage.

Longwood road was a public highway, and the local authorities refused to close it. Father Walsh went to view the land on July 18th, and again on the day following. His purpose was to ascertain whether the road would interfere with the construction of a building. He then

stated to Oussani that he would waive the condition of the contract to the effect that the road must be closed. There is evidence from which the inference may be drawn that Oussani requested the waiver and approved of it. That the buyer's purpose might not be doubtful, a letter was mailed on July 19th, in which Oussani was again informed that there had been a waiver of the condition. On the following day he gave notice that he would not carry out the sale. He had sold the property, it appears, at a larger price to some one else. There was a tender of the money and of a purchase-money mortgage. The tender was rejected, and this action was begun. * * *

If the directors are found on a new trial to have authorized the purchase, we think the plaintiff's right to a decree of specific performance will follow. The argument is made that, even though there was a contract, it lacks the mutuality essential to relief in equity. If the public easement or right of way is not extinguished, the buyer, by the terms of the contract, has the right to rescind. We think the reservation of that right does not involve a failure of the equitable remedy. *Levin v. Dietz*, 194 N.Y. 376, 87 N.E. 454, 20 L.R.A., N.S., 251. The Longwood road was an incumbrance. Like any other incumbrance, it gave the buyer the right to rescind the contract and reject the title. But a buyer in such circumstances is not bound to rescind. He may waive the condition, and accept the title though defective. If he does, the seller may not refuse to convey because the buyer could not have been compelled to waive. *Bostwick v. Beach*, 103 N.Y. 414, 9 N.E. 41. In this case the plaintiff did waive the condition. It announced its waiver while the contract was still in force. There had been no attempt by the seller up to that time to recede from his bargain.

We think the waiver to be effective did not call for the seller's approval. There is evidence, however, that he not only approved of it, but induced it. The condition which was the subject-matter of the waiver was for the benefit of the buyer solely. From the moment that the waiver was announced, the remedy was mutual. *Fry on Spec. Perf.* (5th Ed.) p. 238; *Dyas v. Cruise*, 2 Jo. & Lat. 460, 487; *Beatson v. Nicholson*, 6 Jur. 620; *Hawksley v. Outram*, [1892] 3 Ch. 359; *Barker v. Cox*, L.R. 4 Ch.Div. 464, 469. There may be an exception here to the general rule that mutuality must be judged of as at the date of the contract, but, if so, it is as well established as the rule itself. *Palmer v. Gould*, 144 N.Y. 671, 39 N.E. 378, holds nothing to the contrary. The opinion of Judge Gray in that case was not adopted by the court (144 N.Y. 684, 39 N.E. 378), but, if we assume its correctness, it is inapplicable here. All that it suggests is that partial performance may sometimes be refused where a vendee, knowing of the defect, has taken the chance of its removal, and where conveyance of a part interest would work a hardship to the vendor. See 144 N.Y. 682, 39 N.E. 378; also *Hexter v. Pearce*, (1900) 1 Ch. 341, 345.

There is no such hardship here. The vendee is not exacting compensation for the broken condition. It has waived the condition altogether. If the contract bound the plaintiff the defendant must perform. * * *

Judgment reversed, etc. [for reasons not here involved].

QUESTIONS:

1. Could the defendant have obtained a decree for specific performance against the plaintiff if the latter had refused performance? See Restatement, Contracts, §§ 372, 375.
2. Could the plaintiff have retracted its waiver?
3. Did the plaintiff have a right to damages or a reduction in price?

NOTE

It is usually the defendant who is asserted to have waived a condition of his contractual duty, thus making his failure to perform his promise a breach for which the plaintiff can maintain an action. In the above case the defendant has waived nothing and yet is undoubtedly guilty of a breach of contract for which the plaintiff is entitled to damages. Here it is the plaintiff who waives a condition of his own duty. Why was it necessary for the plaintiff to do this in order to get the remedy that is asked?

A. D. GRANGER CO. v. BROWN-KETCHAM IRON WORKS.

Court of Appeals of New York, 1912. 204 N.Y. 218, 97 N.E. 523.

Action by the A. D. Granger Company against the Brown-Ketcham Iron Works. From a judgment of the Appellate Division (138 App. Div. 909, 123 N.Y.S. 1104), affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

WILLARD BARTLETT, J. This suit was brought to recover a balance alleged to be due under a contract in writing whereby the plaintiff corporation agreed to sell and deliver, and the defendant corporation agreed to purchase and receive, certain vault linings to be placed in the Essex county courthouse at Newark, N. J. There is some dispute as to whether the contract was embodied in a single letter or in a series of letters; but, whichever be the fact, it is clear that it contained this provision: "Terms, net cash. Immediate payment after written acceptance by the architect." The architect thus referred to was Mr. Cass Gilbert, who was employed by Essex county to supervise the erection of the courthouse. The complaint made no mention of the provision respecting payment which I have quoted. It alleged that the plaintiff delivered the vault linings therein specified, and that they were accepted by the defendant and were used and incorporated in the

work. The answer denied that they were accepted or were used or incorporated in the work, except after being repaired and altered; and there was a counterclaim for the expense of repair and alteration.

The plaintiff utterly failed to prove any written acceptance of any of the vault linings by the architect prior to the commencement of the action. Over the objection and exception of the defendant it was allowed to introduce in evidence a certificate by Mr. Cass Gilbert, dated August 16, 1906, 18 months after the suit was brought, stating that the contractors for the construction of the Essex county courthouse were entitled to the forty-fourth payment on their contract. There was nothing on the face of this paper to show that it covered the vault linings which were the subject of the contract between the parties to this action. "As I understand the law," said the learned trial judge in charging the jury, "that certificate, although issued after the action was commenced but also after the work was completed, is competent evidence, and I therefore overruled the objections of the defendant and allowed it in evidence." To this instruction the defendant duly excepted. Although there was no allegation or suggestion of waiver in the complaint, the court also left it to the jury to say whether the proof did not establish a waiver of the requirement of the contract that a written acceptance or certificate by the architect should be necessary to entitle the plaintiff to payment. The point that a written acceptance by the architect was a condition precedent to the right to any payment under the contract, and that a waiver of this condition was not provable because it had not been pleaded, was further brought distinctly to the attention of the trial judge by appropriate requests to charge and exceptions to his refusal to charge as requested.

It requires but little discussion to show that this point was well taken and should have been deemed fatal to any recovery by the plaintiff in the present form of the pleadings. The contract prescribed a condition precedent, to wit, a written acceptance of the vault linings by the architect of the Essex county courthouse, to entitle the plaintiff to payment therefor. No such written acceptance had been given up to the time of the commencement of the action. When the suit was begun, therefore, the plaintiff's case was fatally defective in an element essential to make out a cause of action under the contract. The contract did not obligate the defendant to pay until the written acceptance had been obtained; consequently there was no obligation to pay when the action was commenced.

The subsequent acceptance or certificate, issued many months afterward, could not relate back so as to place the defendant in default. It was wholly irrelevant, and the court erred in receiving it and in instructing the jury that they might treat it as timely. In an action at law, the status of the parties is to be considered as it existed when the suit was begun, unless changed conditions have been brought before

the court by means of supplemental pleadings, which was not the case here. * * *

Judgment reversed, etc.

NOTE

An excuse is not the same thing as performance. It is a legally operative fact, and the legal relations consequent thereon may approach an identity with those that would follow exact performance; but in an action upon an express contract it is generally held that an allegation of full performance is not supported by proof of a part performance and a waiver. In such case there is said to be a variance between the pleadings and the proof. Under modern rules of procedure, however, the plaintiff can easily get permission to amend his complaint by a statement of the facts that constitute a waiver by the defendant of the condition of his duty or that operate as an estoppel to set up nonperformance of the condition as a defense.

It has even been held that an allegation of full performance is not sustained by proof of substantial performance and a waiver. *Allen v. Burns*, 201 Mass. 74, 87 N.E. 194 (1909); *Hennessey v. Preston*, 219 Mass. 61, 106 N.E. 570 (1914); *Long v. Addix*, 184 Ala. 236, 63 So. 982 (1913). But where substantial performance is the only condition precedent and this has been fulfilled, no waiver is necessary and an allegation of full performance of conditions is sustained by the proof. *Smith v. Mathews Const. Co.*, 179 Cal. 797, 179 P. 205 (1919); *Blakely v. Neils Lumber Co.*, 121 Minn. 280, 141 N.W. 179 (1913).

(B) PREVENTION OF PERFORMANCE OF A CONDITION

INTRODUCTORY NOTE

One who has studied the law of Torts knows that it is a legal wrong, in many cases at least, for a third party to prevent one party to a contract from performing his duty to the other. It is not surprising, therefore, to find that the law does not look with approval upon prevention of performance by one of the two contracting parties. "Prevention" may take various forms, however; and attention must be given to the performance that is prevented, whose performance it was to be, and what part it was to play in the transaction.

If a contractor purposely takes action that will prevent his own performance of his legal duty, his action may perhaps be regarded as being a breach of contract just as his actual nonperformance would be.

Again, if he prevents or materially obstructs a performance that was promised by the other party to the contract, he should not be al-

lowed to maintain any action against that party because of the resulting failure to perform. His prevention or obstruction is a good defense in such an action if brought.

Thirdly, suppose that a party's contractual duty is conditional on some action by the other party or on some other event, and that he prevents the performance of that action or the occurrence of that event. Conceivably, such prevention as this might have any one of several effects: (1) It might wholly prevent the other party from ever enforcing the contractual duty that was conditional on an act or event that can not take place. In most cases such a result would seem very unjust, although under some circumstances it may be lawful to prevent the fulfilment of a condition and so to escape having to perform what was promised. (2) It might be regarded as a "tortious" act, or as a breach of an "implied promise" not to prevent the performance or happening of a condition. If so regarded, the other party can maintain an action for damages, the amount recoverable being substantially the same as if the action were for breach of the contractual promise itself. (3) It might be held that prevention of the performance or happening of a condition merely eliminates it as a limitation on the legal duty of the guilty party, enabling the other party to enforce the contractual promise just as if it had never been conditional at all, or just as if the condition had actually been fulfilled. On this theory, the conditional duty merely is turned into an unconditional one.

Since the present Chapter is concerned with "conditions" and the effects of their performance and nonperformance, the cases in the present Section of the Chapter deal only with the problem that is put in the preceding paragraph that begins "Thirdly." What is the effect of a party's preventing the performance or occurrence of a condition of his own contractual duty?

BRACKETT v. KNOWLTON.

Supreme Judicial Court of Maine, 1912. 109 Me. 43, 82 A. 436.

Action by James W. Brackett against Sarah A. Knowlton. On report. Judgment for plaintiff.

Assumpsit to recover the sum of \$453.95. Plea, the general issue. An agreed statement of facts was filed, and the case reported to the law court for determination.

Mr. Justice BIRD, who prepared the opinion, states the case as follows:

The defendant's testator, Jeremiah B. Knowlton, was the owner of certain springs, and prior to the date of the contract set forth below

had advertised them as for sale in certain newspapers owned or controlled by plaintiff. On the day of its date the plaintiff and the testator executed the following agreement:

"Phillips, Maine, Nov. 5, 1900.

"Memorandum of advertising contract between J. B. Knowlton, of Strong, Maine, and the Phillips Phonograph and Maine Woods, Phillips, Maine, for advertising said Knowlton's soda and sulphur springs to such an amount as in the judgment of J. W. Brackett seems best, but not to exceed the sum of (\$1,000) one thousand dollars a year for two years' time under this agreement, the regular price for said advertising to be paid when said springs are sold, or upon sale of one of them. If the property named herein is sold within two years, the amount to be paid by said Knowlton is simply the amount that will have been earned by the advertising up to that time. It is also agreed that J. W. Brackett's bill of (\$317.83) three hundred and seventeen dollars and eighty-three cents, for advertising said springs previous to this date, is also to be paid when said springs, or either of them, is sold.

"There shall be no demand made for advertising until said springs, or one of them, are sold or in some way change owners. This is to be interpreted to mean that the heirs, in case of said Knowlton's death, shall be no more liable than he, unless there is business sufficient to pay it as managed by said heirs.

J. W. Brackett. [Seal.]

"J. B. Knowlton. [Seal.]

"Witness: W. D. Grant."

The plaintiff, in accordance with the contract, continued to advertise the springs in the years 1901 and 1902.

On the 18th of April, 1906, the testator conveyed the springs, described in the contract, as a gift to his grandchildren, who were the testator's legal heirs. The testator died on the 12th day of March, 1907. By his will, he left all his estate to his widow, the executrix. Since the conveyance to them, his grandchildren have neither sold nor leased the springs, nor received any income therefrom. The plaintiff claims that his charges for advertising are due, and brings this action to recover the same.

BIRD, J. The items for which this suit is brought are of two classes, one for advertising before the making of the contract between plaintiff and defendant's testator, and the other for advertising done subsequent to and under the terms of the contract. The former constituted an absolute debt, payment of which was to be contingent upon the happening of a future event, while the latter was to become an obligation of the testator, or his heirs, upon the occurrence of the same event. Whether the items of the first class were done within a reasonable time after the services performed it is unnecessary to determine. See *Sears v. Wright*, 24 Me. 278, 280; *De Wolfe v. French*, 51 Me. 420. By the terms of the contract the items of both classes

were to be payable "when said springs, or either of them, is sold." The happening of this event is explained or modified by the second paragraph of the contract, which we interpret to mean that payment of the sums properly chargeable for advertising shall not be enforceable until one, at least, of the springs is sold by the testator, or in the event of his death, until his heirs shall either sell one of the springs, or, under their management, there is sufficient business to pay them. By the conveyance to his grandchildren by way of gift, the testator made impossible the occurrence of either of the contingencies, and his liability at once accrued. *Crooker v. Holmes*, 65 Me. 195, 199, 20 Am. Rep. 687; *Wright v. Haskell*, 45 Me. 489; *Poland v. Brick Co.*, 100 Me. 133, 135, 60 A. 795.

Judgment for plaintiff for the sum of \$453.95, with interest from the date of the writ.

QUESTIONS:

1. Was the condition precedent a part of the agreed exchange for the money that was promised?
2. Is this a suit for unliquidated damages, or did the testator owe a liquidated debt? See Restatement, Contracts, § 294.
3. Was the making of the gift to the grandchildren a breach of contract?

NOTE

Consider the following cases:

One who has contracted to make a payment after getting a judgment against a third party makes a voluntary compromise with that party so that no judgment is ever obtained. *Camden v. Jarrett*, 154 F. 788 (1907, C.C.A.).

One whose promise is expressly conditional on an approval by a Railway Commission refuses to obey the orders of the Commission, thus preventing its "approval." *Pneumatic Signal Co. v. Texas & P. R. Co.*, 200 N.Y. 125, 93 N.E. 471 (1910).

A property owner, whose duty to pay his broker's commission for finding a buyer is conditional on actual payment of the price by the buyer, prevents the payment by joining with the buyer in rescinding their contract of sale. *Suter v. Farmers' Fertilizer Co.*, 100 Ohio St. 403, 126 N.E. 304 (1919).

A defendant whose promise to pay for work is expressly conditional on his own certificate of satisfaction with the work refuses to investigate or to make any decision. *Hotham v. East India Co.*, 1 T.R. 638 (1787).

An agency contract for the sale of goods on commission provided that all orders were subject to "acceptance" by the principal. If orders actually obtained and sent in are rejected "in bad faith," the agent can get judgment for the agreed commission. *Bodman v. Fisher & Co.*, 268 Pa. 535, 112 A. 99 (1920). If the principal prevents the taking of orders by

the agent by depriving him of supplies and samples, the agent can get judgment for damages for the breach. *Dilworth v. Brown*, 128 Pa.Super. 124, 193 A. 125 (1937).

In *Scott v. Moragues Lumber Co.*, ante p. 499, the defendant made a valid contract that if he should buy a ship then in Brazil he would charter it to the plaintiff on stated terms. Does he commit a breach of contract if he fails to buy the ship because he buys a different ship nearer home and has no more money to invest?

In an antenuptial contract, a man promised his wife to be that his executor would pay her \$20,000, if she survived him. Later, he killed her and then committed suicide. Although she did not survive him, her administrator was given judgment for \$20,000 against his executor. The court said, also, that his act preventing the occurrence of the condition was a breach of contract. *Foreman State Trust & S. Bank v. Tauber*, 348 Ill. 280, 180 N.E. 827 (1932).

See Restatement, Contracts, § 295.

THE VALSESIA [1927] P. 115.

The ship *Valsesia* grounded on a rocky shoal, in spite of having dropped an anchor, and was severely damaged. At high tide, however, she was afloat; and her master engaged the services of two steam tugs owned by the plaintiffs in this action. The master promised to pay the plaintiffs £450 for towing the *Valsesia* away from the shoal and beaching her in a sandy bay. After some hours of difficult work the tugs were in position to tow the *Valsesia* but were prevented from doing so by the neglect of her master to cut (or otherwise slip) the cable by which she was anchored. The tide turned before the cable was cut; and the ship was again grounded on the rocks and became a total loss. The court gave judgment against the owner of the *Valsesia* for damages in the sum of £450. The towing and beaching of the *Valsesia* was a condition precedent to the plaintiff's right to payment of the lump sum promised; but their performance of that condition was prevented by the negligent conduct of the defendant's servants on the ship. The court said: "I find a difficulty in saying that anybody can recover a lump sum to be paid in respect of a completed work when, in fact, that work has not been completed. But if the plaintiffs were prevented from completing it by the negligence of those on board the ship, and if they were thereby deprived of the opportunity of earning the stipulated sum, then they are entitled to damages for the breach * * * and in this case the damages would be exactly commensurate with the stipulated sum." The reason given for this was that they had done substantially all the necessary work for attainment of success and had been saved no expense or time as a result of their being prevented from completion.

Had the owner sued the plaintiffs for breach of their promise to beach the ship, he would have failed. This result could be explained either by saying that he prevented the tugs from performing or by saying that the duty of the tugs was constructively conditional on efficient cooperation by the ship's master.

CLARK v. HOVEY.

Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 485, 105 N.E. 222.

Action by Ewen A. Clark against Freeland E. Hovey. Verdict for plaintiff, and defendant excepts. Judgment for defendant.

RUGG, C. J. This is an action to recover for services as a real estate broker. The plaintiff was employed by the defendant to sell certain real estate, and he procured a purchaser who executed a contract for sale of it with the defendant. Simultaneously with this contract the following agreement was entered into between the plaintiff and the defendant:

"It is agreed by and between Ewen A. Clark, broker, and Freeland E. Hovey, owner, that concerning the agreement for sale of property #2 and #6 Cambridge street, Boston, from Hovey to Jeremiah Green, for the sum of \$60,000, that said Clark agrees to accept the sum of \$500 in full payment of commission and for his full compensation in the matter, and said Hovey agrees to pay said sum.

"It is further agreed by both parties that this \$500 shall not be paid from the first \$5,000 paid Hovey, of which \$500 has been paid to-day, but shall be paid by Hovey to Clark from the first \$500 received by Hovey from Green after the \$5,000 has been paid. In other words, Clark will not make any claim for commission unless Hovey receives more than \$5,000 in cash from the sale."

The contract for sale was never carried out because the defendant could not give a good title by reason of certain restrictions. The question is whether, under these circumstances, the plaintiff is entitled to his commission.

The rights of the parties depend upon the terms of their agreement, which is in writing and not ambiguous. It fixes the price which the plaintiff was to receive. It stipulates in unequivocal words that the compensation shall not be paid by the defendant until after he has received \$5,000 on account of the sale. As matter of construction, this means that it is a condition to his being able to recover any commission that the defendant shall have received \$5,000 in cash from the sale. Its effect is not, as in some of the cases relied on by the plaintiff, to fix a time beyond which the broker shall not be called upon to wait for his pay, but it establishes a moment before the arrival of which he

cannot ask for his compensation. There is nothing in the record to indicate that the employer of the broker has failed through any volition of his own to carry out the contract.

The written agreement between the parties supersedes the ordinary rule that the broker has earned his commission when he has procured the execution of a valid agreement for sale. It follows that the judgment of the lower court was wrong. In accordance with St. 1913, c. 716, § 2, the entry may be:

Judgment for the defendant.

QUESTIONS:

1. Did the plaintiff "assume the risk" of the sort of prevention of performance of the condition that occurred? See Restatement, Contracts, § 295(b).
2. Was the prevention caused by the defendant's breach of contract?
3. Compare *Duffy & Thomas, Inc., v. Miller*, 135 A. 500, 5 N.J.Misc. 77 (1927); *Colvin v. Post Mortgage & Land Co.*, 225 N.Y. 510, 122 N.E. 454 (1919).

FAY v. MOORE.

Supreme Court of Pennsylvania, 1918. 261 Pa. 437, 104 A. 686.

Action by Ella M. Fay, administratrix of the estate of Edward Fay, against James S. Moore. Judgment for plaintiff, and defendant appeals. Affirmed.

FRAZER, J. Plaintiff, a contractor, sues to recover from the owner a balance alleged to be due under a contract for the erection of a building. The defense is that plaintiff failed to complete the work in accordance with the specifications, whereby defendant was obliged to take possession of the building and finish it at an expense beyond the contract price. Plaintiff having died while the action was pending, his wife was substituted on the record as administratrix of his estate. The case has been tried three times, the result of the last trial being a verdict and judgment for plaintiff from which defendant appealed.

The first two assignments of error are to the refusal of the court below to give binding instructions and subsequently to enter judgment for defendant non obstante veredicto. The contract required payments to be made only upon the certificate of the architect. When the building was practically completed, and a certificate for final payment requested, the architect notified plaintiff in writing that the work was not performed in accordance with the contract in certain specified particulars. Plaintiff contends the defects enumerated by the architect were rectified by him, while defendant avers such was not

the case, but, on the contrary, he was obliged to employ another contractor to complete the work.

The first objection is that corner beading was omitted. The specifications call for "wood corner beads on all exposed angles," but failed to set forth the particular kind of beading to be used. Plaintiff's son, who had charge of the construction work, testified beads were put on at exposed corners, and this does not seem to be denied; the contention being a different style of beading should have been supplied, as appears in a subsequent letter from the architect, in which he states the owner "has instructed me to put on beads in accordance with his desire, although I have never seen that kind of bead which he desires, at the same time he states that nothing else [will] be accepted by him; so there is no other alternative, and therefore I am compelled to instruct you to make them different from what I would personally select."

In another letter, written a few days later, the architect says: "I am perfectly aware that the bead Mr. Moore desires is impractical, as well as impossible; but as Mr. Moore gave me no other alternative in the matter, and the best I could do was to give his instructions verbatim to you."

And in a third letter says he had again taken the matter up with the owner "and asked him to give me instructions for the regular old-fashioned wood corner bead put on, which is the only thing that can be accomplished outside of the covered bead, which you have at present, and which Mr. Moore does not want."

Under these circumstances the jury were warranted in finding the architect, in condemning the bead used by plaintiff, was not acting upon his own impartial judgment as to the sufficiency of the work, but at the dictation and to satisfy the whim of the owner.

Another objection is the window sashes were of chestnut instead of white pine lumber, as called for in the contract. With respect to this item, the testimony on behalf of plaintiff is to the effect the architect instructed him to use chestnut instead of pine, so as to conform to the interior finish of the house. The owner visited the work almost daily, and with the architect made up lists of matters to be attended to or corrected, among which appears a memorandum to the effect that the owner would consider the matter of using chestnut instead of white pine sash. While it is true the contract provides that no alterations should be made, except on the written order of the architect, the parties had the right to waive the provision. *Raff v. Isman*, 235 Pa. 347, 84 A. 352. And this the verdict indicates they did. Furthermore, there is no attempt in this case to charge for extra work.

As to the various items of which complaint is made, the testimony on behalf of plaintiff is to the effect that portions of the work, the details of which were not mentioned in the specifications, were done un-

der the direction of the architect, and that other variations and defects were remedied after complaint was received. The architect having persisted in refusing a certificate of completion, giving as an excuse for his action the owner's dissatisfaction with the work, and the contractor continuing to claim a completion of the contract, the owner procured a bid and entered into a contract for the additional work on the house he deemed necessary to complete the contract according to specifications, paying therefor the sum of \$819, and for other items the sum of \$220, which amounts were deducted from the contract price, and the architect signed a certificate to the effect that, after deducting such items, a balance of \$1,100 remained due the contractor.

While the testimony on behalf of plaintiff was contradicted by the architect and other witnesses for defendant, the case was necessarily for the jury, to whom it was submitted by the trial judge with instructions to consider the decision of the architect conclusive, unless they found from the circumstances in the case his decision was the result of collusion with the owner, and not a fair and impartial one. The court also left to the jury to say whether the contractor faithfully, honestly, and substantially complied with the provisions of his contract, and further charged, if they so found, and minor defects or deficiencies existed, such defects would not prevent a recovery for the amount due under the contract, less a reasonable allowance for the cost of remedying the imperfections.

The provision in the contract requiring the production of the certificate of the architect, showing completion of the work, is intended as a protection to the owner against unjust claims by the contractor and to see that the latter properly carries out his agreement, and in cases where the evidence establishes refusal of the architect to be capricious, fraudulent, or based on collusion with the owner, his withholding the certificate will not prevent the contractor from recovering the amount due him. *Pittsburg, etc., Lumber Co. v. Sharp*, 190 Pa. 256, 42 A. 685. There also being evidence in the case to support the conclusion of the jury of there being no wilful or intentional departure from the terms of the contract, the doctrine of substantial performance was applicable, and was properly stated by the trial judge in accordance with the principles laid down in *Morgan v. Gamble*, 230 Pa. 165, 79 A. 410.

* * *

The assignments of error are overruled and the judgment affirmed.

QUESTIONS:

1. Was performance of the condition a part of that for which the defendant bargained as the agreed exchange for his money?
2. Is the action in substance an action of debt for the full price or assumpsit for unliquidated damages?

UNITED STATES v. UNITED ENGINEERING &
CONSTRUCTING CO.

Supreme Court of the United States, 1914.
234 U.S. 236, 34 S.Ct. 843, 58 L.Ed. 1294.

Appeal from the Court of Claims to review a judgment against the United States in a suit upon a contract for public work. Affirmed.

Mr. Justice Day delivered the opinion of the court:

Suit was brought in the court of claims by the United Engineering & Contracting Company to recover of the United States upon a contract, dated the 15th of September, 1900, for the construction within seven calendar months from the date of the contract, namely, by April 15, 1901, of a pumping plant for Dry Dock No. 3 at the New York Navy Yards, the work to be done in accordance with certain plans and specifications annexed to and forming a part of the contract. The claimant recovered a judgment (47 Ct.Cl. 489), and the United States brings this appeal.

The principal question in the case involves the correctness of that part of the judgment of the court of claims which permitted the claimant to recover \$6,000, which the government had deducted as liquidated damages for 240 days' delay in the completion of the work, at the rate of \$25 per day. To understand this question the terms of the contract and certain facts found by the court of claims, upon which the case is to be considered here, must be had in view.

[The claimant commenced the construction of the work in accordance with the contract, and after a portion thereof had been done, the plans and specifications furnished by the government were found defective. The government then made changes in the work to be done, and at times caused entire cessation of the work. Three supplemental agreements were made, not containing any provision for liquidated damages. Further delay was caused by the government's use of the docks for docking vessels. The work was completed and accepted finally by the government on April 5, 1905.]

Notwithstanding the delays of the government, the court of claims found that the claimant, with reasonable diligence, could have completed the plant for tests during the period by about September 21, 1903, and found that if it was chargeable for the delay according to the liquidated damage clause of paragraph 12 of the specifications of \$25 per day, the deduction would be \$750 less than the government had deducted. But it found that, if the claimant was only liable for actual damages, and it did so determine, since there was no evidence as to such damages, the claimant was entitled to recover the entire amount deducted.

In the original contract the specifications provided, paragraph 12, for liquidated damages for delay, as follows:

"12. Damages for delay.—In case the work is not completed within the time specified in the contract, or the time allowed by the Chief of the Bureau of Yards and Docks under paragraph 11 of this specification, it is distinctly understood and agreed that deductions at the rate of \$25 per day shall be made from the contract price for each and every calendar day after and exclusive of the date within which completion was required up to and including the date of completion and acceptance of the work, said sum being specifically agreed upon as the measure of damage to the United States by reason of delay in the completion of the work; and the contractor shall agree and consent that the contract price, reduced by the aggregate of damages so deducted, shall be accepted in full satisfaction for all work done under the contract."

Under the provisions of this paragraph, if there had been nothing subsequently changing the rights of the parties, and the delay had resulted from the failure of the claimant to complete the work within the time specified, the deduction at the rate of \$25 per day might have been made by the United States as liquidated damages. This was the sum estimated and agreed upon between the parties as the damages which might be regarded as sustained by the government in event of the breach of the claimant's obligation to complete the work within the stipulated time. Such contracts for liquidated damages, when reasonable in their character, are not to be regarded as penalties, and may be enforced between the parties. See *Sun Printing & Pub. Asso. v. Moore*, 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366, in which the matter is fully discussed.

The precise question here is whether, when the work was delayed solely because of the government's fault beyond the time fixed for its completion, and afterwards the work was completed without any definite time being fixed in which it was to be done, the claimant can be charged for the subsequent delays for which he was at fault by the rule of the original contract, stipulating liquidated damages, or was that stipulation waived by the conduct of the government, and was it obligatory upon it, in order to recover for the subsequent delays, to show the actual damages sustained. We think the better rule is that when the contractor has agreed to do a piece of work within a given time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment, the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are

waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date; to do this would permit it to recover damages for delay caused by its own conduct.

It may be that damages were sustained by the failure to carry out the subsequent agreement. But the government as well as the claimant, saw fit to go on with the work with no fixed rule for the time of its completion, so that it be reasonable, and the government required no stipulation in the second and third supplemental contracts as to damages in a fixed and definite sum for failure to complete the work as required. Under such circumstances we think it must be content to recover such damages as it is able to prove were actually suffered.

Judgment affirmed.

QUESTIONS:

1. Did the United States prevent the plaintiff from performing a condition precedent? From performing its contractual duty?
2. Why was not the United States entitled to \$25 per day for such delay as was the fault of the plaintiff?

NOTE

Where an owner was "unduly officious" and disagreeable in the manner in which she "superintended" the work of construction, the court held that she was not guilty of prevention of performance by the contractor. See *Li Volsi Const. Co. v. Shepard*, 133 Conn. 133, 48 A.2d 263 (1946). The acts alleged to amount to "prevention" vary greatly in degree, often involving a difficult question of fact.

One who contracts with an aged person to furnish board, lodging, and care in return for a promise of property to be left by will must endure much eccentricity and many complaints before he will be held to have been "prevented" from rendering the promised service. See *Godburn v. Meserve*, 130 Conn. 723, 37 A.2d 235 (1944).

PATTERSON v. MEYERHOFER.

Court of Appeals of New York, 1912. 204 N.Y. 96, 97 N.E. 472.

Action by Benjamin Patterson against Anna Meyerhofer. From a judgment of the Appellate Division (138 App.Div. 891, 122 N.Y.S. 1140), affirming a judgment for defendant, plaintiff appeals. Reversed and new trial granted.

WILLARD BARTLETT, J. The parties to this action entered into a written contract whereby the plaintiff agreed to sell, and the defendant agreed to buy, four several parcels of land with the houses thereon for the sum of \$23,000, to be partly in cash and partly by taking title subject to certain mortgages upon the property. When she executed this contract, the defendant knew that the plaintiff was not then the owner of the premises which he agreed to sell to her, but that he expected and intended to acquire title thereto by purchasing the same at a foreclosure sale. Before this foreclosure sale took place, the defendant stated to the plaintiff that she would not perform the contract on her part, but intended to buy the premises for her own account without in any way recognizing the said contract as binding upon her, and this she did, buying the four parcels for \$5,595 each. The plaintiff attended the foreclosure sale, able, ready, and willing to purchase the premises, and he bid for the same, but in every instance of a bid made by him the defendant bid a higher sum. The result was that she acquired each lot for \$155 less than she had obligated herself to pay the plaintiff therefor under the contract or \$620 less in all. * * *

Upon these facts the plaintiff brought the present action, demanding judgment that he has a lien upon the premises purchased by her at the foreclosure sale, and that she holds the same in trust for the plaintiff subject to the contract. The complaint also prays that the plaintiff be awarded the sum of \$620 damages, being the difference between the price which the defendant paid at the foreclosure sale for the four houses mentioned in the contract and the price which she would have had to pay the plaintiff thereunder. The learned judge who tried the case at Special Term rendered judgment in favor of the defendant, holding that, under the contract of sale, there was no relation of confidence between the vendor and vendee. "In the present case," he said, "each party was free to act for his own interest, restricted only by the stipulations of the contract." He was, therefore, of the opinion that "the defendant had a right to buy in at the auction, and that she is entitled to hold exactly as though she had been a stranger, and that the plaintiff is not entitled to recover the difference between the price paid at the auction and the contract price."

I am inclined to agree with the trial court that no relation of trust can be spelled out of the transactions between the parties. * * * There is no need of judicially declaring any trust in the defendant, however, to secure to the plaintiff the profit which he would have made if the defendant had not intervened as purchaser at the foreclosure sale, and had fulfilled the written contract on her part. This is represented by his claim for \$620 damages. That amount, under the facts as found, I think the plaintiff was entitled to recover. He has demanded it in his complaint, and he should not be thrown out of court because he has also prayed for too much equitable relief.

In the case of every contract there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part. This proposition necessarily follows from the general rule that a party who causes or sanctions the breach of an agreement is thereby precluded from recovering damages for its nonperformance or from interposing it as a defense to an action upon the contract. *Young v. Hunter*, 6 N.Y. 203; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638, and cases there cited. "Where a party stipulates that another shall do a certain thing, he thereby impliedly promises that he will himself do nothing which may hinder or obstruct that other in doing that thing." *Gay v. Blanchard*, 32 La. Ann. 497.

By entering into the contract to purchase from the plaintiff property which she knew he would have to buy at the foreclosure sale in order to convey it to her, the defendant impliedly agreed that she would do nothing to prevent him from acquiring the property at such sale. The defendant violated the agreement thus implied on her part by bidding for and buying the premises herself. Although the plaintiff bid therefor, she uniformly outbid him. Presumably, if she had not interfered, he could have bought the property for the same price which she paid for it. He would then have been able to sell it to her for the price specified in the contract (assuming that she fulfilled the contract), which was \$620 more. This sum, therefore, represents the loss which he has suffered. It is the measure of the plaintiff's damages for the defendant's breach of contract. * * *

For these reasons, the judgments of the Appellate Division and the Special Term should be reversed and a new trial granted, with costs to abide the event. [A dissenting opinion is omitted.]

QUESTIONS:

1. Did the defendant promise not to bid at the auction sale?
2. Is the action for a tort by the defendant or for a breach of contract?
See Restatement, Contracts, §§ 315, 317.
3. Is there any logical confusion in paragraph 4 of Judge Bartlett's opinion?

E. I. DU PONT DE NEMOURS POWDER CO. v. SCHLOTTMAN.

Circuit Court of Appeals of the United States, Second Circuit, 1914.
218 F. 353, 134 C.C.A. 161.

WARD, Circuit Judge. In July, 1908, one Grubb was negotiating with T. C. Du Pont, president of the Du Pont Powder Company, for the sale of the whole capital stock of the Pittsburgh Fuse Company to the Du Pont Company. July 20th Du Pont wrote to Grubb as follows:

"Mr. Chas. G. Grubb, Building—Dear Sir: Should the deal now under discussion for the Pittsburgh Fuse Co. go through, and after we have had the property a year, it is understood that if in my judgment the property has for any reason been worth \$175,000 to our company, and we manufactured double tape fuse at \$2 per thousand with powder at \$3.60 per keg, we are to pay you \$25,000 in either bonds, preferred or common stock of our company as we may elect.

"Yours truly,

T. C. Du Pont, President."

On July 24th the deal referred to in the letter went through in a formal agreement whereby the Du Pont Company agreed to pay Grubb \$75,000 of its preferred and \$75,000 of its common stock for the whole capital stock of the Pittsburgh Fuse Company. Grubb delivered the Fuse Company's stock and the Du Pont Company transferred to it its own stock, but, after operating the plant for about six months, sold it to other parties, who dismantled it.

Grubb, the plaintiff's assignor, died before suit brought, and Mr. T. C. Du Pont did not testify to the circumstances attending the writing of the letter of July 20th. At the conclusion of the case each party asked Judge Ray to direct a verdict in his favor, and he did direct a verdict in favor of the plaintiff for \$25,000.

The complaint treats the letter and the formal agreement as one contract, alleges that the defendant by selling the plant of the Fuse Company wrongfully prevented the test agreed upon, and claims damages for the difference between the fair and reasonable value of the Fuse Company's capital stock alleged to be \$175,000 and the market value of the defendant's stock actually received, alleged to be \$120,000.

The defendant contends that the letter of July 20th is a separate contract, and, as it is not to be performed within the year, is void under the statute of frauds, because it does not state any consideration. We think, however, that the two documents are to be considered together. The Du Pont Company was to pay \$25,000 more in securities if in the judgment of T. C. Du Pont upon operating for one year, the plant was worth \$175,000 to his company and was capable of making double tape fuse at \$2 per thousand feet with powder at \$3.60 a keg. This was to be additional compensation for additional value, so that the objection of the statute of frauds is unavailing.

The letter does not contain any express promise to operate the plant for one year, and the question is whether such a promise is to be implied. We think the court below rightly held that it was. The seller evidently thought the plant worth \$175,000 in the defendant's securities, and the buyer was willing to pay the additional \$25,000 if such value was demonstrated in the way provided. The letter implies a promise on the Du Pont Company's part to operate the plant for a year, and that promise must be taken as part of the consideration for

which Grubb sold the capital stock. The authorities support this conclusion. * * *

The question of damages is the only other question we think needing consideration. If the plaintiff could now perform or secure a performance of the agreed test, he might be obliged to do so as a condition of recovering the contract price. But the defendant has made performance impossible by selling the plant within the period of one year to a purchaser who has dismantled it. No similar test can be substituted. It was personal in its nature, viz., the operation for a year by a wealthy and expert corporation actuated by self-interest to make tape fuse at \$2 a thousand feet. Because the defendant has made the performance of this test impossible, the plaintiff should not be remediless. We think he had the right to show, if he could, in other ways, that the value of the plant was greater by \$25,000 than the sum paid for it. As Judge Bartlett said in *Hopedale Co. v. Electric Storage Battery Co.*, 184 N.Y. 356, 364, 77 N.E. 394, 397: "In other words, the performance of a condition for valuation having been prevented by the act of the vendee, the price of the thing sold was to be fixed by the jury on a quantum valebat." * * *

Judgment affirmed.

NOTE

The recovery here seems to be quasi contractual in character. But, in cases where the plaintiff has fully performed the agreed consideration, the contract thus becoming unilateral, he should be able to maintain debt for the agreed price, even though some collateral condition precedent has not been fulfilled, provided its fulfilment has been prevented by the defendant and such prevention was not contemplated by the parties as a privileged act.

If the plaintiff has not fully performed the consideration, his remedy is express assumpsit for damages or for restitution of the value of his part performance. See Restatement, Contracts, §§ 347, 348. In *MacPherson v. Mackay*, 91 N.J.L. 473, 103 A. 36 (1918), the court says that the plaintiff's claim for the defendant's prevention of fulfilment by the plaintiff is "one of tort-feasance." But in *Loehr v. Dickson*, 141 Wis. 332, 124 N.W. 293, 30 L.R.A., N.S., 495 (1910), where the plaintiff strongly argued that his action was in tort, the court held that it was not in tort but was based upon an implied agreement not to prevent performance. In accord with this, are *Simon v. Etgen*, 213 N.Y. 589, 107 N.E. 1066 (1915), and a good many other cases.

(C) WHEN PERFORMANCE OF A CONDITION IS EXCUSED BY IMPOSSIBILITY OF PERFORMING IT

NEW YORK LIFE INS. CO. v. STATHAM et al.

SAME v. SEYMS.

MANHATTAN LIFE INS. CO. v. BUCK.

Supreme Court of the United States, 1876. 93 U.S. 24, 23 L.Ed. 789.

The first of these cases is here on appeal from, and the second and third on writs of errors to, the Circuit Court of the United States for the Southern District of Mississippi.

The first case is a bill in equity, filed to recover the amount of a policy of life assurance, granted by the defendant (now appellant) in 1851, on the life of Dr. A. D. Statham, of Mississippi, from the proceeds of certain funds belonging to the defendant attached in the hands of its agent at Jackson, in that State. It appears from the statements of the bill that the annual premiums accruing on the policy were all regularly paid, until the breaking out of the late civil war, but that, in consequence of that event, the premium due on the 8th of December, 1861, was not paid; the parties assured being residents of Mississippi, and the defendant a corporation of New York. Dr. Statham died in July, 1862.

The second case is an action at law against the same defendant to recover the amount of a policy issued in 1859 on the life of Henry S. Seyms, the husband of the plaintiff. In this case, also, the premiums had been paid until the breaking out of the war, when, by reason thereof, they ceased to be paid, the plaintiff and her husband being residents of Mississippi. He died in May, 1862.

The third case is a similar action against the Manhattan Life Insurance Company of New York, to recover the amount of a policy issued by it in 1858, on the life of C. L. Buck, of Vicksburg; the circumstances being substantially the same as in the other cases.

Each policy is in the usual form of such an instrument, declaring that the company in consideration of a certain specified sum to it in hand paid by the assured, and of an annual premium of the same amount to be paid on the same day and month in every year during the continuance of the policy, did assure the life of the party named, in a specified amount, for the term of his natural life. Each contained various conditions, upon the breach of which it was to be null and void; and amongst others the following: "That in case the said [assured] shall not pay the said premium on or before the several days

hereinbefore mentioned for the payment thereof, then and in every such case the said company shall not be liable to the payment of the sum insured, or in any part thereof, and this policy shall cease and determine." The Manhattan policy contained the additional provision, that, in every case where the policy should cease or become null and void, all previous payments made thereon should be forfeited to the company.

The non-payment of the premiums in arrears was set up in bar of the actions; and the plaintiffs respectively relied on the existence of the war as an excuse, offering to deduct the premiums in arrears from the amounts of the policies.

The decree and judgments below were against the defendants.

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court.

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. * * *

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building

in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Anything that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and correlated to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money which has been paid for premiums on their respective policies? * * *

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

WAITE, C. J. I agree with the majority of the court in the opinion, that the decree and judgments in these cases should be reversed, and that the failure to pay the annual premiums as they matured put an end to the policies, notwithstanding the default was occasioned by the war; but I do not think that a default, even under such circumstances, raises an implied promise by the company to pay the assured what his policy was equitably worth at the time. I therefore dissent from

that part of the judgment just announced which remands the causes for trial upon such a promise.

STRONG, J. While I concur in a reversal of these judgments and the decree, I dissent entirely from the opinion filed by a majority of the court. I cannot construe the policies as the majority have construed them. A policy of life insurance is a peculiar contract. Its obligations are unilateral. It contains no undertaking of the assured to pay premiums; it merely gives him an option to pay or not, and thus to continue the obligation of the insurers, or terminate it at his pleasure. It follows that the consideration for the assumption of the insurers can in no sense be considered an annuity consisting of the annual premiums. In my opinion, the true meaning of the contract is, that the applicant for insurance, by paying the first premium, obtains an insurance for one year, together with a right to have the insurance continued from year to year during his life, upon payment of the same annual premium, if paid in advance. Whether he will avail himself of the refusal of the insurers, or not, is optional with him. The payment ad diem of the second or any subsequent premium is, therefore, a condition precedent to continued liability of the insurers. The assured may perform it or not, at his option. In such a case, the doctrine that accident, inevitable necessity, or the act of God, may excuse performance, has no existence. It is for this reason that I think the policies upon which these suits were brought were not in force after the assured ceased to pay premiums. And so, though for other reasons, the majority of the court holds: but they hold at the same time, that the assured in each case is entitled to recover the surrender, or what they call the equitable, value of the policy. This is incomprehensible to me. I think it has never before been decided that the surrender value of a policy can be recovered by an assured, unless there has been an agreement between the parties for a surrender: and certainly it has not before been decided that a supervening state of war makes a contract between private parties, or raises an implication of one.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice HUNT, dissenting.

When the parties to an executory money-contract live in different countries, and the governments of those countries become involved in public war with each other, the contract between such parties is suspended during the existence of the war, and revives when peace ensues: and that rule, in my judgment, is as applicable to the contract of life insurance as to any other executory contract. Consequently, I am obliged to dissent from the opinion and judgment of the court in these cases.

QUESTIONS:

1. Was the insurance policy one entire contract, or did it create in the insured a power to make a series of unilateral contracts?
2. Should the answer to the first question affect the decision of the case above?
3. Was the forfeiture clause in the Manhattan policy illegal? See Restatement, Contracts, § 579.

NOTE

The court held that the company must pay back the equitable value of the policy.

Worthington v. Charter Oak Life Ins. Co., 41 Conn. 372, 19 Am.Rep. 495 (1874), draws clearly the distinction between the nonfulfilment of a condition precedent to the plaintiff's right and the nonperformance of his contractual duty by the defendant. Impossibility excuses the latter.

See Restatement, Contracts, § 301; Corbin, *Impossibility of Fulfilment of a Condition Precedent*, 22 Col.L.Rev. 421 (1922), reprinted in *Selected Readings on Contracts*, p. 970.

In *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L.Ed. 490 (1871), the action was upon a policy of fire insurance containing the express stipulation that no suit should be sustainable thereunder unless brought within twelve months after the loss or damage occurred. The Civil War broke out during the twelve months within which the suit should have been brought. Because of the impossibility supposed to exist, the court sustained an action brought several years later, thus nullifying the express condition. The condition subsequent that would have discharged the Insurance Company's duty to pay the loss was failure to bring suit within twelve months. The Civil War made the happening of this condition inevitable because it made suit impossible. Observe that the failure to sue did not affect either the risk of loss assumed by the Company or the amount received for carrying it. See *Conditions Subsequent*; also, *Restatement, Contracts*, § 307.

REED v. LOYAL PROTECTIVE ASS'N.

Supreme Court of Michigan, 1908. 154 Mich. 161, 117 N.W. 600.

Action by Watson Reed against the Loyal Protective Association on an accident policy. From a judgment of the circuit court for plaintiff on appeal from justice court, defendant brings error. Reversed, and new trial ordered.

HOOKER, J. The plaintiff, a policy holder, sued the defendant for sick benefits claimed thereunder, in justice court, where he recovered a judgment for \$170. On appeal the learned circuit judge restricted the jury to a verdict for \$60, and, from a judgment for that sum, the defendant has appealed.

We infer that the plaintiff was hurt through a fall in his barn, and the testimony indicates that his recovery from the effects of the fall was not complete for some months. The accident happened on October 24th or 26th. A physician was at once called, and his last visit at the home of plaintiff was on October 31st. The policy was made "in consideration of the payment of the membership fee, and of the agreements and statements contained in the application for membership, and of the conditions and agreements contained herein and on the back hereof, all of which are hereby made a part of this certificate." It promised that "it is further agreed that if said member shall be afflicted with sickness or receive an injury as aforesaid (other than an injury received while riding as a passenger on said public conveyance), which sickness or injury shall independently of all other causes immediately, wholly, and continuously disable and prevent him from the prosecution of any and every kind of business or labor, then said member in case of sickness and subject to the conditions herein and on the back hereof shall be indemnified in the sum of 5 dollars for the first week and 10 dollars a week thereafter. * * *

"Unless notice of any injury or of the beginning of any sickness is received in writing at the home office of this association in Boston, Massachusetts, on or before the expiration of fourteen days from the commencement of such disability, together with particulars of the injury or sickness, including a statement of the time, place and cause of injury, or date of beginning, and an accurate description of the sickness, signed by the claimant or attending physician or surgeon, the claim shall be valid only for the period dating from the actual time the notification is received at the home office. The claimant shall also furnish within thirty days after the termination of the disability period a sworn statement of the time he was totally or partially disabled, and actual time attended by the physician or surgeon and chairman of the visiting committee of the lodge of which he is a member or of the lodge whose care he is under on and in accordance with blanks provided by this association, and shall furnish such further proof as may be deemed necessary. Failure to comply with the above conditions renders all claims against the association null and void." * * *

On December 1st the notice required to be served within 14 days after the accident was received by the company. It was made—i. e., filled out—by the physician and dated December 5th, and it was claimed by the defendant that this noncompliance with the terms of the contract was fatal to plaintiff's action, but the trial judge held that this would be true, unless the jury should find that the plaintiff was insane at the time of the accident "to the extent that his mind was so deranged that he was unable to furnish defendant notice of such accident within 14 days from the happening of the accident, which derangement of mind was the result of such accident. If you so find,

then such failure on the part of plaintiff to give such notice within the 14 days as provided for in said policy of insurance would not operate as a forfeiture of plaintiff's right to recover under the policy, but that plaintiff would be entitled to a reasonable time in which to furnish defendant with such notice after his mind had attained its normal condition." Counsel for defendant assign error upon this instruction on two grounds: (1) That the contract is an unconditional agreement as to notice, and not subject to a construction, which does violence to its plain terms. (2) If this construction were a proper one, the plaintiff has not proved such derangement, and the proof conclusively shows the opposite.

[The court here reviewed the testimony at length and found none sufficient to show insanity or mental incapacity.]

In view of a possible new trial, we consider another question, viz.: Would such an impediment to the serving of notice within the prescribed period relieve the plaintiff from the forfeiture? We assume that no one will contend that a court of justice has authority to change the obligations of a contract which the parties have seen fit to make. The case is resolved, then, into a question of construction of the language used. After providing for indemnity, the contract provides: "Unless notice of any injury or of the beginning of any sickness is received in writing at the home office of this association in Boston, Massachusetts, on or before the expiration of fourteen days from the commencement of such disability together with particulars of the injury or sickness, including a statement of the time, place and cause of injury, or date of beginning and an accurate description of the sickness, signed by the claimant or attending physician or surgeon, the claim shall be valid only for the period dating from the actual time the notification is received at the home office. * * * Failure to comply with the above conditions renders all claims against the association null and void." We all know that a failure to perform any ordinary contract is not excused by inability to perform an unqualified promise. See Pollock on Contracts, 408 et seq. Certainly this is true, unless the failure is due to the act of God, and in such cases, while it may sometimes excuse the promisor from performance, it is not so certain that it will permit his enforcing the contract which he has been unable to fully perform against the other party, which is what is sought here. It is urged that the authorities are overwhelmingly against the contention of the plaintiff in this case and many are cited. But we are committed to the doctrine in insurance cases, that a provision requiring a notice on pain of forfeiture will not be construed to require strict performance, when by a plain act of God it is made impossible of performance.

In the case of *Phillips v. Ben. Society*, 120 Mich. 142, 79 N.W. 1, the certificate provided that: "In all cases of accident or sickness, im-

mediate notice was required to be given in writing, addressed to the secretary, with full particulars thereof. Failure to give such notice within five days from the happening of such accident or beginning of illness renders the claim invalid, and it cannot be recognized or paid." We said: "It is claimed that the plaintiff did not give timely notice of his injury, in accordance with the provisions of the charter and by-laws. Notice was served upon the company with promptness after he had been informed by one of his physicians that his illness did not result from disease, but from an accident. We do not think that the first notice that he was suffering with neuralgia was binding upon him. It would be a hard rule, and one which the rules of the company must place beyond doubt, which would deprive a member of his benefits through the mistake of his physician. The notice was served as soon as he ascertained that the accident with which he had met was the occasion of his trouble. We think this a sufficient compliance with the by-law." This case was decided in 1899, and we see no means of distinguishing the question now under consideration from the one then decided. See, also, the later cases of *Woodmen's Acc. Ass'n v. Pratt*, 62 Neb. 673, 87 N.W. 546, 55 L.R.A. 291, 89 Am.St.Rep. 777, and *Comstock v. Fraternal Acc. Ass'n*, 116 Wis. 382, 93 N.W. 25, and *Munz v. Standard Co.*, 26 Utah, 69, 72 P. 182, 62 L.R.A. 485, 99 Am.St. Rep. 830, and cases cited. These cases seem to proceed on the theory that it cannot be supposed that the parties contemplated that the assured should be required to do an impossible thing or suffer a forfeiture of existing rights.

There are other questions in the case, but they may not arise on another trial, and we do not discuss them.

The judgment is reversed, and a new trial ordered.

QUESTIONS:

1. What is the difference in character between the condition precedent here and that in the case preceding?
2. What is the difference in the remedy given here and that in the preceding case?
3. Is each decision consistent with Restatement, Contracts, § 301?
4. Is Restatement, Contracts, § 468, applicable to either case?

NOTE

See, directly contra, *Whiteside v. North American Acc. Ins. Co.*, 200 N.Y. 320, 93 N.E. 948, 35 L.R.A.,N.S., 696 (1911), two judges dissent.

In *Evans v. Supreme Council of Royal Arcanum*, 223 N.Y. 497, 120 N.E. 93, 1 A.L.R. 163 (1918), payment of assessments was an express condition precedent to the duty of payment by insurer. The New York Court of Appeals having held that certain assessments were invalid, the insured

tendered only such amounts as were held by that court to be due. The insurer refused the tender. The United States Supreme Court later reversed the decision of the Court of Appeals. The insured was thus left in the position of not having fulfilled the express condition because of his reliance on the decision of the highest court of New York. That court then held that the policy had been made void by the nonpayment.

Observe that insurance contracts are aleatory in character, and that the condition is express. See Vance, *Insurance* (2d Ed.) §§ 26, 27; Richards on *Insurance*, §§ 296-301, 391.

MUTUAL LIFE INS. CO. v. JOHNSON, 293 U.S. 335, 55 S.Ct. 154, 79 L.Ed. 398 (1934).

Justice CARDOZO said: "For the plaintiff it was argued that waiver [of premiums in case of total disability, with notice to the company] having been promised, though subject to a condition as to notice, there must be a liberal construction of a requirement that is merely modal or procedural, and the insurer will not be deemed, in respect of matters of that order, to have exacted the impossible. The controversy is one as to which the courts of the country are arrayed in opposing camps. [Many cases cited.] We think the contract is to be interpreted in accordance with the law of Virginia where delivery was made."

Saying that it was not necessary "to make a choice for ourselves between alternative constructions, Justice CARDOZO proceeded: "Without suggesting an independent preference either one way or the other, we yield to the judges of Virginia expounding a Virginia policy and adjudging its effect. * * * No question is here as to any general principle of the law of contracts of insurance, with consequences broader than those involved in the construction of a highly specialized condition. All that is here for our decision is the meaning with tacit implications, of a particular set of words, which, as experience has shown, may yield a different answer to this reader and to that one."

The court held that insanity of the insured, preventing him from giving notice, eliminated it as a condition of the promise to waive payment of premiums (such payment being otherwise an express condition of the company's duty to pay monthly disability benefits).

QUESTIONS:

1. Is the conflict in the state decisions due to differences in the "interpretation" of the words of the insurance contract or to differences as to social and judicial policy?
2. Which did Cardozo think it was?

3. What does Cardozo's phrase "the tacit implications" mean to you?
 4. Why does he call the condition of notice "a highly specialized condition?"
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DE LONG v. ZETO et al.

Supreme Court of New York, Appellate Division, 1909.
135 App.Div. 79, 119 N.Y.S. 765.

Action by Albert W. De Long against John Zeto and another. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

LAUGHLIN, J. This action was brought to recover the balance alleged to be due on a contract between the parties, by which the plaintiff agreed to furnish and deliver to the defendants certain building materials, in part specially manufactured and framed, to be used in the construction of four three-story frame houses, which the defendants were erecting on Decatur avenue, in the city of Greater New York, for the Cosmos Realty Company. The agreement between the parties is contained in a letter from the plaintiff, in the name in which he was doing business, to the defendants, under date of September 18, 1907, which was accepted in writing by them. The plaintiff was merely to furnish and deliver the material, but was not to put any of it in place in the building. The plaintiff was to receive for the material the sum of \$3,300, and the payments were to be made, \$1,000 "when standing trim is up," \$1,000 "when buildings are complete," and \$1,300, the balance, "30 days thereafter." The evidence shows that the plaintiff delivered all of the material on the premises on which the buildings were being erected, and that it was accepted by the defendants. The first instalment was paid; but the other two instalments have not been paid, and the action is to recover the amount thereof.

The last of the material was delivered in the month of December, 1907. The evidence tends to show that in the month of January thereafter work was suspended on the buildings, that the defendants filed a mechanic's lien, that a mortgage on the premises was foreclosed, and that the premises were sold under the judgment in that action, in which the defendants and the Cosmos Realty Company were made parties defendant. The evidence indicates that the buildings were never completed by the defendants; but it would seem that that fact might have been more clearly shown. However, this action was not commenced until the 2d day of November, 1908, nearly one year after the plaintiff completed the delivery of the material. If the buildings were then completed, there was no defense to the action; and if they were not completed, it would seem, as matter of law, on the facts disclosed by this record, that the defendants had failed to complete the same within a reasonable time, and that the plaintiff was entitled to recover, not-

withstanding the express provision of his contract which postponed the payment of these two instalments until the completion of the buildings.

If the failure of the defendants to complete the buildings was owing to a foreclosure of a mortgage, that is no defense to this action. The plaintiff was not responsible for the foreclosure action, and the consequences of it cannot be visited upon him. The defendants and the Cosmos Realty Company, with which they contracted and which may be liable to them, had it in their power to protect their rights by paying the indebtedness secured by the mortgage and taking an assignment or discharge thereof, as the case might be. The plaintiff was not a party to the foreclosure action, nor was he concerned therewith.

It follows that the judgment should be reversed, and a new trial granted, with costs to appellant to abide the event. All concur.

QUESTIONS:

1. Was the defendant under a contractual duty to the plaintiff to perform the condition precedent?
 2. Was this an action to compel payment of a liquidated debt or for unliquidated damages?
 3. Had the plaintiff performed in full the agreed exchange for the promised money?
 4. Is Restatement, Contracts, § 301, applicable?
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JOHN SOLEY & SONS, Inc. v. JONES et al.

Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 561, 95 N.E. 94.

Action by John Soley & Sons, Incorporated, against J. Edwin Jones and another, copartners doing business under the name of Jones & Meehan. There was a verdict for plaintiff, and defendants bring exceptions. Overruled.

Defendants, having a contract with the Boston Transit Commission for the construction of section 3 of the Washington street tunnel, Boston, contracted with plaintiff to do part of the work.

BRALEY, J. It is a general rule that parties cannot be relieved from their contracts fairly made with full knowledge of the facts, although they may have mistaken their rights, or failed to have restricted sufficiently their liabilities. *Hawkes v. Kehoe*, 193 Mass. 419, 79 N.E. 766, 10 L.R.A.,N.S., 125, 9 Ann.Cas. 1053. The defendants knew that by its terms their contract with the transit commissioners could be canceled and discharged, if the engineer gave a certificate that they were not making such progress in the execution of the work as to indicate that it would be completed within the period fixed for performance.

It was with this knowledge that they entered into the agreement with the plaintiff as a subordinate contractor to perform part of the work. The impossibility of the defendants' performance of the plaintiff's contract if the contingency arose could have been foreseen and provided for in the instrument. A provision that the promise should be dependent upon the continued existence of the principal contract would have been sufficient to protect the defendants if the plaintiff was compelled to abandon the work, because the contract with the commissioners was terminated. *New Haven & Northampton Co. v. Hayden*, 107 Mass. 525, 531. It is their contention that, when construed in connection with the circumstances, such a condition appears by implication, or is an unexpressed term of the agreement. *Hebb v. Welsh*, 185 Mass. 335, 336, 70 N.E. 440. The plaintiff's contract contained a clause that the work should be performed subject to the directions and to the satisfaction of the commissioners, or of their authorized engineer, and the plaintiff concedes that the amount and character of the work could be ascertained only by resort to the specifications of the main contract. If the principal contract in its entirety had been referred to by appropriate language it would have been incorporated, but it cannot be read into the agreement by implication, where only that part which is germane to the plaintiff's performance may be implied, and the language is unambiguous. *De Friest v. Bradley*, 192 Mass. 346, 355, 78 N.E. 467; *Lipsky v. Heller*, 199 Mass. 310, 315, 85 N.E. 453. The auditor, whose finding is not questioned, reports that the plaintiff at the time of execution knew not only of the specifications under which its work must be done, but of the article of cancellation. It apparently acted upon this information, when it ceased work upon having been informed that the right of termination had been exercised. The act of the commissioners, and its decisive effect upon the plaintiff's right to go forward under the contract, having been known to each party, further notice from one to the other of their several rights or demands would have been a vain formality. *Cumberland Glass Mfg. Co. v. Wheaton*, 208 Mass. 425, 94 N.E. 803.

It is urged that, the possible disability which would prevent performance by the defendants having been known to the plaintiff at the inception of the contract, it was mutually understood that they did not intend to perform, and the plaintiff had no expectation of performance, unless the principal contract remained in force. But while we can construe the contract in writing which the parties made, we cannot make a contract for them. It is only where an unanticipated event happens, which was not in the contemplation of the parties at its inception, and upon which the continued existence of the contract must depend, that upon the happening of the event the contract is dissolved, and the promisor relieved from further performance. *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667, 12 L.R.A. 571, 25 Am.St.Rep. 654;

Hawkes v. Kehoe, 193 Mass. 419, 423, 79 N.E. 766, 10 L.R.A.,N.S., 125, 9 Ann.Cas. 1053; Vickery v. Ritchie, 202 Mass. 247, 251, 88 N.E. 835, 26 L.R.A.,N.S., 810; Rowe v. Peabody, 207 Mass. 226, 93 N.E. 604; Sun Printing & Publishing Association v. Moore, 183 U.S. 642, 22 S.Ct. 240, 46 L.Ed. 366; Baily v. De Crespigny, L.R. 4 Q.B. 180, 185. If the plaintiff and defendants contracted with knowledge of the clause of termination, the defendants of course knew that when the principal contract came to an end, either with or without their fault, further performance by the plaintiff would be impossible. Instead of providing for a contingency reasonably to be anticipated, the defendants gave an absolute promise to pay the contract price on the basis that there should be no interference with the work of construction if the plaintiff's conduct was satisfactory to the commissioners as it appears to have been. Having made themselves responsible for the existence of the subject-matter of the contract until without fault on the plaintiff's part it had been performed, they are not within the exception or principle of construction recognized and followed in Wells v. Calnan, 107 Mass. 514, 9 Am.Rep. 65, Butterfield v. Byron, 153 Mass. 517, 27 N.E. 667, 12 L.R.A. 571, 25 Am.St.Rep. 654, Young v. Chicopee, 186 Mass. 518, 72 N.E. 63, Angus v. Scully, 176 Mass. 357, 57 N.E. 674, 49 L.R.A. 562, 79 Am.St.Rep. 318, and Hawkes v. Kehoe, 193 Mass. 419, 79 N.E. 766, 10 L.R.A.,N.S., 125, 9 Ann.Cas. 1053; where the occurrence which discharged the contract was of such a character that the parties were held not to have had it in contemplation at the making of the agreement. See Hebert v. Dewey, 191 Mass. 403, 411, 77 N.E. 822; Vickery v. Ritchie, 202 Mass. 247, 88 N.E. 835, 26 L.R.A.,N.S., 810. The rulings on the question of liability upon which the measure of damages under the first count of the declaration must rest, that the causes for the termination of the principal contract were immaterial as the commissioners had reserved that right, and that there had been a breach, were in accordance with our construction of the rights of the parties. The contract not having been dissolved, the plaintiff was not remitted to compensation for the fair value of the work done with a reasonable profit for such work, and also upon the work remaining to be performed, or restricted to a sum which would be proportionate to the contract price the defendants were to receive from the commissioners. But it was entitled to the benefit of the contract after deducting from the contract price the reasonable cost of completing the work. Olds v. Mapes-Reeve Construction Co., 177 Mass. 41, 58 N.E. 478; Norcross Brothers Co. v. Vose, 199 Mass. 81, 85 N.E. 468; Gagnon v. Sperry & Hutchinson Co., 206 Mass. 547, 92 N.E. 761. The rulings requested were rightly refused, and the instructions given were correct.

Exceptions overruled.

QUESTIONS:

1. What were the performances promised by each of the two parties? Which one of these was made impossible by the cancellation of the principal contract by the Commission?
 2. Did the defendant promise the plaintiff that the principal contract would not be canceled?
 3. Can the plaintiff compel payment of the agreed price in full as a liquidated debt?
 4. If service rendered is normally a condition precedent to a right to wages [see Restatement, Contracts, § 270, and *Coletti v. Knox Hat Co.*, 252 N.Y. 468, 169 N.E. 648 (1930)], is its performance excused by the fact that the servant (a sailor) is captured and held prisoner by the enemy? See *Horlock v. Beal*, [1916] 1 A.C. 486. Or has died? See *Donlan v. City of Boston*, 223 Mass. 285, 111 N.E. 718 (1916).
 5. Would a party be excused from the performance of a condition because his arrest for crime made performance impossible? See *Jinnings v. Amend*, 101 Kan. 130, 165 P. 845, L.R.A.1917F, 626 (1917).
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(D) EXCUSE OF CONDITION BY DEFENDANT'S REPUDIATION OR BY HIS PROSPECTIVE INABILITY TO PERFORM THE AGREED EXCHANGE

EXPLANATORY NOTE

When two parties have made a bargain for an exchange of performances, the law does not require one of them to proceed with his performance if he can convince the court that he is not going to get, without substantial diminution, the agreed equivalent. This is true whether the other party's failure of performance is wrongful or not. If some performance by one party is a condition precedent to the other's duty to render a return performance, and the latter is not going to be rendered, the performance of the condition is excused. If, when suit is brought against him in such a case, the defendant can show no better excuse for his failure of performance than the plaintiff's nonperformance of a condition precedent, he has no defense at all.

Suppose a bargain between A and B, and that before his performance is due B has repudiated his duty or has become disabled to perform the substantial equivalent for which A bargained. The problem confronting A has several aspects; and he may ask his legal adviser the following questions:

1. Has B committed a breach of duty for which I can maintain suit at once?

2. Before bringing such a suit must I proceed with performance myself as if nothing had happened; or is performance of conditions precedent to my right of action now excused?

3. Am I at once totally discharged from my contractual duty?

Cases dealing with the second of these questions would be found at this point, except for the fact that the question is usually incidental to one of the other two. The cases will therefore be found in the following Chapter on Anticipatory Breach, and in a later Chapter on Discharge.

As to Prospective Inability to Perform (often called "Failure of Consideration") the hard question is generally one of fact: Has the party asserting it alleged or proved facts that establish prospective inability? Merely proving the insolvency of the other party is seldom enough, since insolvency frequently does not prevent performance. See *Keppelon v. Ritter Flooring Corp.*, 97 N.J.L. 200, 116 A. 491 (1922), printed in Chapter 9, Discharge Section 7(B).

CHAPTER 7

BREACH OF CONTRACT BY REPUDIATION OR BY MAKING PERFORMANCE IMPOSSIBLE

INTRODUCTORY NOTE

In the preceding Chapter we have considered at some length the facts and events (Conditions) that unless somehow excused must exist or occur before a contractor's promissory duty becomes a Duty of Immediate Performance. When all these necessary operative facts and events exist or have occurred, then and not until then does failure to render a promised performance operate as a Breach of Contract and as a cause of action for an appropriate judicial remedy. But breaches of contract vary in both form and extent, with corresponding variance in their legal effect upon the injured party's reciprocal duties and in the form and extent of the judicial remedy that will be granted. In the present Chapter cases are printed illustrating some of the forms that a Breach of Contract may take, aside from mere non-performance itself—mere failure to render the promised action or forbearance at the agreed time.

Failure to render a promised performance may be either partial or total; it may be substantial or comparatively immaterial. If all conditions precedent have occurred and the time for immediate performance has arrived, a failure then to render it is a Breach for which a remedy in compensatory damages is at once available. This is true whether the Breach is total or partial, large or small; it is true even if it is not large and important enough to discharge the other party from any of his reciprocal duties.

An express Repudiation of the primary contractual duty, or conduct making future performance impossible or highly improbable, even before the time for actual performance has arrived, may be a Breach of Contract. The law requires more of a contractor than the mere rendition of the performance that he has promised; from the very formation of the contract and as a part of the total primary obligation, there is a legal duty not to repudiate, a duty not to destroy the other party's sense of security and expectation of performance and the market value of his contract right. The present Chapter is restricted to cases dealing with this kind of Breach of contractual duty. An anticipatory repudiation by one party may be operative both to

discharge the other party from any further duty on his part and also to give him an immediate right to damages or other judicial remedy.

In studying cases dealing with the question what constitutes a Breach of Contract, it is of advantage to advert to the Remedies that may be available, even though they can not be considered in detail.

The principal judicial Remedy at common law was a judgment for Damages in money. For any breach, large or small, this remedy is available. In the succeeding Chapter, the methods for determining the amount of money to be allowed as compensation for harm done will be briefly considered.

In certain cases an alternative Remedy became available. This has come to be described as Restitution. If the breach is of such importance as to discharge the other party from further contractual duty, it has been described as a "Total Breach." In such a case, instead of suing for Damages measured by the value of his bargain, the injured party may sue for his "money back"—that is for the value of his own performance so far as that has been received by the defendant. The courts have often said that when he elects this Restitutionary remedy he "rescinds" the contract. This use of the word "rescind" has caused some confusion of thought. Also, it has caused this alternative remedy to be classified as "quasi-contractual" (that is, "non-contractual"), a classification that was further induced by the fact that the form of action generally used at common law was *Indebitatus Assumpsit* (a hybrid combination of Debt and *Assumpsit*), whereas the form in which "Damages" were asked was usually described as Special or Express *Assumpsit*. These two forms had extensive overlapping in their use. When used as a remedy by one who is injured by a breach of contract, Restitution is as truly a remedy for breach as is a judgment for Damages measured in a different way.

When neither of the preceding common law remedies was adequate to satisfy the judicial sense of justice, a more complete and satisfactory remedy might be obtained in the court of Chancery. This is generally described as a Decree for Specific Performance, although the court of Chancery might also include an award of damages in its decree or compel the Restitution of specific property. In many of the cases printed in this volume, the remedy sought was this "equitable" remedy; but it is left to other books and courses to develop the forms and applications of this remedy, the procedural rules to be followed, and the juristic effects that are produced.

See Restatement, Contracts, Chapter 11, "Breach of Contract," and Chapter 12, "Judicial Remedies for Breach of Contract," including Damages, Restitution, and Specific Performance.

SECTION 1.—BREACH BY IMPOSSIBILITY OF PERFORMANCE,
CAUSED WILFULLY OR OTHERWISE

MARY SHORT v. STONE.

In the Queen's Bench, 1846. 8 Q.B. 358.

Assumpsit. The declaration stated that heretofore, to wit, on, etc., "in consideration that the plaintiff, being then unmarried, at the request of the defendant, had then promised the defendant to marry him, the defendant, he, the defendant, then promised the plaintiff to marry her within a reasonable time next after he should be thereunto requested by the plaintiff so to do; and the plaintiff avers that she, confiding in the said promise of the defendant, hath always hitherto remained and continued, and still is, sole and unmarried, and was always, from the time of the making of her said promise until the marriage of the said defendant as hereinafter mentioned, ready and willing to marry the defendant, whereof the defendant hath always had notice; yet the defendant, disregarding his said promise, after the making thereof and before the commencement of this suit, to wit, on," etc., "wrongfully and injuriously married a certain other person, to wit, one Edith Collins, contrary to his said promise: to the damage," etc.

Plea 2. "Defendant says that he was not at any time before the commencement of this suit requested by the plaintiff to marry her according to his said promise in that behalf." Verification.

Demurrer, assigning for causes, among others, that the plea confesses, but does not sufficiently avoid, and defendant has therein alleged a fact wholly immaterial to the merits; "for, inasmuch as it appears by the declaration that the defendant, before the commencement of this suit, had married another person, the plaintiff need not nor ought not to have requested the defendant to marry her." * *

LORD DENMAN, C. J. We must look at this case with a view to the feelings and intentions of the parties at the time of entering into such a contract; and the intention clearly is, to marry in the state in which the parties respectively are at the time. If either party puts himself out of that state, he must be taken to dispense with the contract so far that the other may have an action against him without a request to marry. It is unnecessary to inquire what cases, among those which have been mentioned, are analogous to this, because here the intent must be considered; and, looking to that, the fact stated on the record is a necessary dispensation. According to this, which appears to me

the true construction of the contract, the plaintiff shows a good right of action, and is entitled to judgment.

Judgment for plaintiff.

NOTE

As to when voluntary action by a contractor, making his own performance in the future impossible or highly improbable, is operative as an immediate breach, see Restatement, Contracts, § 318.

NEWCOMB v. BRACKETT.

Supreme Judicial Court of Massachusetts, 1819. 16 Mass. 161.

Action on the case for damages. The plaintiff alleged the execution of a written contract on August 8, 1808, wherein, in consideration of the transfer by bill of sale of a half interest in the sloop Union of the agreed value of \$200, the defendant promised to convey to the plaintiff a certain tract of land then held by him as security for a debt as soon as the plaintiff should pay to him the balance of that debt amounting to \$100. He further alleged that on April 19, 1810, the defendant disabled himself from performing his promise by conveying the said tract of land to one Arnold in breach of his contract with the plaintiff. [Statement is rewritten.]

The defendant demurred to this declaration, and assigned the following causes of demurrer.

1. That the plaintiff hath not alleged or shown, that he has ever paid or tendered to the defendant the residue of said debt, mentioned in the declaration.
2. That he has not alleged or shown, that he has paid or offered to pay to the defendant the sum of 100 dollars, mentioned in the declaration.
3. That he has not alleged or shown, that he ever requested the defendant to transfer to him the deed which the defendant held against J. Field's estate, or to assign and transfer to him the land mentioned in the declaration.

The demurrer was joined by the plaintiff.

PARKER, C. J. The contract set forth in the declaration is substantially, that in consideration of the value of a sloop sold by the plaintiff to the defendant, estimated at 200 dollars, the defendant would, upon payment of 100 dollars by the plaintiff, which was due to the defendant from one Field, and to secure which he had taken a deed of Field's estate, convey said estate to the plaintiff; and the breach of the contract alleged is, that the defendant had disabled himself from performing the contract, by conveying the same estate to another person.

The declaration is demurred to, and the objection to it is, that the plaintiff had neither paid, nor offered to pay, the debt of Field to the defendant; and therefore has no title to the action.

No time is fixed in the contract, within which the money was to be paid, or the estate conveyed to the plaintiff. The plaintiff then had a reasonable time, by virtue of the contract, to perform his part of it; and the defendant might have hastened him, by tendering the deed, and demanding the money which the plaintiff had assumed to pay.

It is implied in the contract, on the part of the defendant, that he would do nothing by which he should become unable to perform it; and by making a deed to another person, he has disabled himself, and so virtually broken his contract. It being impossible for him, after having thus done, to account for the 200 dollars in the land, as he undertook, there is a breach of his contract, for which proper damages may be recovered. The law will not, in such circumstances, require a payment or tender by the plaintiff; for this would be to hazard an additional loss, without any possible advantage. * * *

The declaration, in the case at bar, shows that the defendant had conveyed to a stranger the land, which he promised to convey to the plaintiff. This excuses the plaintiff from tendering the money, and entitles him to damages from the breach of the contract.

Declaration adjudged good.

QUESTIONS:

1. Was the defendant's duty to convey conditional on tender of the \$100?
2. Was the defendant's conveyance to a third person a breach of the contract? Restatement, Contracts, § 318(b).
3. Would the defendant's conveyance to a third person have been a breach if it had been made expressly subject to the plaintiff's contract right? Cf. *Noyes v. Brown*, ante p. 547.
4. Was the remedy sought by the plaintiff Damages or Restitution, as those are described in the Introductory Note?

BURK et al. v. SCHREIBER.

Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 35, 66 N.E. 411.

Action by Burk and others against Schreiber. There was a verdict for plaintiffs, and the case was reported. Judgment on the verdict.

KNOWLTON, C. J. There is no dispute that, by the terms of her contract, the defendant was bound to give the plaintiffs a deed which would convey a good title. The time for the delivery of the deed and

the payment of the balance of the price was extended three times, for a period of 12 days in all, and on the last day appointed it appeared that there was an attachment upon the property which was outstanding and undischarged. The defendant's attorney submitted a paper of recent date which purported to release the attachment, signed by the attorney of record of the attaching creditor. The attaching creditor had deceased nearly four months before, and no administrator had been appointed. The plaintiffs then declined to accept the deed tendered by the defendant, and declined the defendant's offer to procure a discharge of the attachment as soon as possible. They bring this action, not to recover damages for the breach of the defendant's contract, but to recover back a part of the purchase money previously advanced at the time of the auction sale.

The plaintiffs were not bound either to accept the deed while there was an incumbrance on the property, or to wait to see whether the defendant would procure a release of the attachment after the appointment of an administrator, or give a bond, with sureties, to dissolve the attachment. The defendant was unable to perform her contract according to its terms, and the plaintiffs, insisting on a performance, had a right to rescind it and recover back their payment, as money had and received to their use. They were not obliged to tender performance, or to make a formal offer of performance. The inability of the defendant to perform gave them a right to rescind. *Swan v. Drury*, 22 Pick. 485; *Pickman v. Trinity Church*, 123 Mass. 1-6, 25 Am.Rep. 1; *Mead v. Fox*, 6 Cush. 199; *Callaghan v. O'Brien*, 136 Mass. 378; *Gormley v. Kyle*, 137 Mass. 189; *Richmond v. Gray*, 3 Allen, 25; *Jeffries v. Jeffries*, 117 Mass. 187. The plaintiffs may recover their advance payment on the ground that the contract has ceased to be in effect, and that the money is held without consideration.

Judgment on the verdict.

QUESTIONS:

1. Did the defendant commit a breach by nonperformance or by repudiation?
2. Was the remedy sought by the plaintiff Damages or Restitution? Could he have asked and obtained the alternative one?
3. Was it necessary, before bringing suit for either remedy, for the plaintiff to tender payment of the price?

NOTE

In actions for damages for breach of a vendor's contract to convey title to land, there is a variation in the extent of the recovery allowed. In England and in some of our states, the amount awarded as against a vendor, whose breach is not "wilful" and consists of his inability to convey

good title as promised, is limited to the amount of the price already paid plus expenditures made in reliance on the contract (these latter now being dead loss). This is a combination of Restitution and partial Damages. In other states (and especially for a wilful breach), a judgment for damages measured by the value of the bargain would be given (the value of the land less any part of the price not yet paid).

ZIEHEN v. SMITH.

Court of Appeals of New York, 1896. 148 N.Y. 558, 42 N.E. 1080.

Action by William Ziehen against David J. Smith and John H. Smith for breach of contract. The complaint was dismissed on the trial, as to John H. Smith. From a judgment of the general term (73 Hun, 571, 26 N.Y.S. 419) affirming a judgment entered on a verdict for plaintiff, and an order denying a new trial (2 Misc.Rep. 487, 24 N.Y.S. 922), defendant appeals. Reversed.

O'BRIEN, J. The plaintiff, as vendee, under an executory contract for the sale of real estate, has recovered of the defendant, the vendor, damages for a breach of the contract to convey, to the extent of that part of the purchase money paid at the execution of the contract, and for certain expenses in the examination of the title. The question presented by the record is whether the plaintiff established at the trial such a breach of the contract as entitled him to recover. By the contract, which bears date August 10, 1892, the defendant agreed to convey to the plaintiff, by good and sufficient deed, the lands described therein, being a country hotel with some adjacent land. The plaintiff was to pay for the same the sum of \$3,500, as follows: \$500 down, which was paid at the time of the execution of the contract; \$300 more on the 15th day of September, 1892. He was to assume an existing mortgage on the property of \$1,000, and the balance, of \$1,700, he was to secure by his bond and mortgage on the property, payable, with interest, one year after date. The courts below have assumed that the payment of the \$300 by the plaintiff, the execution of the bond and mortgage, and the delivery of the conveyance by the defendant, were intended to be concurrent acts, and therefore the day designated by the contract for mutual performance was the 15th of September, 1892.

Since no other day is mentioned in the contract for the payment of the money or the exchange of the papers, we think that this construction was just and reasonable, and in fact the only legal inference of which the language of the instrument was capable. It is not alleged or claimed that the plaintiff on that day, or at any other time, offered to perform on his part, or demanded performance on the part of the defendant; and this presents the serious question in the case, and the only obstacle to the plaintiff's recovery. It is, no doubt, the general

rule that, in order to entitle a party to recover damages for the breach of an executory contract of this character, he must show performance, or tender of performance, on his part. He must show in some way that the other party is in default, in order to maintain the action, or that performance or tender has been waived. But a tender of performance on the part of the vendee is dispensed with in a case where it appears that the vendor has disabled himself from performance, or that he is on the day fixed by the contract for that purpose, for any reason, unable to perform. The judgment in this case must stand, if at all, upon the ground that on the 15th day of September, 1892, the defendant was unable to give to the plaintiff any title to the property embraced in the contract; and hence any tender of performance on the part of the plaintiff, or demand of performance on his part, was unnecessary, because, upon the facts appearing, it would be an idle or useless ceremony.

It appeared upon the trial that at the time of the execution of the contract there was another mortgage upon the premises of \$1,500, which fact was not disclosed to the plaintiff, and of the existence of which he was then ignorant. That on or prior to the 21st of July, 1892, some 20 days before the contract was entered into, an action was commenced to foreclose this mortgage, and notice of the pendency of the action filed in the county clerk's office; that on the 30th of September, following, judgment of foreclosure was granted, and entered on the 31st of October, thereafter, and on the 28th of December the property was sold to a third party by virtue of the judgment, and duly conveyed by deed from the referee. It appears that the defendant was not the maker of this mortgage, and was not aware of its existence, but it was made by a former owner, and the defendant's title was subject to it when he contracted to sell the property to the plaintiff. The decisions on the point involved do not seem to be entirely harmonious. In some of them it is said that the existence, at the date fixed for performance, of liens or incumbrances upon the property, is sufficient to sustain an action by the vendee to recover the part of the purchase money paid upon the contract. *Morange v. Morris*, *42 N.Y. 48; *Ingalls v. Hahn*, 47 Hun. 104.

The general rule, however, to be deduced from an examination of the leading authorities, seems to be that in cases where, by the terms of the contract, the acts of the parties are to be concurrent, it is the duty of him who seeks to maintain an action for a breach of the contract, either by way of damages for the nonperformance, or for the recovery of money paid thereon, not only to be ready and willing to perform on his part, but he must demand performance from the other party. The qualifications to this rule are to be found in cases where the necessity of a formal tender or demand is obviated by the acts of the party sought to be charged, as by his express refusal in advance to

comply with the terms of the contract in that respect, or where it appears that he has placed himself in a position in which performance is impossible. If the vendor of real estate, under an executory contract, is unable to perform on his part, at the time provided by the contract, a formal tender or demand on the part of the vendee is not necessary in order to enable him to maintain an action to recover the money paid on the contract, or for damages. *Hudson v. Swift*, 20 Johns. 24; *Fuller v. Hubbard*, 6 Cow. 13, 16 Am.Dec. 423; *Green v. Green*, 9 Cow. 47; *Hartley v. James*, 50 N.Y. 38; *Bigler v. Morgan*, 77 N.Y. 312; *Burwell v. Jackson*, 9 N.Y. 547; *Bogardus v. Insurance Co.*, 101 N.Y. 328, 4 N.E. 522; *Tamsen v. Schaefer*, 108 N.Y. 604, 15 N.E. 731.

In this case there was no proof that the defendant waived tender or demand, either by words or conduct. The only difficulty in the way of the performance on his part was the existence of the mortgage, which the proof tends to show was given by a former owner, and its existence on the day of performance was not known to either party. In order to sustain the judgment, we must hold that the defendant, on the day of performance, was unable to convey to the plaintiff the title which the contract required, simply because of the existence of the incumbrance. We do not think that it can be said, upon the facts of this case, that the defendant had placed himself in such a position that he was unable to perform the contract on his part, and that his title was destroyed, or that it was impossible for him to convey, within the meaning of the rule which dispenses with the necessity of tender and demand in order to work a breach of an executory contract for the sale of land. It cannot be affirmed, under the circumstances, that, if the plaintiff had made the tender and demand on the day provided in the contract, he would not have received the title which the defendant had contracted to convey. The contract is not broken by the mere fact of the existence on the day of performance of some lien or incumbrance which it is in the power of the vendor to remove. That is all that was shown in this case, and hence the judgment was recovered in violation of an important principle of the law governing contracts. For this reason the judgment should be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.

QUESTIONS:

1. Was either party guilty of a breach of contract at the close of September 15?
2. Had performance by the vendor become impossible before this action for restitution was brought? Consider what happened on Dec. 28, 1892.
3. If the answer to question 2 is "Yes," should the plaintiff be given restitution without tendering the second instalment of \$300? See Restatement, Contracts, §§ 306, 347.

4. If there had been no defect of title, how soon would the parties be discharged if neither one made any tender of performance? Cf. Restatement, Contracts, § 395.

NOTE

Compare *Newcomb v. Brackett*, ante, where conveyance of land was promised to be made as soon as the other party should make a payment of \$100. Neither party made any move for nearly two years. The owner of the land then conveyed it to a third party. This was held to be a breach of contract, tender of the \$100 being excused thereby.

The fact that a party who has promised to pay money is insolvent is not sufficient to show that it is impossible for him to perform his promise. If a contract for the sale of land or goods is such that a tender of a conveyance is a condition of the buyer's duty to make payment, an action for damages for breach by the buyer must fail if the seller has made no tender and shows no other excuse than that the buyer is insolvent. See *Keppelon v. Ritter Flooring Corp.*, 97 N.J.L. 200, 116 A. 491 (1922), post, in Chapter on Discharge.

Prospective inability of one party to perform on time does not excuse the other party from performing and is not operative as an immediate breach, in case performance on time is not an express condition or otherwise "of the essence." *Holt v. United Security Life Ins. Co.*, 76 N.J.L. 585, 72 A. 301 (1908).

One has no right of action merely because he has reason to anticipate that the other will become unable to perform on time, and this is true, even though time is of the essence. *Brady v. Oliver*, 125 Tenn. 595, 147 S.W. 1135, 41 L.R.A.,N.S., 60, Ann.Cas.1913C, 376 (1911).

Bankruptcy, sometimes but not always making performance impossible, has been called a breach by anticipation; it may create an immediate right to share with other creditors in the assets of the bankrupt, provable in the bankruptcy proceedings. *Central Trust Co. of Illinois v. Chicago Auditorium Ass'n*, 240 U.S. 581, 36 S.Ct. 412, 60 L.Ed. 811, L.R.A.1917B, 580 (1916).

That the effect of bankruptcy is not identical with that of repudiation, see Restatement, Contracts, § 324.

CANDA et al. v. WICK.

Court of Appeals of New York, 1885. 100 N.Y. 127, 2 N.E. 381.

ANDREWS, J. The referee found, upon sufficient evidence to justify the finding, that the reasons assigned by the defendant on the twenty-first of September, 1881, for refusing to receive the balance of the brick of the cargo of the schooner *Ellen* were groundless. He further found that the brick were of the quality specified in the contract, and that there was sufficient available space for piling them. Upon the de-

defendant's refusal to permit the plaintiffs' cartmen to continue the delivery, the plaintiffs offered to deliver the balance of the cargo, and stated to the defendant that if brick advanced in price they could not be held responsible for the delivery on the contract. The defendant persisted in his refusal to receive any more brick from the cargo of the *Ellen*, assigning the reasons before stated, viz., defective quality and want of space.

The plaintiffs had a right to make delivery on the contract on the twenty-first of September. The written memorandum is silent as to the time of delivery, but the evidence shows that prompt delivery and acceptance were contemplated, and that this was one of the conditions upon which the plaintiffs entered into the contract. The tender and refusal constituted, we think, a breach of the contract by the defendant. It was not necessary that the plaintiffs should tender the whole 400,000 brick in order to put the defendant in default. It was not contemplated that the entire number should be delivered in one mass, but, as is evident from the situation of the parties and the surroundings, they were to be delivered from time to time, at the convenience of the plaintiffs, and without delaying the defendant in prosecuting the work in which they were to be used. When the defendant refused, without adequate reason, to accept the cargo of the *Ellen*, the plaintiffs were at liberty to treat the contract as broken, and were not bound to make an actual tender of the remainder of the brick before bringing the action. This would have been a useless ceremony. The warning given by the plaintiffs to the defendant, that his refusal would absolve them from any obligation on the contract, was not, as is claimed, equivalent to an assertion of a right on their part to regard the contract as still subsisting and executory, or as a reservation of a right to deliver the brick, if they should so elect. The letter of October 4, 1881, shows that on several occasions, after the twenty-first of September, the plaintiffs were willing to go on with the contract, but the defendant was not ready, and only became ready when brick had greatly advanced in price.

The right of action having accrued from the transaction of September 21st, it was not waived, as matter of law, by a subsequent offer on the part of the plaintiffs to furnish the brick, which was not accepted by the defendant until the advance in the market had materially changed the situation. The price which the plaintiffs received for the brick on sale to other parties was immaterial, in view of the facts that they were delivered on contracts made prior to September 21st, and that the plaintiffs had the ability to furnish all the brick required for all their contracts, including that with the plaintiffs.

The judgment should be affirmed.

QUESTIONS:

1. Was delivery of the brick a condition precedent to the defendant's duty to pay?
2. Did the plaintiff commit a breach by saying that he would not deliver if brick advanced in price?
3. When did the first breach of contract occur?
4. Did the plaintiff's offers of delivery affect in any way the legal relations of the parties? See Restatement, Contracts, §§ 319, 320.

NOTE

An act by the defendant preventing the performance by the plaintiff of that which would otherwise be a condition precedent to the latter's right to payment not only excuses performance of the condition but may operate as a breach of the defendant's duty. Even if the wrongful rejection of the goods is not accompanied by an express refusal to pay the price, the plaintiff will generally be justified in believing that the rejection implies a refusal to pay. See again the cases in Chapter 6, Section 4, on Excuse of Conditions by Prevention.

SECTION 2.—ANTICIPATORY REPUDIATION AS A CAUSE OF ACTION

(Including Power of Retraction)

HOCHSTER v. DE LA TOUR.

In the Queen's Bench, 1853. 2 Ellis & Bl. 678.

The plaintiff brought this action on May 22, 1852, for breach of a bilateral contract whereby the defendant had promised to employ the plaintiff to accompany him as a courier on the continent of Europe for three months beginning on June 1, 1852, and to pay £10 per month for the service. The plaintiff remained ready and willing to begin service on June 1 as agreed; but the defendant wrongfully discharged him and repudiated the contract on May 11. On receiving notice of his discharge the plaintiff obtained similar employment with Lord Ashburton, but this employment would not begin until July. [Statement is rewritten.]

The defendant's counsel objected that there could be no breach of the contract before the 1st of June. The learned judge was of a contrary opinion, but reserved leave to enter a nonsuit on this objection. The other questions were left to the jury, who found for plaintiff.

Hugh Hill, in the same term, obtained a rule nisi to enter a nonsuit or arrest the judgment. In last Trinity Term.

Hannen showed cause. * * * If one party to an executory contract gave the other notice that he refused to go on with the bargain, in order that the other side might act upon that refusal in such a manner as to incapacitate himself from fulfilling it, and he did so act, the refusal could never be retracted; and, accordingly, in *Cort v. Ambergate &c. R. Co.* (17 Q.B. 127) this court after considering the cases, decided that in such a case the plaintiff might recover, though he was no longer in a position to fulfil his contract. That was a contract under seal to manufacture and supply iron chairs. The purchasers discharged the vendors from manufacturing the goods; and it was held that an action might be maintained by the vendors. It is true, however, that in that case the writ was issued after the time when the chairs ought to have been received. In the present case, if the writ had been issued on the 2nd of June, *Cort v. Ambergate &c. R. Co.* would have been expressly in point. The question, therefore, comes to be: Does it make any difference that the writ was issued before the 1st of June? If the dicta of Parke, B., in *Phillpotts v. Evans*, 5 M. & W. 475, are to be taken as universally applicable it does make a difference; but they cannot be so taken. In a contract to marry at a future day, a marriage of the man before that day is a breach. *Short v. Stone*, 8 Q.B. 358. The reason of this is, that the marriage is a final refusal to go on with the contract. It is not on the ground that the defendant has rendered it impossible to fulfil the contract; for, as was urged in vain in *Short v. Stone*, the first wife might be dead before the day came. So also, on a contract to assign a term of years on a day future, a previous assignment to a stranger is a breach. *Lovelock v. Franklyn*, 8 Q.B. 371. [Lord Campbell, C.J. It probably will not be disputed that an act on the part of the defendant incapacitating himself from going on with the contract would be a breach. But how does the defendant's refusal in May incapacitate him from travelling in June? It was possible that he might do so.] It was; but the plaintiff, who, so long as the engagement subsisted, was bound to keep himself disengaged and make preparations so as to be ready and willing to travel with the defendant on the 1st of June, was informed by the defendant that he would not go on with the contract, in order that the plaintiff might act upon that information; and the plaintiff then was entitled to engage himself to another, as he did. In *Planchè v. Colburn* (8 Bing. 14) the plaintiff had contracted with defendants to write a work for "The Juvenile Library"; and he was held to be entitled to recover on their discontinuing the publication; yet the time for the completion of the contract, that is for the work being published in "The Juvenile Library," had not arrived, for that would not be till a reasonable time after the author had completed the work. Now in that case the author

never did complete the work. [Lord Campbell, C.J. It certainly would have been cruelly hard if the author had been obliged, as a condition precedent to redress, to compose a work which he knew could never be published. Crompton, J. When a party announces his intention not to fulfill the contract, the other side may take him at his word and rescind the contract. That word "rescind" implies that both parties have agreed that the contract shall be at an end as if it had never been. But I am inclined to think that the party may also say: "Since you have announced that you will not go on with the contract, I will consent that it shall be at an end from this time; but I will hold you liable for the damage I have sustained; and I will proceed to make that damage as little as possible by making the best use I can of my liberty." This is the principle of those cases in which there has been a discussion as to the measure of damages to which a servant is entitled on a wrongful dismissal. They were all considered in *Elderton v. Emmens* (6 C.B. 160). Lord Campbell, C.J. The counsel in support of the rule have to answer a very able argument.]

Hugh Hill and Deighton, contra. In *Cort v. Ambergate &c. R. Co.*, the writ was taken out after the time for completing the contract. That case is consistent with the defendant's position, which is, that an act incapacitating the defendant, in law, from completing the contract is a breach, because it is implied that the parties to a contract shall keep themselves legally capable of performing it; but that an announcement of an intention to break the contract when the time comes is no more than an offer to rescind. It is evidence, till retracted, of a dispensation with the necessity of readiness and willingness on the other side; and, if not retracted, it is, when the time for performance comes, evidence of a continued refusal; but till then it may be retracted. Such is the doctrine in *Phillpotts v. Evans* (5 M. & W. 475) and *Ripley v. McClure* (4 Exch. 345). [Crompton, J. May not the plaintiff, on notice that the defendant will not employ him, look out for other employment, so as to diminish the loss?] If he adopts the defendant's notice, which is in legal effect an offer to rescind, he must adopt it altogether. [Lord Campbell, C.J. So that you say the plaintiff, to preserve any remedy at all, was bound to remain idle. Erle, J. Do you go one step further? Suppose the defendant, after the plaintiff's engagement with Lord Ashburton, had retracted his refusal and required the plaintiff to travel with him on the 1st of June, and the plaintiff had refused to do so, and gone with Lord Ashburton instead? Do you say that the now defendant could in that case have sued the now plaintiff for a breach of contract?] It would be, in such a case, a question of fact for a jury, whether there had not been an exoneration. In *Phillpotts v. Evans*, it was held that the measure of damages was the market price at the time when the contract ought to be completed. If a refusal before that time is a breach, how could these

damages be ascertained? [Coleridge, J. No doubt it was possible, in this case, that, before the 1st of June, the plaintiff might die, in which case the plaintiff would have gained nothing had the contract gone on. Lord Campbell, C.J. All contingencies should be taken into account by the jury in assessing the damages. Crompton, J. That objection would equally apply to the action by a servant for dismissing him before the end of his term, and so disabling him from earning his wages; yet that action may be brought immediately on the dismissal; note to *Cutter v. Powell* (6 T.R. 320)]. It is quite possible that the plaintiff himself might have intended not to go on; no one can tell what intention is. [Lord Campbell, C.J. The intention of the defendant might be proved by showing that he entered in his diary a memorandum to that effect; and, certainly, no action would lie for entering such a memorandum. But the question is as to the effect of a communication to the other side, made that he might know that intention and act upon it.]

Cur. adv. vult.

LORD CAMPBELL, C. J., now delivered the judgment of the Court.

On this motion in arrest of judgment, the question arises, Whether, if there be an agreement between A and B, whereby B engages to employ A on and from a future day for a given period of time, to travel with him into a foreign country as a courier, and to start with him in that capacity on that day, A being to receive a monthly salary during the continuance of such service, B may, before the day, refuse to perform the agreement and break and renounce it, so as to entitle A before the day to commence an action against B to recover damages for breach of the agreement; A having been ready and willing to perform it, till it was broken and renounced by B. The defendant's counsel very powerfully contended that, if the plaintiff was not contented to dissolve the contract and to abandon all remedy upon it, he was bound to remain ready and willing to perform it till the day when the actual employment as courier in the service of the defendant was to begin; and that there could be no breach of the agreement before that day to give a right of action. But it cannot be laid down as a universal rule that, where by agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived. If a man promises to marry a woman on a future day, and before that day marries another woman, he is instantly liable to an action for breach of promise of marriage. *Short v. Stone* (8 Q.B. 358). If a man contracts to execute a lease on and from a future day for a certain term, and before that day executes a lease to another for the same term, he may be immediately sued for breaking the contract. *Ford v. Tiley* (6 B. & C. 325). So, if a man contracts to sell and deliver specific goods on a future day, and before the day he sells and delivers them to another, he is immediately liable to

an action at the suit of the person with whom he first contracted to sell and deliver them. *Bowdell v. Parsons* (10 East, 359). One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day, but this does not necessarily follow; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff. Another reason may be that, where there is a contract to do an act on a future day, there is a relation constituted between the parties in the meantime by the contract, and that they impliedly promise that in the meantime neither will do anything to the prejudice of the other inconsistent with that relation. As an example, a man and woman engaged to marry are affianced to one another during the period between the time of the engagement and the celebration of the marriage.

In this very case of traveller and courier, from the day of the hiring till the day when the employment was to begin, they were engaged to each other; and it seems to be a breach of an implied contract if either of them renounces the engagement. This reasoning seems in accordance with the unanimous decision of the Exchequer Chamber in *Elderton v. Emmens* (6 C.B. 160), which we have followed in subsequent cases in this court. The declaration in the present case, in alleging a breach, states a great deal more than a passing intention on the part of the defendant which he may repent of, and could only be proved by evidence that he had utterly renounced the contract, or done some act which rendered it impossible for him to perform it.

If the plaintiff has no remedy for breach of the contract unless he treats the contract as in force, and acts upon it down to the 1st of June, 1852, it follows that, till then, he must enter into no employment which will interfere with his promise "to start with the defendant on such travels on the day and year," and that he must then be properly equipped in all respects as a courier for a three months' tour on the continent of Europe. But it is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it, retaining his right to sue for any damage he has suffered from the breach of it. Thus, instead of remaining idle and laying out money in preparations which must be useless, he is at liberty to seek service under another employer, which would go in mitigation to the damages to which he would otherwise be entitled for a breach of the contract. It seems strange that the defendant, after renouncing the contract, and absolutely declaring that he will never act under it, should be permitted to object that faith is given to his assertion, and that an opportunity is not left to him of

changing his mind. If the plaintiff is barred of any remedy by entering into an engagement inconsistent with starting as a courier with the defendant on the 1st of June, he is prejudiced by putting faith in the defendant's assertion, and it would be more consonant with principle, if the defendant were precluded from saying that he had not broken the contract when he declared that he entirely renounced it.

Suppose that the defendant, at the time of his renunciation, had embarked on a voyage for Australia, so as to render it physically impossible for him to employ the plaintiff as a courier on the continent of Europe in the months of June, July, and August, 1852, according to decided cases, the action might have been brought before the 1st of June; but the renunciation may have been founded on other facts, to be given in evidence, which would equally have rendered the defendant's performance of the contract impossible. The man who wrongfully renounces a contract into which he has deliberately entered cannot justly complain if he is immediately sued for a compensation in damages by the man whom he has injured; and it seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, still holding it as prospectively binding for the exercise of this option, which may be advantageous to the innocent party, and cannot be prejudicial to the wrongdoer. An argument against the action before the 1st of June is urged from the difficulty of calculating the damages, but this argument is equally strong against an action before the 1st of September, when the three months would expire. In either case, the jury in assessing the damages would be justified in looking to all that had happened, or was likely to happen, to increase or mitigate the loss of the plaintiff down to the day of trial. We do not find any decision contrary to the view we are taking of this case. * * *

Upon the whole, we think that the declaration in this case is sufficient. It gives us great satisfaction to reflect that, the question being on the record, our opinion may be reviewed in a court of error. In the meantime we must give judgment for the plaintiff.

Judgment for plaintiff.

QUESTIONS:

1. Was the defendant's letter of May 11 an "offer to rescind"?
2. How should Hugh Hill have answered the question put by Crompton, J.?
3. Was the answer that Hill made the cause of losing his client's case?
4. May not the rule adopted in this case result in the plaintiff's being awarded damages for expected harm that afterwards does not in fact occur?

5. Is it possible that the defendant's repudiation might discharge the plaintiff's duty to remain ready and willing to perform on June 1, without at the same time giving the plaintiff a right of action prior to June 1?
6. What are the relative advantages of allowing or refusing a right of action for damages prior to June 1?
7. When two parties make a contract, do they "impliedly promise" that they will not express words of repudiation before time for performance?

NOTE

Some very able judges and legal theorists heartily disapproved of the above decision, believing that no action should be maintainable prior to the date set for the beginning of performance, even though the defendant's anticipatory repudiation would excuse the plaintiff from remaining ready and willing to perform his service and would justify his taking another job. A leading case in which the court held that such an express repudiation is not a breach for which an action can at once be maintained is *Daniels v. Newton*, 114 Mass. 530 (1874). It was followed in a few other states. Even though it may never have been overruled in express terms, it is believed that it would nowhere be followed today in the case of a bilateral bargain that has not yet been fully performed by the plaintiff. See *Restatement, Contracts*, § 318.

A repudiation of duty at or after the time set for performance is not an "anticipatory breach," for the reason that it is accompanied by an actual nonperformance, partial or total, that is itself a breach. If, however, an actual nonperformance when due is only "partial," the breach then committed will be a "total breach" if there is also a repudiation of further duty. Such a breach has sometimes been described as "partly anticipatory."

It has sometimes been held that an anticipatory repudiation is not a breach for which an action will lie unless and until the plaintiff expresses his intention to regard it as final.

Such a holding should be disapproved. A repudiation is very different from an offer to "rescind" the contract; and an action for damages is maintainable without first giving any notice of "rescission" or of election to accept the repudiation as final. As long as the other party has given no such notice and has not yet materially changed his position in consequence of the repudiation, the repudiator may have a power of retraction by a notice to that effect; but the bringing of a suit for damages is such a change of position as will terminate the power to retract. *Restatement, Contracts*, §§ 318, 320, 321.

On receiving an anticipatory repudiation a party may follow one of several courses:

(1) he may say and do nothing, leaving to the repudiator his power of retraction;

(2) he may ask for a retraction and plead for performance, retaining his right of action if no retraction follows;

(3) he may change his position in reasonable reliance on the repudiation, ending the power of retraction;

(4) he may maintain suit at once for Damages, or for Restitution of the value of performance already rendered by him, or for Specific Performance if a judgment for Damages would be an inadequate remedy; but

(5) he can not proceed with his own performance and thereby increase the damages that are recoverable; he can not recover damages for the harm that he could reasonably avoid by not so proceeding.

The repudiation discharges the injured party from further duty on his own part just as soon as the power of retraction is gone; and it excuses the performance of what would otherwise have been a condition precedent to his right of action, provided the condition could and would have been performed but for the repudiation. See Restatement, Contracts, §§ 280, 306.

DINGLEY et al. v. OLER et al.

Supreme Court of the United States, 1886.
117 U.S. 490, 6 S.Ct. 850, 29 L.Ed. 984.

MATTHEWS, J. This was an action of assumpsit, brought by Dingley Bros. in the superior court of the county of Kennebec, in Maine, against W. M. Oler & Co., of Baltimore, to recover damages for the alleged breach of an agreement, whereby it was averred the defendants undertook and promised, in consideration of 3,245.25 tons of ice delivered to them by the plaintiffs in 1879, to return and deliver to the plaintiffs the same quantity of ice from the defendants' ice-houses, in the year 1880. The case was removed by the defendants into the circuit court of the United States for the district of Maine, when the cause was put at issue by a plea of non assumpsit, and was submitted to the court by the parties, the intervention of a jury having been duly waived. The court made a special finding of the facts, and, in pursuance of the conclusions of law based thereon, rendered judgment in favor of the plaintiffs for the sum of \$7,335.35. Exceptions were taken by each party to rulings of the court, on which errors are assigned, the cause being brought here for review on writs of error sued out by the respective parties. The court found as matter of fact, that late in the season of 1879 the plaintiffs, finding themselves in possession of a large quantity of ice undisposed of, and which threatened to be a total loss, pressed the defendants to buy some or all of it. Both parties were dealers in ice, cutting it upon the Kennebec river, and shipping it thence during the season; that is, while the river is open. The offers of the plaintiffs were rejected, but the defendants, by their letter of sixth September, 1879, made a counter offer to take a cargo and "return the same to you next year from our houses." The plaintiffs, by

their letter of September, 1879, accepted this offer, and several cargoes were delivered upon the same terms. The total delivery was 3,245.25 tons.

In July, 1880, one of the plaintiffs spoke to one of the defendants about delivering the ice; and he replied that he did not know about that,—delivering ice when it was worth five dollars a ton, which they had taken when it was worth fifty cents a ton, but he promised to write an answer. July 7, 1880, the defendants wrote, repeating their objections, and saying, among other things, “we must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice in cash at the price you offered other parties here (that is, fifty cents), or give you ice when the market reaches that point.” The plaintiffs, tenth July, 1880, wrote that they had a right to the ice, and had sold it in expectation of its delivery, to which the defendants answered fifteenth July, 1880, reciting the circumstances of the case, and the hardship of such a demand, and again denying the obligation. The letter contains this sentence: “We cannot, therefore, comply with your request to deliver the ice claimed, and respectfully submit that you ought not to ask this of us,” etc., asking for a reply or a personal interview. Neither appears to have been given, and this action was commenced July 21, 1880. The court further found that ice was worth five dollars a ton in July, 1880, and fell later in the season to two dollars a ton.

Thereupon the court held, as matter of law, that there was a contract executed by the plaintiffs, and to be executed by the defendants, who were bound to deliver 3,245.25 tons of ice from their houses on the Kennebec river during the year 1880; that the year means the shipping season; and that the defendants had the whole season, if they chose to demand it, in which to make delivery; and that the letters of July 7th and 15th, from the defendants to the plaintiffs, contained an unequivocal refusal to deliver any ice during the season; that the defendants having unqualifiedly refused to ship the ice, this action can be maintained, though brought before the close of the season, but that the damages are not to be reckoned by the price of ice in July; that what the plaintiffs lost was 3,245.25 tons of ice sometime during the season; that the price of ice went down after July to two dollars a ton, and the measure of damages must be reckoned at this rate, with interest from the date of the writ.

To these conclusions of law the plaintiffs below excepted, contending that the right to fix the time for delivery under the contract had vested in them; that it was properly exercised by their demand in July, 1880; that the refusal to deliver at that time constituted the breach of the contract by the defendants, and fixed the damages at five dollars per ton, the market value of the ice on that day.

The defendants below excepted, contending on their part that the letters of July 7th and 15th did not constitute an unequivocal refusal to deliver any ice during the season, amounting to a renunciation, and, in that sense, a breach of the contract; and that the action was prematurely brought, the right of action, if any, not accruing until after the expiration of the period within which, by the terms of the contract, they had the option to deliver.

The letter of July 7, 1880, from the defendants to the plaintiffs, is as follows:

"Baltimore, Md., seventh July, 1880.

"Messrs. Dingley Bros., Gardiner, Me.—Dear Sirs: As per promise of our W. M. O., we write you concerning the ice we got from you last fall. We have before us the whole of the correspondence on that head, and note throughout the same that you promise to stand between us and any loss. We quote from yours of September 9, 1879, on this head, as follows: 'In fact, we do not propose for you to become losers on account of extending us this accommodation.' Our W. H. O. does not remember your having spoken to him while at Gardiner about your intention of selling the ice, and was very much surprised when informed that you had done so. We are very sorry, indeed, that this question should have arisen between us, who have been on such friendly terms hitherto; but we feel that it is not just or equitable for you (in consideration of the ice being used by us only upon your earnest solicitation, and upon your representation that you would lose the whole unless we assisted you by taking some) to expect us to give you ice now worth \$5 per ton when we have letters of yours offering the ice that we got at fifty cents per ton. We must therefore decline to ship the ice for you this season, and claim as our right to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point. Again expressing our sincere regret that any complication should arise between us, and assuring you of our innocence in the matter, we are,

"Yours, truly,

W. M. Oler & Co."

The letter was answered by Dingley Bros., on July 10, as follows:

"Gardiner, July 10, 1880.

"Messrs. W. M. Oler & Co., Baltimore—Dear Sirs: Yours of 7th is in hand, and we must say the conclusion you have come to greatly astonishes us. Our sole object in making this exchange, no one knows better than yourselves, was to tide us over to such a time during this season as the ice could be marketed at some reasonable figure, and in confirmation of this we refer you to your proposition, made under date of September 6th, viz.: 'It would, of course, be more convenient for us to ship this cargo from our own houses; but remembering past favors, we feel inclined to assist you in your present difficulty, and will load this cargo from your house, should our terms be agreeable to you.

We, of course, do not entertain the idea of buying, having a superabundance on hand, but will take this cargo, and return same to you next year from our houses.' Upon this we have acted, and in the utmost good faith made sale of the ice; and now, after all of this, and having refused to buy it yourselves, for you to ask a postponement in the delivery seems to us hardly right. Now, whatever the final settlement of this matter is to be, we want you to fill our order; otherwise, we cannot tell what the result might be. It is not in our minds to do otherwise than right with any one, and certainly with yourselves; and it is our great desire not to get complicated with the third party in that matter; and assure you that your regrets cannot exceed ours that there should have arisen any difference of opinion concerning this affair, and certain it is that neither of us can afford to do wrong by the other in it; and hoping you will take a more favorable view upon further reflection, we remain,

"Truly yours,

Dingley Bros."

The defendants' letter of July 15th was in reply to this, and is as follows:

"Baltimore, Md., fifteenth July, 1880.

"Messrs. Dingley Bros., Gardiner, Me.—Gentlemen: Yours of 10th duly received, and in reply would state that our desire to do right is quite as sincere and earnest as your own, and that we regret our inability to see the matter referred to in the same form in which you state it. The case, briefly stated, appears to us thus, as we think the correspondence of last year will show: being very much troubled with the quantity of ice left on your hands by an unfortunate contract with the Messrs. Barker, you repeatedly urged and importuned us to help you out, and promised us if we would do so that no loss should result to us from the transaction. Under these assurances, we at length agreed, purely for your accommodation and relief, to take one cargo, and later, under the same influences, took more. Now you ask us, at a time when we are pressed by our sales and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated. This does not seem to us to be fair, and certainly does not comport or agree in any way with your agreement to protect us from loss by means of the favor we were intending to do you. We are reluctant to have a disagreement or difference of opinion with old friends, but regard it our duty to protect our own interests, always, however, with a proper regard to the dictates of right. We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein and in ours of the 7th. You do not reply to our arguments, but simply ask us to surrender our well-formed opinion. Can you reasonably ask us to do this? Is not your usually clear and equitable judgment clouded by the mani-

fest considerations of self-interest pressing upon you? We beg you to consider anew all the circumstances of the transaction and your assurances to us as inducements to make it with you, and cannot doubt that you will be led thereby to admit that your request is not reasonable. We will be glad to hear from you in reply, but would be more pleased to have a personal interview, and venture to suggest that you come here for the purpose. Our business is now more active and confining than ever before. We are deprived of the services of W. Geo., and therefore cannot come to see you. With regards, we are,

"Yours truly,

W. M. Oler & Co."

To this letter no answer was returned, and the present suit was brought six days after its date.

We agree in opinion with the circuit court that, according to the terms of the contract, the defendants had the option of delivering the ice contracted for at any time during the whole shipping season of 1880, giving to the plaintiffs reasonable notice of the time when fixed, and an opportunity to prepare for receiving and taking it away from the defendants' houses. * * *

We differ, however, from the opinion of the circuit court that the defendants are to be considered, from the language of their letters above set out, as having renounced the contract by a refusal to perform, within the meaning of the rule which, it is assumed, in such a case, confers upon the plaintiffs a right of action before the expiration of the contract period for performance. We do not so construe the correspondence between the parties. In the letter of July 7th the defendants say: "We must therefore decline to ship the ice for you this season, and claim, as our right, to pay you for the ice, in cash, at the price you offered it to other parties here, or give you ice when the market reaches that point." Although in this extract they decline to ship the ice that season, it is accompanied with the expression of alternative intention, and that is, to ship it, as must be understood, during that season, if and when the market price should reach the point which, in their opinion, the plaintiffs ought to be willing to accept as its fair price between them. It was not intended, we think, as a final and absolute declaration that the contract must be regarded as altogether off, so far as their performance was concerned, and it was not so treated by the plaintiffs; for, in their answer of July 10th, they repeat their demand for delivery immediately, speak of the letter of the 7th instant as asking "for a postponement of the delivery," urge them "to fill our order," and close with "hoping you [the defendants] will take a more favorable view upon further reflection," etc. Here, certainly, was a locus penitentiæ conceded to the defendants by the plaintiffs themselves, and a request for further consideration, based upon a renewed demand, instead of abiding by and standing upon the previous one.

Accordingly, on July 15th, the defendants replied to the demand for an immediate delivery to meet the exigency of the plaintiffs' sale of the same ice to others, and the letter is evidently and expressly confined to an answer to the particular demand for a delivery at that time. They accordingly say: "Now, you ask us at a time when we are pressed by our sales, and by short supply, threatening us and others, to deliver to you the equivalent in tons of the ice taken from you under the circumstances stated: This does not seem to us to be fair," etc. "We cannot, therefore, comply with your request to deliver to you the ice claimed, and respectfully submit that you ought not to ask this of us in view of the fact stated herein, and in ours of the 7th." This, we think, is very far from being a positive, unconditional, and unequivocal declaration of fixed purpose not to perform the contract in any event or at any time. In view of the consequences sought to be deduced and claimed as a matter of law to follow, the defendants have a right to claim that their expressions, sought to be converted into a renunciation of the contract, shall not be enlarged by construction beyond their strict meaning.

[The court here discussed several authorities, and quoted Benjamin on Sales, 424, that "a mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for, if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."]

The judgment is accordingly reversed upon the writ of error sued out by the defendants below, and the cause remanded, with instructions to take further proceedings therein according to law; and upon the writ of error of plaintiffs below, judgment will be given that they take nothing by their writ of error.

NOTE

A statement of intention not to perform is not prevented from being held a repudiation by the fact that it is conditional, if the condition is one requiring some new performance by the other party that he is under no duty to render or requiring him to give up something to which he has a right. Such is the decision if a buyer writes to the seller, "I will take no more of your goods under our contract unless you reduce the price." *Associated Cinemas of America v. World Amusement Co.*, 201 Minn. 94, 276 N.W. 7 (1937).

That statements manifesting inability to perform or a doubt as to future willingness may excuse the performance of a condition and may justify such a change of position as will prevent the party making the statement from using the contract as a defense when sued for breach at the time when actual performance is due, see *Restatement, Contracts*, §§ 306, 323.

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A repudiation by one party to a bargain suspends the other party's duty to proceed with his own performance. *Wetkopsky v. New Haven Gas Light Co.*, 90 Conn. 286, 96 A. 950 (1916). But in order to privilege the other to quit, the repudiation must be definite and go to the essence of the contract. *Ackley & Co. v. Hunter-Benn & Co.'s Co.*, 166 Ala. 295, 51 So. 964 (1910), "it is not every disagreement as to the terms of a contract which authorizes one of the parties thereto to declare the contract annulled"; *Wheeler v. New Brunswick & C. R. Co.*, 115 U.S. 29, 5 S.Ct. 1061, 29 L.Ed. 341 (1885), a letter claiming that by "ton" was meant 2,000 pounds instead of 2,240 was no repudiation—four justices dissenting; *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 Tex. 585, 142 S.W. 867 (1912), a statement that one is going to quit, while at the same time continuing to work, is no repudiation.

JOHNSTONE v. MILLING, L.R. 16 Q.B.D. 460 (1886, Ct. of App.). In a long term lease the landlord promised that after the expiration of the first four years he would do certain rebuilding on the premises if given written notice to do so by the tenant. Before the four years expired and having received no notice, the landlord told the tenant that he could not raise the money necessary for the rebuilding. The court held that the declaration of inability was not a breach of contract by the landlord because (1) it was not a repudiation of duty; (2) it had not been accepted as final by the tenant, who terminated the lease in accordance with another provision in it; and (3) even if it had been a definite refusal to rebuild, the promise to rebuild was only a minor part of the lease, and the rule that an action lies at once for an anticipatory repudiation applies only when the repudiation is total or of so essential a part as to justify the other party in refusing further performance.

**LAGERLOEF TRADING CO., Inc., v. AMERICAN PAPER
PRODUCTS CO. OF INDIANA.**

Circuit Court of Appeals of the United States, 1923. 291 F. 947.

The following is a part of the opinion of *BAKER*, Circuit Judge:

"What burden and risk of 'election' should a promisor's anticipatory repudiation of his fair and binding promise cast upon the promisee? The promisor's proposal to cancel the promisee's obligations would, if accepted, be a good consideration for the promisee's release of the promisor's obligations. But it takes two to make the new bargain of mutual release. And if the promisor's proposal of cancellation is made when no benefit could possibly accrue to any one except himself, when by reason of his power in the business world to award future prizes or inflict future pains he expects or hopes to force the promisee to

stand the loss, the only 'election' which the law should permit to be cast upon the promisee is to say yes or no to the promisor's proposal of mutual releases. If the promisee says yes, the matter is at an end. If he says no (meaning thereby that he declines to submit to the arbitrary and unjust demand), he should not be held to be digging pitfalls for himself and building isles of safety for the repudiator. And he is so betrayed, if the law makes more of his no than this:

"I refuse to accept your proposal of mutual releases. I am able and willing to go ahead with our arrangements as originally agreed upon, except that it may be necessary to count out the loss of time occasioned by your recalcitrance. This is the only "election" or notice of my intention to which you are entitled. It is no concern of yours whether I sue you to-day on "anticipatory breach" or on any other day down to the due date. If I do not sue you on "anticipatory breach," you may take my action in that regard as a continuing invitation to you to repent. Indeed, I may from time to time down to the due date repeatedly urge you to repentance, but only in the interest of your morality, not to increase your immorality by permitting you to claim immunity through my courtesy and fair dealing. I am giving you the opportunity to repent, and in that sense I am "keeping the contract alive for your benefit," but in no other sense. If despite your recalcitrance I do things looking toward performance, that is only to show my willingness and ability, for I realize that the law will not permit me to increase the damages by doing unnecessary things. And, finally, if by the due date you have not repented, I shall then and thereafter count on what had stood as your continuous anticipatory repudiation as having ripened into a completed breach.'

"We say that, in our judgment, the law should so pronounce, because the law should not be regarded as crystallized strata of a dead past, but as a living force that pulses in response to preponderant convictions of morality. Commercial law should reflect commercial morality. Over the portals of commerce no longer swings the ancient warning. Associations of commerce, leagues of advertisers and of advertising publishers, courts of equity developing rules of fair trade and the people through their representatives in Congress setting up a Commission to promote and emphasize commercial morality in a broader sweep than is possible for courts, all these help to make plain the preponderant conviction of to-day. Repudiators of fair and solemn and binding promises are commercial sinners. If they are unrepentant, courts should hold them to the full consequences of their sins. While promisees should be encouraged to hold open the door to repentance, courts should be vigilant to see that repudiating promisors do not use that very door as an exit to immunity.

"We say further that, in our judgment, the law has already so pronounced. It is quite impossible, within any reasonable limits, to analyze the authorities, to pick out the dicta, to compare case with case.

In the margin we set out the citations which the able and painstaking counsel of these opposing parties have discussed at length. In our opinion the weight of authority is in line with what we regard as the sound reason of the matter."

NOTE

This decision is supported by Restatement, Contracts, § 320; but there are other cases in addition to *Johnstone v. Milling*, ante, that state the law otherwise.

In *Bu-Vi-Bar Petroleum Corp. v. Krow*, 40 F.2d 488, 69 A.L.R. 1295 (1930, C.C.A.), after a repudiation by the defendant, the plaintiff telegraphed, "I have spent large sums of money on this contract and expect you to drill this well. Advise me at once when you will start work." The defendant made no reply. The court held that this did not prevent the repudiation from excusing performance of conditions precedent by the plaintiff and that he could maintain suit for damages without performing them or tendering performance.

SMITH & RICE CO. v. CANADY.

Supreme Judicial Court of Massachusetts, 1912. 213 Mass. 122, 99 N.E. 968.

Bill by the Smith & Rice Company against James W. Canady to compel specific performance. From a decree dismissing the bill, plaintiff appeals. Affirmed.

MORTON, J. This is a bill in equity to compel specific performance by the defendant of the following agreement under seal:

"I agree to sell and convey, by warranty deed conveying a good title, free from all incumbrances, to Smith & Rice Co., corporation, of Worcester, Massachusetts, for the sum of thirteen hundred dollars, the following described property: The farm on which I now live in Spencer, Mass., known as the McKonik farm, the deed of which is recorded in Worcester District, Deeds Book 1875, page 307. Also all wood cut on farm and in shed at house and what hay may be left in the barn. Possession of said premises and a deed of the same shall be delivered to the same Smith & Rice Co. on or before the 10th day of April, 1911. Payment of the purchase money shall be made upon delivery of the deed. Witness my hand and seal this 9th day of March, 1911.

"Witness: [Signed] James W. Canady. [Seal.]"

The case was duly heard and a decree was entered dismissing the bill without costs. The plaintiff appealed.

It appeared that shortly after the defendant signed the agreement he attempted to revoke the offer contained in it by means of the following letter which was sent by him to and received by the plaintiff:

"Spencer, Mar. 17th, 1910.

"Mr. Rice—Dear Sir: I give you notice that I do hereby revoke my offer to sell to you my farm in Spencer. You don't agree to buy it nor do you give me a penny or other thing to hold it until you find out whether you want it or not and at the last moment you can tell me you don't want it and I lose other customers. That is not fair or right.

"Yours,

[Signed] J. W. Canady."

The letter appears to be dated 1910, but that is obviously a mistake for 1911. The court found that the attempted revocation contained in this letter was abandoned and given up by the defendant some time about April 1, 1911. The facts found by the court warranted such a finding. What was found by the court was that "some time about April 1, 1911, at the request of the plaintiff, the defendant went to the office of the plaintiff's attorney, and while there discussed with the plaintiff the matter of the conveyance; was asked by the plaintiff then to execute and deliver a deed of the premises, to which demand the defendant replied that he was not bound to do such [so] under his agreement before the 10th day of April, 1911. The plaintiff then requested the defendant to remain a short while until he, the plaintiff, could procure at a nearby bank money sufficient to make a tender. This request the defendant refused to comply with and left the office." It also appeared that the defendant thereafter caused a proper deed of conveyance to be prepared and remained at his dwelling house on the premises the entire day of the 10th of April, ready and able to deliver possession and title in accordance with his offer.

These facts plainly warranted a finding that the attempted revocation had been abandoned and given up by the defendant, and that the plaintiff must have so understood it and was bound to govern itself accordingly. The offer made by the defendant required the plaintiff to tender on or before April 10th the amount for which the defendant agreed to sell and convey the farm. What took place in the office of the plaintiff's attorney plainly did not constitute a tender, and the court found that "the plaintiff thereafter, before the bringing of this bill, never made demand upon the defendant for a deed of the premises, nor tendered nor offered to tender the price to be paid for such conveyance." The time named in the offer was of the essence of the agreement made by the defendant, and even if what took place in the attorney's office could be construed as an acceptance by the plaintiff of the defendant's offer the plaintiff was bound to tender performance on its part before the expiration of the time named, in order to entitle itself to a conveyance of the farm. As already observed, it is clear that what took place in the attorney's office did not constitute a tender, and it is expressly found that thereafter, before the bringing of the bill, the plaintiff made no demand for a deed and did not offer to pay the price required for a conveyance. There was no such refusal to con-

vey on the part of the defendant as to dispense with a tender. *Mengis v. Carson*, 114 Mass. 410. The attempted withdrawal of the offer was abandoned, not only without objection so far as appears on the part of the plaintiff, but in consequence, as it could have been found, of his holding the defendant to his offer and of the defendant's recognizing that he was bound to convey if the plaintiff insisted upon his doing so and complied with the conditions on which the offer was made. As was said in *Mengis v. Carson*, supra: "A mere declaration of unwillingness which shows only a passing intention on the part of the defendant of which he may repent, and which does not amount to an assurance that the other party is relieved from the part required of him" does not excuse the plaintiff from performing such part. The defendant's recognition of his obligation to convey if the plaintiff insisted upon it was shown by his statement to the plaintiff, when the plaintiff asked for a deed, that he was not bound to give a deed till April 10th, and by the fact that he caused a proper deed to be prepared and was ready and able to give title and possession on the 10th day of April. There was nothing to excuse the plaintiff from a proper tender on or before the 10th day of April, and the plaintiff not having made such tender was not entitled to a conveyance and the bill was rightly dismissed.

Decree affirmed with costs of appeal.

NOTE

The repudiator loses his power of retraction as soon as the other party has materially changed his position in reliance on the repudiation or has notified the repudiator that he assents to it as final. See Restatement, Contracts, § 319.

KELLY v. SECURITY MUT. LIFE INS. CO.

Court of Appeals of New York, 1906. 186 N.Y. 16, 78 N.E. 584, 9 Ann.Cas. 661.

Action by William Kelly against the Security Mutual Life Insurance Company. From a judgment in favor of plaintiff, affirmed by the Appellate Division (106 App.Div. 352, 94 N.Y.S. 601), defendant appeals. Reversed, and new trial granted.

The complaint contains two counts, in the first of which the plaintiff alleged, in substance, that in August, 1889, the defendant, a domestic corporation duly authorized, issued to him its policy of insurance for \$1,000, payable on his death to his wife, the policy being referred to as part of the complaint; that the plaintiff performed his part of the contract, but the defendant wrongfully declared said policy forfeited, and refused to continue it in force; that the beneficiary transferred her rights thereunder to him and that the policy was worth to him \$1,000, in which amount he alleged he had sustained damages. The second

count was upon a like policy payable to the children of the plaintiff, who transferred their rights to him before the commencement of the action. Judgment was demanded for the sum of \$2,000, with costs. Each policy was a certificate of the defendant admitting the plaintiff to membership, subject to certain specified conditions, including the prompt payment of quarterly dues on the days named. Upon his death his wife in one case and his children in the other, became entitled to payment from the reserve fund of the sum of \$1,000. The failure to pay dues rendered the contract void and forfeited all payments made thereon, with an unimportant exception. The answer alleged as an affirmative defense that the policies became null and void on the 2d of May, 1903, because the plaintiff failed to pay the premiums which fell due on that day as required by the contracts. The question sent to the jury was whether the defendant by its course of dealing with the plaintiff had waived strict performance as to the payment of dues on the law day. They were instructed if they found a waiver to bring in a verdict in favor of the plaintiff for the present value of the policies, including interest. The jury found a general verdict for the plaintiff for \$1,289.78. The judgment entered thereon was unanimously affirmed by the Appellate Division, and the defendant appealed to this court.

VANN, J. (after stating the facts). Before any evidence was taken at the trial the defendant moved to dismiss the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, but the motion was denied and the defendant excepted. This ruling survives unanimous affirmance by the Appellate Division, and is open to review by this court. *Jones v. Reilly*, 174 N.Y. 104, 66 N.E. 649; *Sanders v. Saxton*, 182 N.Y. 477, 478, 75 N.E. 529, 1 L.R.A., N.S., 727, 108 Am.St.Rep. 826. The defendant was not required to present the question by demurrer or answer, but could raise it by motion made at the trial. *Weeks v. O'Brien*, 141 N.Y. 199, 203, 36 N.E. 185; Code Civ.Proc. § 499.

The case made by the complaint was not in equity to relieve from forfeiture and reinstate the policy, but purely at law to recover damages for the breach of its contract by the defendant. The only promise made by the defendant in the contract was to pay a sum of money on the death of the plaintiff, but no breach of that promise was alleged. The plaintiff is still living, and nothing is yet due upon the contract, according to its terms. What breach was alleged? The only allegation on that subject is that the defendant wrongfully declared the contract "void and forfeited," denied that the plaintiff had "any rights thereunder," and refused "to continue said policy in force." How or why, when, to whom or by whom the defendant declared the contract forfeited, or denied the plaintiff's rights thereunder, or refused to continue it in force, is not stated. There is no allegation of a refusal to

receive premiums, or give receipts therefor, or that the defendant had never recognized its contract, or that it had not retracted its repudiation, or that it was in such a position that it could not retract. The pleader was satisfied with the conclusion that he set forth. This was not a breach of the contract, because the time for performance by the defendant had not arrived. An attempt to repudiate such a contract does not make it due. If the maker of a promissory note, given for borrowed money and due one year after date, notifies the holder the next day that he repudiates it and will not pay it, can the holder sue at once? Can a mortgagor make his mortgage due before the law day by repudiating it in advance?

The rule that renunciation of a continuous executory contract by one party before the day of performance gives the other party the right to sue at once for damages, is usually applied only to contracts of a special character, even in the jurisdictions where it obtains at all. It is not generally applied to contracts for the payment of money at a future time and in some states the principle is not recognized in any way whatever. *Daniels v. Newton*, 114 Mass. 530, 19 Am.Rep. 384; *Stanford v. McGill*, 6 N.D. 536, 72 N.W. 938, 38 L.R.A. 760; *Carstens v. McDonald*, 38 Neb. 858, 57 N.W. 757; *King v. Waterman*, 55 Neb. 324, 75 N.W. 830. In other states and in the Federal courts the principle is adopted but applied with caution. *Roehm v. Horst*, 178 U.S. 1, 17, 18, 20 S.Ct. 780, 44 L.Ed. 953; *Schmidt v. Schnell*, 7 O.C.D. 657; *Brown v. Odill*, 104 Tenn. 250, 56 S.W. 840, 52 L.R.A. 660, 78 Am. St.Rep. 914; *Roebeling's Sons v. Fence Co.*, 130 Ill. 660, 22 N.E. 518; *Unexcelled Fire Works Co. v. Polites*, 130 Pa. 536, 18 A. 1058, 17 Am. St.Rep. 788. In this state it seems to be limited to contracts to marry (*Burtis v. Thompson*, 42 N.Y. 246, 1 Am.Rep. 516); for personal services (*Howard v. Daly*, 61 N.Y. 362, 19 Am.Rep. 285); and for the manufacture or sale of goods (*Windmuller v. Pope*, 107 N.Y. 674, 14 N.E. 436; *Nichols v. Scranton Steel Co.*, 137 N.Y. 471, 33 N.E. 561). At least we have not extended it to mutual life insurance policies, perhaps for the reason that the question of fact opened to unscrupulous persons by such extension might undermine the solvency of the company and inflict gross injustice upon the other policy holders.

The plaintiff alleges a breach only by anticipation. We held directly against his contention in a recent case which we regard as controlling. *Langan v. Supreme Council Am.L. of H.*, 174 N.Y. 266, 66 N.E. 932. That was an action at law founded upon a certificate of insurance, whereby the defendant promised, upon the death of the plaintiff, to pay his wife a sum not exceeding \$5,000. The plaintiff alleged performance until the "defendant by its wrongful act broke the said contract, and declared the same void." He further alleged that the defendant had "failed to carry out the conditions of the contract by declaring that it will not perform the contract or pay the insurance

agreed to be paid, and that, upon his death, the beneficiary will not then be entitled" to the sum specified, "and that by reason of the breach of the aforesaid contract by defendant, plaintiff has sustained damages in the sum of \$5,000." A judgment for \$1,505.96, "the present value of the policy," was affirmed by the Appellate Division, but reversed by this court, upon the ground that "there was no breach of contract * * * which justified an action for damages; that the action of the plaintiff" in tendering performance "preserved the contract of insurance as it was; that he was not, thereupon, compelled to a course of inaction, but might resort to a court of equity, * * * and compel the defendant to live up to its contract."

The principle of that case controls this. Both actions were at law to recover damages for the breach of the same kind of a contract and in the same way. As we held that an action at law would not lie in that case because there was no breach, and that the remedy of the plaintiff was in equity, we are compelled to hold the same way in this case. The plaintiff had no right to sue for damages before the time for performance by the defendant had arrived. He had sustained no damages, for the policy was still in force, and if it refused to recognize its obligation thereunder he could compel recognition by a judgment exactly adapted to the situation.

The judgment below should be reversed, and a new trial granted, with costs to abide event. [One judge dissented.]

QUESTIONS:

1. Can this case be successfully distinguished from *Hochster v. De la Tour* on the ground that the policy was a unilateral, aleatory contract for the payment of money? See Restatement, Contracts, § 318.
2. Was the insurance company's duty conditional on any performance by the plaintiff?
3. In order to hold the company to its contract, would the insured have to continue to tender payment of the quarterly dues? Is Restatement, Contracts, § 280, applicable? Consider *Id.* §§ 292, 293.
4. Would a decree in equity have any effect "to relieve from forfeiture and reinstate the policy"?

NOTE

Observe that a repudiation by an obligor does not "accelerate the due date" for performance (in absence of an express provision to that effect). This is true whether the obligation is to pay a sum of money or to deliver ice. In *Hochster v. De la Tour* the defendant's repudiation did not accelerate either the date for starting the journey to Europe or the date for payment of salary. The question is merely whether an action for damages will lie as soon as a repudiation is communicated. If a judg-

ment for damages is granted for the repudiation of a money debt that is not yet due the damages are measured by the "present value" of that debt, determined by a reasonable method of discount.

O'NEILL v. SUPREME COUNCIL AMERICAN LEGION
OF HONOR

Supreme Court of New Jersey, 1904. 70 N.J.L. 410, 57 A. 463, 1 Ann.Cas. 422.

Action by Thomas O'Neill against the Supreme Council American Legion of Honor. Demurrer to pleas overruled.

PITNEY, J. The declaration avers that in the year 1891 the defendant was a corporation of the state of Massachusetts, engaged in business in the state of New Jersey, and made a contract under seal with the plaintiff, known as a benefit certificate (set forth in full in the pleading), whereby it was certified that the plaintiff was a companion of the American Legion of Honor, and thereupon, in consideration of full compliance by him with all by-laws of the supreme council of that order, then existing or thereafter adopted, and the conditions in the benefit certificate contained, the supreme council agreed to pay to the plaintiff's sister, in trust for his six children, the sum of \$5,000, upon satisfactory proof of the plaintiff's death while in good standing upon the books of the supreme council. It alleges that the contract was made in consideration of the payment by the plaintiff of the assessments or premiums which might from time to time be called by the defendant. It avers payment by the plaintiff of all assessments called, and performance by him of all conditions, until the defendant broke the contract and declared the same void. It sets up that the defendant has failed, neglected, and refused to carry out the conditions of the contract, in that on August 22, 1900, on December 10, 1901, and on divers other days between those dates, the defendant declared to the plaintiff that it would not perform the contract or pay the insurance money thereby agreed to be paid, and that upon the plaintiff's death the beneficiaries would not be entitled to receive the sum of \$5,000, and that the defendant would not pay the same, but that the beneficiaries should receive only \$2,000. The declaration further avers that upon the breach of the contract by the defendant as aforesaid, and upon the several dates mentioned above, the plaintiff tendered to the defendant the same monthly assessments and payments as had been theretofore called or required by the defendant upon the contract, and the plaintiff offered and agreed to continue making such payments, and in all respects offered to comply with the terms and conditions of the contract; yet the defendant refused to accept from the plaintiff the assessments so tendered, and refused to recognize the contract or con-

tinue it in force; whereby the plaintiff has sustained damages, to recover which the action is brought.

The defendant has pleaded the general issue and five special pleas. To each of the latter the plaintiff demurs. The first question for consideration is whether the declaration sets forth a good cause of action. The cause of action asserted is not the right to recover the sum named in the benefit certificate according to its terms, but to recover damages for a renunciation of the agreement, by the party bound, in advance of the time set for performance. Numerous reported decisions have laid down the doctrine that where a contract embodies mutual and interdependent conditions and obligations, and one party either disables himself from performing, or prevents the other from performing, or repudiates in advance his obligations under the contract, and refuses to be longer bound thereby, communicating such repudiation to the other party, the latter party is not only excused from further performance on his part, but may at his option treat the contract as terminated for all purposes of performance, and maintain an action at once for damages occasioned by such repudiation, without awaiting the time fixed by the contract for performance by the defendant. This doctrine has been followed in the English courts for more than half a century. * * *

[The court here quoted the statement of Crompton, J., made during the argument in *Hochster v. De la Tour*, and also a part of the opinion delivered by Lord Campbell, C. J. The court declared that that decision has been generally followed in the United States, citing cases, one of which was *Roehm v. Horst*, 178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953 (1899.)]

Upon the whole, we are satisfied that the doctrine of *Hochster v. De la Tour* is well founded in principle as well as supported by authority. We are also clear that it applies to such a contract as the one in suit, and that the declaration sets forth a renunciation so clear and unequivocal as to give ground for an action, it being averred that the defendant has declared to the plaintiff that it will not perform the contract, and has refused to accept the monthly assessments tendered by the plaintiff in performance of conditions precedent on his part.

But it is further objected that the plaintiff has no interest in the benefit certificate of such a character as to entitle him to maintain an action for damages by reason of its renunciation. It is urged that under such a certificate the member acquires no property in the benefit, but only a power to designate the beneficiary.¹ * * *

¹The court held as to this that the power and privilege of appointing the beneficiary are accompanied by a legal right against the insurer that such beneficiary shall be paid and that the in-

sured has a "pecuniary interest." "In this aspect the contract has to a member a value of the same character as any other investment made for the ultimate benefit of his children."

Two recent decisions are cited to us as authority for the contention that such an action as the present cannot be maintained against a benefit society by one of its members. They are *Langan v. Supreme Council*, 174 N.Y. 266, 66 N.E. 932, and *Porter v. American Legion of Honor*, 183 Mass. 326, 67 N.E. 238. The latter case follows *Daniels v. Newton* in treating the renunciation of a contract, before arrival of the time for performance, as inefficacious, and therefore as conferring no present right of action. In the *Langan Case* the New York Court of Appeals, without overruling or even questioning the authority of the former decisions of the same court (already cited) that sustain the doctrine of *Hochster v. De la Tour*, nevertheless refused to entertain an action at law brought by a member against a benefit society to recover damages for the repudiation of a benefit certificate. The denial of the legal remedy was placed: First, upon the ground that the defendant could not, by repudiation, terminate its liability under the benefit certificate; the answer to which is that, under the doctrine referred to, such repudiation does give rise to a present liability, at the option of the party injured.² But, secondly, the decision was based on the ground that the plaintiff could, by an equitable action, require the defendant to recognize the contract as in force. It is needless to say that under our system of jurisprudence the latter ground is untenable. We frequently deny equitable relief where an adequate remedy exists at law, but where a suitor has a legal cause of action we do not turn him out of the courts of law on the ground that he may be able to obtain adequate relief in equity. * * *

Judgment for the plaintiff.

FEDERAL LIFE INS. CO. v. RASCOE.

Circuit Court of Appeals of the United States, 1926. 12 F.2d 693.

Action by Jennie M. Rascoe against the Federal Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Mrs. Jennie M. Rascoe brought an action in the chancery court at Nashville, Tenn., against the Federal Life Insurance Company to recover on a policy of insurance by the terms of which the insurance company agreed to pay her the sum of \$25 per week so long as she suffers total disability from accidental injuries sustained while a passenger in or on a public conveyance provided by a common carrier for passenger service. It was further averred that, by reason of injuries

² Note the two uses of "liability" in this sentence. The first is the equivalent of "the primary contractual duty" to pay, in the future and on certain con-

ditions, to the named beneficiary. The second is the equivalent of "the secondary duty to make compensation" for a breach of the first duty.

sustained by the plaintiff while a passenger on a train of the Louisville & Nashville Railroad Company, a common carrier for passengers, she was wholly and continuously disabled from performing any and every kind of duty pertaining to her occupation; that proofs were made in accordance with the terms of the policy, and that after some delay and investigation the defendant made several payments to the plaintiff, aggregating \$840.37, including the sum allowed for hospital expenses, and covering the payments due from the date of the accident, May 16, 1922, to January 2, 1923; and that ever since that time the defendant has wholly failed, refused, and neglected to make any further payments to plaintiff, although she has during all of this time been wholly disabled from performing any and every kind of duty pertaining to her occupation, and will be so disabled for and during the balance of her natural life.

Upon application of defendant, this cause was removed to the United States District Court, in which court the defendant filed an answer, admitting the contract, proofs of loss, and payments made by it to the plaintiff, and that it had refused to make further payments, and denied that it was indebted to the complainant, or liable in any amount whatever, she having received all payments to which she is entitled under the terms of her policy. On February 9, 1925, the court, on motion of the plaintiff, entered an order transferring the case from the equity docket to the law docket, and leave was given to the plaintiff to amend her declaration, by striking out paragraph 15 of the original bill and inserting in lieu thereof the following: "Complainant charges that defendant, Federal Life Insurance Company, has deliberately breached, rejected, repudiated, and abandoned its said contract of insurance with complainant, and that it has done so after recognizing the validity and binding force of said contract, and without just cause." A similar averment was added to paragraphs 1, 2, and 3, and the prayer was amended by striking out sections 2, 3, and 4, and substituting in lieu thereof a prayer for damages for breach of contract in the sum of \$25,000, to which order, transferring the cause to the law docket of the court and permitting the plaintiff to amend, the defendant excepted. Leave was also granted to the defendant to amend its answer, by denying the allegations in plaintiff's amendment to her original bill and her right to recover damages for breach of contract. * * *

DONAHUE, Circuit Judge (after stating the facts as above). * * * It is further claimed that the court erred in overruling the demurrer to the amended declaration. In support of this assignment of error it is insisted that the amended declaration fails to state a cause of action, because there can be no anticipatory breach of a unilateral contract for the payment of money at some future date. As an abstract proposition that may be true, but this is not a unilateral contract for the unconditional payment of money, such as a bond or a promissory note. While

the plaintiff in this case has fully discharged her obligation to pay the premiums coming due prior to her injuries, and has continued to pay the premiums until the insurance company declined to accept further payments, nevertheless it is averred in the bill of complaint that by the express terms of this contract she is still required to furnish, and has furnished, regularly to the insurance company, every 30 days, or as near thereto as may be reasonably possible, a report in writing from her attending physician or surgeon, fully stating the condition of the assured and the probable duration of her disability.

This contract therefore, is not an unconditional promise to pay a sum certain in instalment, or in gross, where plaintiff has fully performed. On the contrary, she is required every 30 days to submit her person to the examination of a physician and pay the physician for making such examination and for preparing a report in writing to be forwarded to the company. These are the means and methods of proof of continuing disability stipulated in the contract to be furnished by the assured after first proofs of injury and resulting disability have been made and accepted by the insurance company, and, in the absence of fraud or collusion, this provision is binding alike on the company and the assured.

It is not merely a technical requirement, but a substantial and continuing burden, involving the expenditure of time and money on the part of the assured. It is said, however, that this is merely a condition precedent to the payment of these instalments, and not a condition that could be enforced by the company. The latter may be true, so far as enforcement by action is concerned; nevertheless it is a provision binding on the plaintiff, the performance of which may be enforced by refusal to pay.³ In this respect it does not differ from a tender of property under a sales contract, or the tender of service under an employment contract (*Hochster v. De la Tour*, 2 El. & Bl. 678), or the delivery of notes as in *Equitable Trust Company v. Railroad Company* (D. C.) 244 F. 485, in which case this question is fully discussed in the opinion on pages 501, 502, and 504. * * *

³The physician's report on physical condition was an express condition precedent to the insurer's duty to make the weekly payments. There was no promise by the plaintiff that the report would be made. Indeed, it was to the insurer's advantage that it should not be made; it was no part of a valuable equivalent for which the insurer bargained.

It is somewhat unusual to say that the performance of a condition like the above "may be enforced by refusal to

pay." It is true, however, that the prospect of a legally privileged refusal to pay puts a strong economic pressure on the plaintiff to perform the burdensome condition, a pressure that is generally more effective than would be the prospect of an action for damages for breach of a promise.

In spite of this pressure, there being no promise to pay premiums or to make the health report, the contract may properly be called a "unilateral" contract.

In this case the plaintiff does not rely upon an anticipatory breach, nor upon mere delay, neglect, or default to pay the several instalments due under the terms of this contract, but upon an actual breach, after full proofs of continuing disability had been made in the manner and form specifically provided in the policy, coupled with an actual repudiation of the entire contract. * * *

This is a single contract. The fact that defendant is required to perform in part at stated intervals does not change its unitary character into a multiplicity of contracts, each relating to but one instalment. If there has been an actual breach, coupled with repudiation, of this one contract, then, to avoid a multiplicity of suits, public policy requires that plaintiff may maintain but one action for the entire damages occasioned by such breach. * * *

The policy provides for the payment of weekly indemnity during disability. It is the claim of the plaintiff that she is permanently disabled. If she can sustain this claim of proofs, then, it appearing that she is in good health, except for the result of her injuries, which are not at all likely to shorten her expectancy, there can be no substantial difficulty, since the adoption of life tables in the ascertainment of her damages. *Parker v. Russell*, supra [133 Mass. 74]. If, on the other hand, it should appear from the proofs that she is not permanently disabled, then her damages can be readily ascertained for such length of time as the evidence discloses will be necessary to effect a cure.
* * *

Affirmed.

DENISON, Circuit Judge. I find myself unable to concur. If the amended declaration is freed from conclusions and confined to fact allegations, the demurrer sufficiently presented the question whether there could be a judgment for the present value of an annuity to the plaintiff, continuing so long as she "lives and suffers."

The parties made a contract by which, in the event of the plaintiff's injury, defendant was to perform at future periods. The judgment, upon the theory of anticipatory breach, has transformed it into a contract for present performance. Unless there is clear and satisfactory reason, according to settled legal principles, the defendant should not be held liable for not doing something which it never agreed to do, and this is as true in regard to time of performance as to other particulars. A plaintiff, who wants now a payment which he agreed to wait for until next year, should show a clear right, not a doubtful one.

Roehm v. Horst [178 U.S. 1, 20 S.Ct. 780, 44 L.Ed. 953] is the leading case in the United States. It declares that, where a contract is executory on both sides and is repudiated by one party, the other may presently have his damages assessed as for an anticipatory

breach; but it excepts from that rule cases where the contract on the plaintiff's part is not executory. The exception cannot be interpreted and applied without understanding the reason for it, and search for the reason for the exception must take us to the reason for the rule. This is not satisfactorily developed, as I think, in any judicial or text-book discussion which I have seen. The suggestion that there is an implied contract to keep the express contract in force, and that damages of this character are really assessed for breach of this implied contract, seems to me to be going a long way for an answer. See *Equitable Co. v. Western Co.* (D. C.) 244 F. 485, 501. To my mind the most forcible reason for the rule of anticipatory damages is this:

In the ordinary case of mutually dependent executory contracts, the plaintiff may say to defendant: "True, I have no right to claim damages now for your nonperformance of what you agreed to do next year; but the meritorious reason for my inability is that you are not obliged to perform your part of next year's contract, unless I also perform my part. Now, by your repudiation, you have put it out of my power further to perform, and hence you cannot be permitted to say that you have not received or will not receive that consideration for your future act, and there is no good reason why you should not pay now (less discount) the damages which would accrue next year."

If this be the reason for the rule, it explains as well the exception. Where his part of the contract has been executed by the plaintiff, he has nothing to do but to wait, and to do so continues to be in his power. His position will not be prejudicially changed by defendant's repudiation; and hence he will have no estoppel to rely upon to precipitate the defendant's obligation. It follows that, not only by its authority, but upon sound principles, the exception made in *Roehm v. Horst* should be recognized and applied, and not dissipated by hesitant application.

I do not understand that a contract sued upon is executory, as against a plaintiff, unless it binds him to do something, so that an action may lie against him for specific performance, or for nonperformance. By that definition the contract here sued upon is not executory on the plaintiff's part. She is merely obliged from time to time to furnish evidence, if and when she wishes payment; what she must do is, in kind, like presenting a note for payment at a particular place, although it is more burdensome in degree; after all, it is a condition, not an obligation. * * *

In my judgment, this case illustrates the evils of laxity in permitting a premature recovery. In such a case as this (as facts often are, though possibly not in this case), plaintiff in a year or two may recover entirely or (if the case is as bad as here claimed) is very likely not to live long. In either case the true liability is for a short term; but the recovery has been upon the basis of the full expectation of

life of a healthy person,—though no error in this respect was duly saved.

NOTE

The dissent appears to overlook the fact that the defendant's repudiation was only partly "anticipatory." One or more weekly payments fell due before this suit was brought. In such cases it is usually held that the plaintiff can maintain only one action for damages, covering future injury as well as past injury. The cases are not harmonious on the point, either in analysis or in reasoning. See works on Procedure, and discussions of the rule against "splitting a cause of action."

If the dissent is sustained, would the plaintiff be permitted to maintain a new action each week? To do this would be a difficult matter for a disabled woman without funds. After repudiation by the insurer, the value of the insurance contract as collateral for a loan is practically destroyed. Does not the dissenting judge's decision deprive the plaintiff of an effective remedy for her means of support at the time when she needs it most (if in fact disabled)?

If the rule as to "anticipatory breach" is held applicable only to contracts that are "executory on both sides," should this be held (with the majority opinion) to include a unilateral contract consisting of one executory promise that is conditional upon some burdensome performance (still "executory") by the promisee? See Restatement, Contracts, § 318.

Did the plaintiff in this case have "nothing to do but wait" (without the promised means of support)? Was her position "not prejudicially changed by defendant's repudiation"? The reasoning of the dissent on this point, if sound, is equally applicable to bilateral contracts that are still "executory on both sides." A repudiation by the defendant makes it unnecessary for the plaintiff to perform or to tender performance of his own promise. He too has "nothing to do but wait;" and yet he has an immediate action. It seems somewhat unreasonable to refuse an immediate action to a plaintiff on the ground that he has already fully performed before the repudiation occurs (the contract then having become unilateral, with "nothing to do but wait").

Although the defendant's repudiation makes it unnecessary for the plaintiff to perform what would otherwise be a condition precedent to his right of action for the defendant's breach, he is usually required to show that he would have been able and willing to perform it but for the repudiation. See *Strasbourger v. Leerburger*, 233 N.Y. 55, 134 N.E. 834 (1922). Prospective inability to perform one part of an agreed exchange, an inability that may be caused by various factors, usually justifies the other party in changing his position, thus terminating his own duty to render the return performance. See Restatement, Contracts, §§ 281-287. In like cases it would seem to justify a repudiating communication.

The court's decision in this case has been said in several Supreme Court opinions to have been "overruled." See especially *New York Life Ins. Co. v. Viglas*, 297 U.S. 672, 56 S.Ct. 615, 80 L.Ed. 971 (1936), a case like the *Rascoe* case in which the defendant had promised to waive premiums,

and to make weekly payments during total disability. During the late "depression" there was a remarkable increase in the number of persons holding such insurance policies who became "totally disabled." The premiums charged seem to have been quite insufficient to cover the disability payments promised. In the *Viglas* case, in an opinion by Cardozo, the court did not refuse a judgment for damages on the ground that the contract was a unilateral contract for the future payment of money, but rather on the ground that the company's refusal to pay was made believing in good faith that the disability had ceased and that it did not constitute an unconditional repudiation. The recoverable future damages are too uncertain in amount. There is no way to determine how many future payments will become payable. "Life tables" indicate average life expectancy—but not of "totally disabled" persons and certainly not of the disabled plaintiff. Probably the best remedy is an equitable decree ordering the defendant to make the weekly payments until it asks a reopening of the case and proves that the disability no longer continues. Furthermore, the fact that the alleged "repudiation" may have been based on honest mistake, the defendant believing in good faith that the "disability" did not exist, is a factor to be considered in determining the remedy to be given.

Even though the anticipatory repudiation gives an immediate right of action to the injured party, it has been held that the statute of limitations does not begin to run against him from the date of the repudiation, but rather from the date when actual performance was due and not rendered. *Ga Nun v. Palmer*, 202 N.Y. 483, 96 N.E. 99, 36 L.R.A.,N.S., 922 (1911). If the injured party expresses an assent to the repudiation as final, the statutory period might be held to run from the date of such expression. See *Restatement, Contracts*, §§ 321, 322.

CHAPTER 8

REMEDIES FOR BREACH—DAMAGES

INTRODUCTORY NOTE

The cases printed in this chapter, while far from sufficient to enable the student to construct rules of remedial law for himself, will nevertheless help him to understand and to criticize such rules. Their inclusion in this book is chiefly for the purpose of helping him to appreciate the effectiveness and value of enforceability of contract. This requires an approach to the subject from the standpoint of remedy and procedure. The effectiveness of substantive legal rights and duties depends upon the remedies that are available to prevent or to make reparation for their breach, and upon the efficiency of the procedure by which those remedies are obtainable. The expression "there ought to be a law" has become a badge of the simple-minded. The disillusioned require to know "what are the remedies and how do they work." This chapter makes a mere beginning in the direction of the answer; it makes that beginning as a part of the original study of the rules that are to be applied and enforced.

One who commits a breach of contract must make compensation therefor to the injured party. In determining the amount of this compensation as the "damages" to be awarded, the aim in view is to put the injured party in as good a position as he would have had if performance had been rendered as promised. It goes without saying that this aim can never be exactly attained. The position that one would have occupied if history had been different is purely hypothetical. And yet that is the problem that the trial court and jury are required to solve. They must determine what additions to the injured party's wealth (expected gains) have been prevented by the breach and what subtractions from his wealth (losses) have been caused by it. The working rules of law by which court and jury are directed are never capable of exact and perfect application. Not all of the court decisions can be reconciled with any set of rules; and in innumerable cases the courts have seemed to avoid the statement of any rule of damages by which the result reached can be explained. This should indeed make one pause before condemning a decision merely because it is not in accord with somebody's stated rule. This is cer-

tainly true with respect to the rules in Restatement, Contracts, Chapter 12, "Judicial Remedies for Breach of Contract," a Chapter for which the present editor must accept much responsibility. See especially Restatement, § 329, Comment a, where the stated rules are declared to be merely "guides in the estimation of damages," the application of which "requires the use of more judicial discretion than is usually the case."

The most general rule as to damages for breach of contract is thus expressed in Restatement, Contracts, § 329: "Where a right of action for breach exists, compensatory damages will be given for the net amount of the losses caused and gains prevented, in excess of savings made possible, if established in accordance with the rules stated in §§ 330–346." The most important of the subsidiary rules referred to are those with respect to foreseeability (§ 330), certainty (§ 331), and avoidance of harm (§ 336). The other sections deal with alternative methods of measurement and with particular kinds of harm and a few special kinds of contract.

Many contracts are "losing" contracts for one of the parties, even in the absence of any breach by the other. Performance "costs" more than one anticipates; and the exchange for which he bargains costs more to maintain, brings in less by its use or resale, and effects smaller savings than expected. Such losses and disappointments as these—expenditures incurred and unrealized gains—the contractor must bear himself. This is true even though his expenditures are incurred in reasonable reliance on the contract and in reasonable expectation of resultant gains. He can not charge the other party with these losses and disappointments; they are not "caused" by the other party's breach of duty.

It is only when the other party has committed a breach that he can be so charged; and even then the compensatory damages are limited to those losses and pecuniary disappointments that are "caused" by the breach. The great variation and inconsistency that exists in the application of this rule is due to our doubts and difficulties in understanding and determining "causation". In the judicial process, courts and juries have to depend on the same practical rules and common beliefs that the rest of us have to live by in our daily activities.

A contract-breaker can be charged with the amount of an expected gain that his breach has prevented, if when the contract was made he had reason to foresee that his breach would prevent it from accruing. He can be charged with an expenditure made in reliance on the contract if he had reason to foresee that it would be incurred and that his breach would make it futile. It is only such harms that his breach can be said to have caused. It is not enough to show that an expenditure was in reliance on the contract. It must be shown that but for his breach the expenditure would have been reimbursed by expected

gains and that he had reason to know it. Further, if the prevention of these gains has already been included in the damages awarded, the expenditures must not also be included.

SECTION 1.—KINDS OF HARM FOR WHICH COMPENSATION IS GIVEN

(Foreseeability, Certainty, Futurity)

HADLEY v. BAXENDALE.

In the Court of Exchequer, 1854. 9 Exch. 341.

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich on the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of £2, 4s. was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with £25 damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule nisi for a new trial on the ground of misdirection.

ALDERSON, B. We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will, in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and, in *Blake v. Midland Railway Company*, 18 Q.B. 93, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at *Nisi Prius*.

"There are certain established rules," this Court says, in *Alder v. Keighley*, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this:—Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conven-

tional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances shew reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such breach of contract, communicated to or known by the defendants. The Judge ought, therefore, to have told the jury, that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

In the course of the argument of this case by counsel, Parke, B., said: "The sensible rule appears to be that which has been laid down in France, and which is declared in their Code, Code Civil, book 3, tit. 3, §§ 1149, 1150, 1151, and which is thus translated in Sedgwick on Damages, p. 67: 'The damages due to the creditor consist in general of the loss that he has sustained, and the profit which he has been prevented from acquiring, subject to the modifications hereinafter contained. The debtor is liable only for the damages foreseen, or which might have been foreseen, at the time of the execution of the contract, when it is not owing to his fraud that the agreement has been violated. Even in the case of nonperformance of the contract, resulting from the fraud of the debtor, the damages comprise only so much of the loss sustained by the creditor, and so much of the profit which he has been prevented from acquiring, as directly and immediately results from the nonperformance of the contract.' "

Baron Parke further said, referring to a case stated by counsel: "The defendants there must of necessity have known that the consequence of their not completing their contract would be to stop the working of the mill. But how could the defendants here know that any such result would follow?"

NOTE

The rule of *Hadley v. Baxendale* is stated in Restatement, Contracts, § 330, Foreseeability of Harm as a Requisite for Recovery.

In Restatement, Contracts, §§ 326-346, various rules are stated for measuring the money damages that are recoverable for breach of contract. In Comment a, under section 329, it is said: "In awarding compensatory damages, the effort is made to put the injured party in as good a position as that in which he would have been put by full performance of the contract, at the least cost to the defendant and without charging him with harms that he had no sufficient reason to foresee when he made the contract. The various difficulties involved in this effort frequently make it impracticable to attain its purpose with any near approach to exactness."

KERR S. S. CO., Inc., v. RADIO CORPORATION OF AMERICA.

Court of Appeals of New York, 1927.
245 N.Y. 284, 157 N.E. 140, 55 A.L.R. 1139.

Action by the Kerr Steamship Company, Inc., against the Radio Corporation of America. From a judgment of the Appellate Division (216 App.Div. 839, 216 N.Y.S. 856), affirming a judgment of the trial term entered on directed verdict, defendant appeals by permission. Judgments of the Appellate Division and of the Trial Term reversed, and judgment directed for plaintiff in named amount.

CARDOZO, C. J. On May 15, 1922, the plaintiff, Kerr Steamship Company, Inc., delivered to defendant, the Radio Corporation of America, a telegram consisting of 29 words in cipher to be transmitted to Manila, Philippine Islands. The telegram was written on one of the defendant's blanks, and is prefaced by the printed words:

"Send the following radiogram via R. C. A., subject to terms on back hereof which are hereby agreed to."

The defendant had no direct circuit for the transmission of radiograms to the Philippine Islands. A radiogram could have been sent to London, where by transfer to other companies it might have reached its destination. This was expensive for the customer. To reduce the expense and follow a more direct route, the defendant forwarded its Philippine messages over the line of the Commercial Cable Company, which transmitted them by cable. When messages were thus forwarded, the practice was to send them upstairs to be copied. One copy was then handed to the cable company and one kept for the defendant's files. That practice was followed in this instance, except that the copy intended for the cable company was mislaid and not delivered. As a consequence the telegram was never sent.

The telegram on its face is an unintelligible cipher. It is written in Scott's code. Translated into English, it remains at best obscure, though some inkling of the transaction may be conveyed to an ingenious mind. Untranslated, it is jargon. The fact is that one Macondray, to whom the telegram was addressed, had cabled the plaintiff for instructions as to the loading of a ship, the Blossom. The instructions were contained in the undelivered message. As a result of the failure to transmit them, the cargo was not laden and the freight was lost. The trial judge directed a verdict for \$6,675.29, the freight that would have been earned if the message had been carried. He held that the cipher, though the defendant could not read it, must have been understood as having relation to some transaction of a business nature, and that from this understanding without more there ensued a liability for the damages that would have been recognized as natural if the transaction had been known. The defendant insists that the tolls which the plaintiff was to pay, \$26.78, must be the limit of recovery.

The settled doctrine of this court confines the liability of a telegraph company for failure to transmit a message within the limits of the rule in *Hadley v. Baxendale* (9 Exch. 341). Where the terms of the telegram disclose the general nature of the transaction which is the subject of the message, the company is answerable for the natural consequences of its neglect in relation to the transaction thus known or foreseen. *Leonard v. New York A. & B. Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am.Rep. 446; *Rittenhouse v. Independent Line of Telegraph*, 44 N.Y. 263, 4 Am.Rep. 673. On the other hand, where the terms of the message give no hint of the nature of the transaction, the

liability is for nominal damages or for the cost of carriage if the tolls have been prepaid. *Baldwin v. United States Tel. Co.*, 45 N.Y. 744, 6 Am.Rep. 165. This is in accord with authority elsewhere. *Primrose v. Western Union Tel. Co.*, 154 U.S. 1, 29, 14 S.Ct. 1098, 38 L.Ed. 883; *Wheelock v. Postal Tel. Cable Co. of Massachusetts*, 197 Mass. 119, 83 N.E. 313, 14 Ann.Cas 188; *Sanders v. Stuart*, L.R. 1 C.P.Div. 326; 3 *Sutherland on Damages*, § 959.

We are now asked to hold that the transaction has been revealed within the meaning of the rule if the length and cost of the telegram or the names of the parties would fairly suggest to a reasonable man that business of moment is the subject of the message. This is very nearly to annihilate the rule in the guise of an exception. The defendant upon receiving from a steamship company a long telegram in cipher to be transmitted to Manila would naturally infer that the message had relation to business of some sort. Beyond that it could infer nothing. The message might relate to the loading of a cargo, but equally it might relate to the sale of a vessel or to the employment of an agent or to any one of myriad transactions as divergent as the poles. Notice of the business, if it is to lay the basis for special damages, must be sufficiently informing to be notice of the risk. *Primrose v. Western Union Tel. Co.*, *supra*; *Western Union Tel. Co. v. Sullivan*, 82 Ohio St. 14, 91 N. E. 867, 137 Am.St.Rep. 754; 3 *Sutherland on Damages*, §§ 959, 970.

At the root of the problem is the distinction between general and special damage as it has been developed in our law. There is need to keep in mind that the distinction is not absolute, but relative. To put it in other words, damage which is general in relation to a contract of one kind may be classified as special in relation to another. If A. and B. contract for the sale of staple goods, the general damage upon a breach is the difference between the market value and the price. But if A. delivers to X. a telegram to B. in cipher with reference to the same sale, or a letter in a sealed envelope, the general damage upon the default of X. is the cost of carriage and no more. As to him the difference between price and value is damage to be ranked as special, and therefore not recoverable unless the message is disclosed. The argument for a larger liability loses sight of this distinction. It misses a sure foothold in that it shifts from general damage in one relation to general damage in another. The bearer of a message who infers from the surrounding circumstances that what he bears has relation to business of some kind is liable, we are told, for any damages that are natural with reference to the character of the business as to which knowledge is imputed. When we ask, however, to what extent the character of the business will be the subject of imputed knowledge, we are told that it is so much of the business only as will make the damage natural (cf. *Western Union Tel. Co. v. Way*, 83 Ala. 542, 557, 558, 4 So. 844; *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am.Rep 435).

Thus we travel in a circle, what is natural or general being adapted to so much of a putative business as is constructively known, and what is constructively known being adapted to what is general and natural. One cannot build conclusions upon foundations so unstable. The loss of a cipher message to load a vessel in the Philippines may mean to one the loss of freight, to another an idle factory, to another a frustrated bargain for the sale or leasing of the cargo. We cannot say what ventures are collateral till we know the ventures that are primary. Not till we learn the profits that are direct can we know which ones are secondary. There is a *contradictio in adjecto* when we speak of the general damages appropriate to an indeterminate transaction.

The key to *Hadley v. Baxendale* is lost if we fail to keep in mind the relativity of causation as a concept of the law. McLaughlin, "Proximate Cause," 39 Harv.L.R. 149; Edgerton, "Legal Cause," 72 U. of Pa.L.R. 211, 343; Bohlen, *Studies in the Law of Torts*, p. 503; Haldane, *The Reign of Relativity*, pp. 125, 126. The argument for the plaintiff mistakenly assumes that the test of what is general damage in a controversy between the sender of a message and the receiver is also the test between the sender and the carrier. To unify the two relations is to abandon *Hadley v. Baxendale* in its application to contracts for the transmission of a message. If knowledge that a message is concerned with business of some kind is by imputation knowledge of those forms of business, and those only, that are typical or normal, there must be search for a definition of the normal and the typical. The quest is obviously futile. Every effect is natural when there is complete knowledge of the cause. Haldane, *supra*. Every damage becomes natural when the transaction out of which it arises has been fully comprehended. Imputed knowledge cannot stop with imputed notice of transactions that are standardized by usage. In the complexities of modern life, one does not know where the ordinary ends and the extraordinary begins. Imputed knowledge, if it exists, must rest upon an assumption less timid and uncertain. The assumption cannot be less than this, that whatever a carrier could ascertain by diligent inquiry as to the nature of the undisclosed transaction, this he should be deemed to have ascertained, and charged with damages accordingly. We do not need to consider whether such a rule might wisely have been applied in the beginning, when the law as to carriers of messages was yet in its infancy. Most certainly it is not the rule announced in our decisions. We cannot accept it now without throwing overboard the doctrine that notice is essential. Notice may indeed be adequate though the transaction is indicated in outline only. * * * The carrier must draw such reasonable inferences in respect of the character of the business as would be drawn by men of affairs from condensed or abbreviated dispatches. Something, however, there must be to give warning that the subject of the message is not merely business in general, but business of a known order. Sutherland on Damages, § 959.

We are not unmindful of the force of the plaintiff's assault upon the rule in *Hadley v. Baxendale* in its application to the relation between telegraph carrier and customer. The truth seems to be that neither the clerk who receives the message over the counter nor the operator who transmits it nor any other employee gives or is expected to give any thought to the sense of what he is receiving or transmitting. This imparts to the whole doctrine as to the need for notice an air of unreality. The doctrine, however, has prevailed for years, so many that it is tantamount to a rule of property. The companies have regulated their rates upon the basis of its continuance. They have omitted precautions that they might have thought it necessary to adopt if the hazard of the business was to be indefinitely increased. Nor is the doctrine without other foundation in utility and justice. Much may be said in favor of the social policy of a rule whereby the companies have been relieved of liabilities that might otherwise be crushing. The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great. The total burden is not heavy since it is distributed among many, and can be proportioned in any instance to the loss likely to ensue. The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided. To pay for this unknown risk, it will be driven to increase the rates payable by all, though the increase is likely to result in the protection of a few. We are not concerned to balance the considerations of policy that give support to the existing rule against others that weigh against it. Enough for present purposes that there are weights in either scale. Telegraph companies in interstate and foreign commerce are subject to the power of Congress. 36 Stat. 539, 544. If the rule of damages long recognized by state and federal decision is to give way to another, the change should come through legislation.

The plaintiff makes the point that the action is one in tort for the breach of a duty owing from a public service corporation, and that the rule of *Hadley v. Baxendale* does not protect the carrier unless sued upon the contract. There is much authority the other way. * * * Though the duty to serve may be antecedent to the contract, yet the contract when made defines and circumscribes the duty. * * * Possibly the existing rule of damage would have been rejected at the beginning if the carrier's default had been dissociated from the law of contracts and considered as a tort. * * * As it is, there is little trace of a disposition to make the measure of the liability dependent on the form of action. A different question would be here if the plaintiff were seeking reparation for a wrong unrelated to the contract, as, e. g., for a refusal to accept a message or for an insistence upon the payment of discriminatory rates. The plaintiff alleges in the complaint that the defendant did accept the message and "promised and agreed"

to transmit it, and that the plaintiff has "duly performed each and every condition of the agreement" on its part to be performed and is willing to pay the charges. We do not stop to inquire whether such a complaint is turned into one in tort by the later allegation that the defendant was negligent in the performance of its promise. * * * Upon the acceptance of the message the defendant's duty was to deliver it in accordance with the contract, and the damages recoverable for nonperformance of the contract are the damages recoverable for nonperformance of the duty. * * *

The conclusion thus reached makes it unnecessary to consider whether a limitation of liability has been effected by agreement.
* * *

GLOBE REFINING COMPANY v. LANDA COTTON OIL
COMPANY.

Supreme Court of the United States, 1903.
190 U.S. 540, 23 S.Ct. 754, 47 L.Ed. 1171.

In error to the Circuit Court of the United States for the Western District of Texas to review a judgment sustaining a plea that the damages had been unduly magnified for the purpose of conferring jurisdiction, and dismissing the cause. Affirmed.

Mr. Justice HOLMES delivered the opinion of the court:

This is an action of contract brought by the plaintiff in error, a Kentucky corporation, against the defendant in error, a Texas corporation, for breach of a contract to sell and deliver crude oil. The defendant excepted to certain allegations of damage, and pleaded that the damages had been claimed and magnified fraudulently for the purpose of giving the United States circuit court jurisdiction, when in truth they were less than \$2,000. The judge sustained the exceptions. He also tried the question of jurisdiction before hearing the merits, refused the plaintiff a jury, found that the plea was sustained, and dismissed the cause. The plaintiff excepted to all the rulings and action of the court, and brings the case here by writ of error. If the rulings and findings were right, there is no question that the judge was right in dismissing the suit (*North American Transp. & Trading Co. v. Morrison*, 178 U.S. 262, 267, 20 S.Ct. 869, 44 L.Ed. 1061, 1064,); but the grounds upon which he went are re-examinable here. *Wetmore v. Rymer*, 169 U.S. 115, 18 S.Ct. 293, 42 L.Ed. 682.

The contract was made through a broker, it would seem by writing, and, at all events, was admitted to be correctly stated in the following letter:

Dallas, Texas, 7/30/97.

Landa Oil Company,
New Braunfels, Texas.
Gentlemen:—

Referring to the exchange of our telegrams to-day, we have sold for your account to the Globe Refining Company, Louisville Kentucky, ten (10) tanks prime crude C/S oil at the price of $15\frac{3}{4}$ cents per gallon of $7\frac{1}{2}$ pounds, f. o. b. buyers' tank at your mill. Weights and quality guaranteed.

Terms: Sight draft without exchange b/l dg. attached. Sellers paying commission.

Shipment: Part last half August and balance first half September. Shipping instructions to be furnished by the Globe Refining Company. Yours truly,

Thomas & Green, as Broker.

Having this contract before us, we proceed to consider the allegations of special damage over and above the difference between the contract price of the oil and the price at the time of the breach, which was the measure adopted by the judge.¹ These allegations must be read with care, for it is obvious that the pleader has gone as far as he dared to go, and to the verge of anything that could be justified under the contract, if not beyond.

It is alleged that it was agreed and understood that the plaintiff would send its tank cars to the defendant's mills, and that the defendant promptly would fill them with oil (so far, simply following the contract), and that the plaintiff sent tanks. "In order to do this, the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the cars from said Louisville to said New Braunfels in the sum of \$900," which sum plaintiff had to pay, "and was incurred as an advancement on said oil contract." This is the first item. The last words quoted mean only that the sum paid would have been allowed by the railroad as part payment of the return charges had the tanks been filled and sent back over the same road.

Next it is alleged that the defendant, contemplating a breach of the contract, caused the plaintiff to send its cars a thousand miles, at a

¹ When a seller fails or refuses to deliver goods of a sort that are obtainable in the market, the buyer suffers only nominal harm if he can and does readily obtain the goods from another seller at the same price. If the market price at the time and place of delivery is higher than the contract price, the harm suffered by having to buy of another seller is the extra amount—the differ-

ence between the contract price and the market price. When making the contract the seller has reason to foresee that his breach will cause at least this amount of harm to the buyer. In the instant case the Globe Refining Co. was entitled to this amount as its "general damages;" but it was less than the statutory minimum required to give the federal court jurisdiction of the case.

cost of \$1,000; that the defendant canceled its contract on the 2d of September, but did not notify the plaintiff until the 14th, when, if the plaintiff had known of the cancelation, it would have been supplying itself from other sources; that plaintiff (no doubt defendant is meant) did so wilfully and maliciously, causing an unnecessary loss of \$2,000.

Next it is alleged that, by reason of the breach of contract and want of notice, plaintiff lost the use of its tanks for thirty days,—a loss estimated at \$700 more. Next it is alleged that the plaintiff had arranged with its own customers to furnish the oil in question within a certain time, which contemplated sharp compliance with the contract by the defendant; “all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with the plaintiff.” This item is put at \$740, with \$1,000 more for loss of customers, credit, and reputation. Finally, at the end of the petition, it is alleged generally that it was known to defendant, and in contemplation of the contract, that plaintiff would have to send tanks at great expense from distant points, and that plaintiff “was required to pay additional freight in order to rearrange the destination of the various tanks and other points.” Then it is alleged that by reason of the defendant’s breach, the plaintiff had to pay \$350 additional freight.*

Whatever may be the scope of the allegations which we have quoted, it will be seen that none of the items was contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer’s tanks should be at the defendant’s mill. Under such circumstances the question is suggested how far the express terms of a writing, admitted to be complete, can be enlarged by averment and oral evidence; and, if they can be enlarged in that way, what averments are sufficient. When a man commits a tort, he incurs, by force of the law, a liability to damages, measured by certain rules. When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But, unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage v. Genning*, 1 Rolle, 368; *Hulbert v. Hart*, 1 Vern.

* In bringing an action for damages, the plaintiff will be advised by his lawyer to “be sure to ask for enough;” but in the instant case the lawyer seems to have gone to unusual lengths in alleging special kinds and amounts of harm that would not exist in an ordinary case. Such elements of “special

damage” must be affirmatively alleged and proved. Also, as to each item he must show, under the rule of *Hadley v. Baxendale*, that the defendant had reason to foresee when the contract was made that such a harm would be caused by his breach.

133. It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, in the present case, the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented the performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.

This point of view is taken by implication in the rule that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Grebert-Borgnis v. Nugent*, L.R. 15 Q.B.Div. 85, 92; *Horne v. Midland R. Co.* L.R. 7 C.P. 583, 591; *Hadley v. Baxendale*, 9 Exch. 341, 354; *Western U. Teleg. Co. v. Hall*, 124 U.S. 444, 456, 8 S.Ct. 577, 31 L.Ed. 479, 483; *Howard v. Stillwell & B. Mfg. Co.*, 139 U.S. 199, 206, 11 S.Ct. 500, 35 L.Ed. 147, 150; *Primrose v. Western U. Teleg. Co.*, 154 U.S. 1, 32, 14 S.Ct. 1098, 38 L.Ed. 883, 895. The suggestion thrown out by *Bramwell, B.*, in *Gee v. Lancashire & Y. R. Co.*, 6 Hurlst. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further, *Hydraulic Engineering Co. v. McHaffie*, L.R. 4 Q.B.Div. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore v. New York Shot & Lead Co.*, 40 N.Y. 422. * * *

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account

if he fails to deliver the goods. With that established, we recur to the allegations. With regard to the first, it is obvious that the plaintiff was free to bring its tanks from where it liked,—a thousand miles away or an adjoining yard,—so far as the contract was concerned. The allegation hardly amounts to saying that the defendant had notice that the plaintiff was likely to send its cars from a distance. It is not alleged that the defendant had notice that the plaintiff had to bind itself to pay \$900, at the time when the contract was made, and it nowhere is alleged that the defendant assumed any liability in respect of this uncertain element of charge. The same observations may be made with regard to the claim for loss of use of the tanks and to the final allegations as to sending the tanks from distant points. It is true that this last was alleged to have been in contemplation of the contract, if we give the plaintiff the benefit of the doubt in construing a somewhat confused sentence. But, having the contract before us, we can see that this ambiguous expression cannot be taken to mean more than notice, and notice of a fact which would depend upon the accidents of the future.

It is to be said further, with regard to the foregoing items, that they were the expenses which the plaintiff was willing to incur for performance. If it had received the oil, these were deductions from any profit which the plaintiff would have made. But, if it gets the difference between the contract price and the market price, it gets what represents the value of the oil in its hands, and to allow these items in addition would be making the defendant pay twice for the same thing.

It must not be forgotten that we are dealing with pleadings, not evidence, and with pleadings which, as we have said, evidently put the plaintiff's case as high as it possibly can be put. There are no inferences to be drawn, and therefore cases like *Hammond v. Bussey*, L. R. 20 Q.B.Div. 79, do not apply. It is a simple question of allegations which, by declining to amend, the plaintiff has admitted that it cannot reinforce. This consideration applies with special force to the attempt to hold the defendant liable for the breach of the plaintiff's contract with third persons. The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that "defendant had contracted to that end with the plaintiff." Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.

The only other allegation needing to be dealt with is that the defendant maliciously caused the plaintiff to send the tanks a thousand miles, contemplating a breach of its contract. So far as this item has

not been answered by what has been said, it is necessary only to add a few words. The fact alleged has no relation to the time of the contract. Therefore it cannot affect the damages, the measure of which was fixed at that time. The motive for the breach commonly is immaterial in an action on the contract. *Grand Tower Min. Mfg. & Transp. Co. v. Phillips*, 23 Wall. 471, 480, 23 L.Ed. 71, 75; *Wood's Mayne, Damages*, § 45; 2 *Sedgw. Damages*, 8th Ed. § 603. It is in this case. Whether, under any circumstances, it might give rise to an action of tort, is not material here. See *Emmons v. Alvord*, 177 Mass. 466, 470, 59 N.E. 126. • • •

Judgment affirmed.

NOTE

Early in his career, Justice Holmes advanced the theory that the legal duty of a contractor is a duty to perform one of two alternatives—either to perform as promised or to pay compensatory damages. He may never have fully accepted this theory; but some modification of it may have caused him to adopt the theory of damages that is stated in this case, and to say that “the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured.” Some other judges, both before and since, have made similar statements. They are not now generally accepted. See *Restatement, Contracts*, § 330, Comment a, and § 333, especially Illustration 7. The rule of *Hadley v. Baxendale* limits recoverable damages to those harms actually resulting from breach that could reasonably have been foreseen when the contract was made; but that rule does not require that the harms suffered should have been actually foreseen, much less does it require that the defendant should have promised to pay compensation for them either expressly or by implication.

For the various elements of “special” harm alleged by the plaintiff above, the law does not require the defendant to make compensation unless (1) they were caused by the breach (according to some accepted theory of “causation”); (2) the defendant had reason to foresee such a harm when the contract was made (not its exact, or even approximate, amount); and (3) the evidence shows with some reasonable approach to certainty the amount of the harm measured in dollars.

The expenditure of \$900 in sending tank cars to the defendant's refinery was not caused by the defendant's breach. The only expected reimbursement of this amount was from the oil promised by the defendant. The plaintiff is given the full equivalent of this oil when he gets its market value less the unpaid purchase price. If he gets the full value of the promised performance he is not entitled to the expenditures that were necessary to earn that performance. But if there was extra delay in the use of the tanks caused by the breach, and this was a reasonably foreseeable item, it should be included in damages. If the breach made it necessary to send the cars elsewhere for oil, with extra freight charges therefor, this amount should also be included if reasonably foreseeable. These last two items, were expenditures that would not have been made if the defendant had kept its promise. If when the contract was made,

the defendant knew that its failure to deliver would prevent the plaintiff from performing a specific profitable contract, one that the plaintiff could not perform by getting oil elsewhere, the profit so prevented may be included in damages.

While the plaintiff's allegations of "special damage" seem exaggerated and doubtful, the reasons given for sustaining the lower court's decision, by merely considering the plaintiff's declaration and not the evidence offered to sustain it, are not convincing.

The plaintiff's theory of "cancellation" is incorrect. Even if the defendant resolved on Sept. 2 not to deliver the oil, that was neither a "cancellation" nor a breach. The breach occurred on the communicated refusal to deliver. If the defendant had given notice of its repudiation before the tank cars were started the saving of \$900 thereby effected would reduce the plaintiff's recoverable damages by that amount.

COPPOLA v. KRAUSHAAR.

Supreme Court of New York, Appellate Division, Second Department, 1905.
102 App.Div. 306, 92 N.Y.S. 436.

Action for breach of contract by Lorenzo Coppola against Isidor Kraushaar. From a judgment of dismissal, plaintiff appeals. Reversed.

JENKS, J. The plaintiff was dismissed at trial, before testimony was taken, because he had not stated a cause of action. The question presented is on the pleading. * * *

The plaintiff complains that on January 3, 1902, he ordered of the defendant two gowns for his betrothed, to be made after model 4,846; that the defendant was told at the time that plaintiff was to wed on January 19th, and was incurring great expense for the wedding feast; that defendant agreed, in consideration of \$50, of which he then received from the plaintiff \$10, to furnish the gowns to the woman on or before January 18th; that on January 18th the plaintiff and his betrothed demanded the gowns, but that the defendant wholly failed in performance; that in consequence of such failure the wedding appointed for January 19th "was broken off" by the lady, and the expenses "which the plaintiff went to in buying presents, wines, clothes, and other expenses," to the extent of \$500, were "expended uselessly," wherefore he demands damages in said sum.

The suit is novel, in view of the damages laid—so novel that one is almost tempted to conjecture that the pleader has lost sight of the distinction between breach of contract and breach of promise of marriage. See *Smith v. Sherman*, 4 Cush. (Mass.) 408. It cannot be said that the damages alleged were the immediate and necessary result of the breach, or to have entered into the contemplation of the parties when they made the contract. Although the plaintiff impressed the

necessity of performance by January 18th by stating the occasion of the need, he did not foretell the consequences now alleged. He does not allege that either of the "two dresses" was the bridal gown. In Sedgwick on Damages (8th Ed.) § 159, it is said:

"In *Booth v. Spuyten Duyvil R. M. Co.*, 60 N.Y. 487, Church, C. J., stated as his opinion that notice of the object of the contract would not of itself change the measure of damages, 'unless it formed the basis of an agreement.' "

On the other hand, there is nothing alleged to show or permit the inference that the defendant could or should contemplate that his default would result in even a postponement of the wedding feast—much less, that the wedding would "be broken," whatever that term may import. And it must import more than a mere postponement, inasmuch as it is alleged that the expenses for presents, wines, and clothes were useless, while presents, wines, and clothes bought in view of a wedding are only useless when the wedding is not only postponed, but does not come to pass. Before the defendant can be held to these alleged damages for them, I think that the parties must have had in contemplation that the wedding would never occur if the defendant failed to furnish the "two dresses" on the day before the appointed time. Sedgwick on Damages, § 129, says that:

"The true test would seem to be whether the action of the intervening agency was such as was to be expected to happen upon the defendant's act. If it were so to be expected, the result is not remote."

While such a disappointment would naturally be keen to any prospective bride, it was hardly to be contemplated, in the absence of specific warning, that she would forever refuse to wed if those "two dresses" were not forthcoming before the day set for the ceremony. The damages are too remote. *Hadley v. Baxendale*, 9 Exch. 341; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N.Y. 209, 31 N.E. 1018; *Dodds v. Hakes*, 114 N.Y. 261, 21 N.E. 398; *Griffin v. Colver*, 16 N.Y. 489, 69 Am.Dec. 718.

But I think that it was error to dismiss the complaint. * * *

Under the pleadings the plaintiff could give evidence of a breach of contract. He had paid \$10 in part consideration to the defendant. * * *

Even if plaintiff were entitled to but nominal damages, he should not have been dismissed. * * * If he stated facts which constituted a cause of action, the pleading was not demurrable, although the good statement was based upon a wrong theory, and although he specified only items of damage to which he was not entitled. * * * He certainly has stated facts which require the inference that he was damaged \$10. But on the other hand, he has not stated any facts which permit the inference that he has suffered any other actual damage

save that alleged, which is too remote. He is, however, entitled to a reversal, although at best he may ultimately gain a pyrrhic victory.

The judgment should be reversed, with costs. All concur.

NOTE

See Restatement, Contracts, §§ 328, 330.

NEWSOME v. WESTERN UNION TELEGRAPH CO.

Supreme Court of North Carolina, 1910. 153 N.C. 153, 69 S.E. 10.

Action by Thomas J. Newsome against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed. * * *

BROWN, J. The facts of this case are stated fully in 137 N. C. 513, 50 S.E. 279, and 144 N.C. 178, 56 S.E. 863. The alleged negligence consists in transmitting a telegram to one Royal, Benson, N. C., ordering four gallons corn whisky to be sent by express to Mints Siding, in Sampson county, N. C. The signature was transcribed on the delivered telegram as T. J. Sessions, instead of T. J. Newsome. The plaintiff alleges that he ordered the whisky by agreement with his raft hands, who were preparing to construct rafts and take his timber and rosin to Wilmington during a freshet in February, 1902, and that they refused to go into the water without it, in consequence of which he lost the benefit of the freshet, and was greatly endamaged.

The defendant requested an instruction that in no view of the evidence can plaintiff recover more than nominal damage, which was refused. The courts will be careful not to apply to a contract of this character a rule of damage which will impose upon the defendant an unreasonable and speculative liability, which an individual may avoid by declining to enter into the contract. The fact that the plaintiff informed the defendant's operator that he needed the whisky in order to get his rafting done will not allow us to hold the defendant to damages which from the very nature of the case must be purely speculative and remote. It should be borne in mind that the defendant, being a public agency, was compelled to accept the telegram, and to agree with the plaintiff, at the price fixed by the North Carolina Corporation Commission, to transmit it. Under such circumstances it cannot be said that the defendant contracted with reference to the damages claimed by the plaintiff simply because its agent was informed of the purpose for which the plaintiff wanted the whisky. While we apply the rule of *Hadley v. Baxendale* to this kind of a contract, yet that rule will not justify the imposition of remote and speculative damages upon a public service corporation.

In *Tanning Co. v. Telegraph Co.*, 143 N.C. 376, 55 S.E. 777, cited and approved in *Manufacturing Co. v. Telegraph Co.*, 152 N.C. 157, 67 S.E. 329, this court said: "Damages are measured in matters of contract, not only by the well-known rule laid down in *Hadley v. Baxendale*, 9 Exch. 341, but they must not be the remote, but the proximate, consequence of a breach of contract, and must not be speculative or contingent." See, also, *Byrd v. Express Co.*, 139 N.C. 273, 51 S.E. 851. It is an elementary principle that all damages must flow directly and naturally, and that they must be certain both in their nature and in respect to the cause from which they proceed. *Shearman and Redfield on Neg.* §§ 25, 26. Damages which are uncertain and speculative, or which are not the natural and probable result of the breach, are too remote to be recoverable. 2 *Joyce*, § 1284. It is universally held that damages are not to be based upon mere conjectural probability of future loss or gain. 8 *Am. & Eng.* 610, and cases cited. Something more than a possible result must appear.

The fact that the whisky was not sent may have caused the hands not to go into the water, but it is a far cry between constructing the raft at Thomas and marketing the product at Wilmington. The whisky may have arrived and still the raft remain unconstructed. The raft may have been constructed and loaded, and still never have reached Wilmington. It requires quite a stretch of the imagination to conceive that, had the four gallons of corn whisky arrived at Thomas, the raft would have been properly constructed, loaded, and safely conducted over a heavy freshet to Wilmington, and the merchandize duly and profitably marketed. Whisky is very potential at times, but it cannot be relied upon to produce such beneficent results as is claimed for it in this case. It is a singular fact in the county where the four gallons of corn whisky were expected to produce such unusual results its use was decried and its sale prohibited by law. It was contraband, outlawed, and dealing in it made a crime.

We are of opinion that the plaintiff is entitled to recover nominal damages only.

Error.

NOTE

It seems very clear that the telegraph agents, even though they were informed of the uses for which the whisky was intended had no reason to foresee that the hands would be caused to refuse to construct the raft, that a "freshet" would be missed, and that a later sale of the lumber would be less advantageous.

CRICHFIELD v. JULIA.

Circuit Court of Appeals of the United States, Second Circuit, 1906. 147 F. 65.

TOWNSEND, Circuit Judge. This action was brought to recover \$100,000, for damages for breach of contract. * * *

[The plaintiff had rendered services in obtaining an asphalt concession in Venezuela, in return for a promise of the defendant, the terms of which were as follows:]

"In the event of obtaining of the said concessions in favor of the said Crichfield, and the acceptance of the same by him, the said Crichfield agrees that he will pay in cash, United States currency, unto the said John P. Julia the sum of five thousand dollars (\$5,000), and will also guaranty to organize a corporation to handle said deposits, and will issue to said Julia preferred stock therein, guarantied to pay six per cent. dividend, gold, annually, to a par value of one hundred thousand, said stock to be issued within six months after the date of such concession." * * *

The exception to the admission of evidence, that it failed to show that any preferred stock was issued, and that, therefore, the jury were allowed to speculate as to the value of the preferred stock, the issuance of which was provided for by the agreement, may be considered in connection with the exceptions to the refusal of the court to direct the jury that the plaintiff was not entitled to substantial damages, on the ground that the contract was too indefinite and uncertain to warrant a recovery for more than nominal damages and that the proof was insufficient to sustain a finding for substantial damages.

Upon this branch of the case the court charged the jury as follows:

"As a matter of fact, the company was organized and the company did issue stock; and by that same company the Inciarte property was taken on, and the railroad concession was taken, and the property was improved in various ways, in the buildings and fixtures of all kinds, boats and what not. If that company had provided for preferred stock, and had issued it and it had gone upon the market and had been dealt in, of course you would have a very convenient method of ascertaining what that preferred stock was worth. But no preferred stock was provided for in the organization of that company, none was issued, and none ever has been issued; therefore, what you have to do, if you can, is to determine what was, at the time that that preferred stock should have been turned over, its fair and reasonable value if it existed. Even although no preferred stock was issued, if this common stock had been put upon the market, and bought and sold, you might have something very tangible to enable you to reach some sort of an opinion as to what would have been the value of 1,000 shares of preferred stock, superior to the common stock. But there had been no

sale, no transaction, no dealings in the stock, so far as we know; and the problem which you have before you is an extremely difficult one, I must concede, and I think you will agree with. One hundred thousand dollars worth of preferred stock does not necessarily mean \$100,000. You are business men enough to know that; that there is preferred stock of old and established companies, which have been going on for years and have been making considerable money, that is not worth par. And with regard to new companies, it is within your knowledge that the face value of stock, whether it is common or preferred, does rarely import that that is its real value. All that was promised to the plaintiff was, not \$100,000 in money, but 6 per cent. preferred stock of the company, which should be organized to operate this particular property.

“Another way of approaching this subject is to see what property there is. So far as appears, all the property that the company has ever owned consisted of this mine, Inciarte, and the railroad concession, the railroad that it has built, the improvements on the property and the plant that it has made down there, the improvements that it has put in the way of equipment, and so forth. If all that there was to be issued was \$100,000 of preferred stock, and you could find out, reasonably and satisfactorily to yourselves as to what the value of all the property of the company was, then perhaps you might be able to make a calculation which would satisfy your own minds that you were making a fair and reasonable appraisal of this \$100,000 worth of preferred stock. But, unfortunately for that method of proceeding, this contract does not contain restrictions with regard to that preferred stock which would enable you to adopt that method. It engages that the plaintiff in the event of the carrying out of the contract, should have \$100,000 of the preferred stock, but there is no promise or guaranty as to whether the total preferred stock of the company shall be \$100,000 or \$1,000,000. Moreover, there is no restriction in this contract as to whether or not the company which is to issue the \$100,000 of preferred stock to Julia, and to others if necessary, shall not issue bonds. Of course, you as business men are perfectly aware that \$100,000 of preferred stock, when that is the total issue of preferred stock, is worth much more, when it is bottomed on property worth any given amount than if the total issue of preferred stock is \$1,000,000. You know perfectly well that if you have a certain property, which is the total property of the company, and you have common and preferred stock out against it, the value of the preferred stock would be one thing if there were no bonds at all outstanding and that the value of the preferred stock would be a different thing if there were bonds; and it is perfectly possible that bonds may be out which are superior to the preferred stock to an amount so large as to reduce the preferred stock practically to nothing at all.

"As I told you before, the burden of proof here is upon the plaintiff, and he must satisfy you on each branch of the case. He is under obligation to furnish you with satisfactory testimony from which you can determine the damages, not as a mere matter of blind guess work, but by a process of reasoning and examination which will enable you to satisfy your minds, as intelligent business men, that you are reaching a fair and proper conclusion upon the evidence. * * *"

By this fair and accurate statement the court fully presented to the jury the situation, as disclosed by the evidence, the issue between the parties, the evidence upon which the claim for substantial damages was predicated, the difficulties in the way of an ascertainment of actual damage, and, suggesting to them the limitations upon their right to proceed upon unwarranted assumptions as to values, warned them against awarding speculative damages. * * *

It is claimed that the verdict was speculative, in that it determined what would have been the value of the one thousand shares of 6 per cent. preferred stock agreed to be paid, when no preferred stock was ever issued, when no value was shown for the common stock which was issued, and when the contract failed to provide what amount of preferred stock should be issued, or whether it should be subject to an issue of bonds. Damages are speculative when the probability that a circumstance will exist as an element for compensation becomes conjectural. *Anderson's Dictionary of Law*. The term "speculative damages" is usually applied in cases of breach of contract where money is sought for loss of uncertain or remote profits not within the understanding of the parties, or where there is uncertainty as to whether the party has been in fact damaged, or whether the damages result from the act of the other party, or where they are wholly uncertain in measure or extent. *Anvil Mining Co. v. Humble*, 153 U.S. 540, 14 S.Ct. 876, 38 L.Ed. 814; 8 *American & English Encyclopedia of Law* (2d Ed.) 609. The rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause rather than uncertainty as to measure or extent; that is, if it is uncertain whether the defendant's act caused any damage, or whether the damage proved flowed from the defendant's act, there may be no recovery of such uncertain damages; whereas uncertainty which affects merely the measure or extent of the injury suffered does not bar a recovery. * * *

We have frequently had occasion to consider this question in this circuit, and have approved the rule that mere uncertainty as to amount would not preclude recovery in actions to recover compensation for breach of contract to sell or manufacture, or for failure to deliver property which has no recognized market value, and that the party who has wrongfully broken a contract should not be permitted to reap advantage from his own wrong by insisting on proof which, by

reason of his breach, is unobtainable. In *re Stern*, 116 F. 604, 54 C.C.A. 60; *Allen v. Field*, 130 F. 641, 65 C.C.A. 19.

This rule is peculiarly applicable to the case at bar. Here, the finding of the jury establishes that the plaintiff fulfilled his contract, the evidence shows that a corporation was formed, that the defendant turned over to it the mine and concessions obtained by plaintiff for which it issued bonds and common stock, that the corporation was working the mine, had received large amounts of asphalt therefrom, and had a large amount still on hand. The evidence justified a finding that the defendant had reaped a substantial benefit from the services rendered by plaintiff under said contract, and had so far complied with his guaranty as to cause a corporation to be organized to handle said property. The sole defense now interposed to the payment of anything except nominal damages is the technical and inequitable one, that as the company was so organized as not to provide for the issuance of any preferred stock, the defendant is relieved from all liability under the contract, because having by his own act deprived the plaintiff of the means of accurately showing what would be the value of such stock, the law will not permit the plaintiff to resort to the best evidence obtainable as to such value, provided such evidence is speculative in the sense of being incomplete or uncertain.

It is argued that, in order to fix the value of the preferred stock which plaintiff was to receive, the contract must have contained a provision defining the amount of preferred stock to be issued, and that, in the absence of a provision as to whether it was or was not to be subject to a bond issue, its value was utterly unascertainable. But we think, in the absence of any words or definition of limitation, that the use of the term "preferred stock," in connection with defendant's guaranty of interest, may fairly be taken to indicate stock whose par value is to be based upon the actual value of the property it represents, and not upon any fictitious or speculative value. If the stock were so affected by a bonded indebtedness as not to have a substantial value representing a par value it would be a preferred stock merely in name, and would not represent the understanding of the parties as evidenced by the agreement and the defendant's guaranty. It is further argued that the guaranty that the stock would "pay 6 per cent. dividend, gold, annually," in no way formed a basis for establishing its value, because, *inter alia*, if no dividends were earned, none could be demanded by the owner of the preferred stock, notwithstanding the guaranty. If this be so, it supports the presumption that the preferred stock was to be of substantial value, as suggested above, because if it were not of a substantial value, such as the par value, so that dividends might be earned, the owner of the preferred stock would receive nothing in return for his services. We must assume that the plaintiff would not have agreed to take worthless or nondividend paying preferred stock. * * *

We have been unable to find any case which supports the contention of the defendant. The general rule, as stated by the court below, is that the plaintiff is entitled to recover what would have been the market value of such preferred stock, if it had been issued. If there be no market value, then the question is as to what would have been its actual value. The question, therefore, for the jury to determine here was what would have been the real or intrinsic value of this stock, in view of the proved assets of the corporation.

"If the property to be delivered has no market value, its real value is to be ascertained by such elements of value as are attainable." 3 Sutherland on Damages, 1921.

Where no proof is available as to whether stock has market value, intrinsic value, ascertained from value of corporate assets and amount of liabilities, may be taken as the basis for the assessment of damages. Redding v. Godwin, 44 Minn. 355, 46 N.W. 563; Industrial & General Trust, Ltd. v. Tod, 180 N.Y. 215, 232, 73 N.E. 7.

In such a case it is "perfectly competent to resort to other modes of proof to establish its actual value, and this may very properly be done by proof of its dividend earning capacity, the value of the assets of the corporation. * * * In the absence of evidence of actual sales the market value is presumptively the par value." Trust and Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S.W. 129.

"In the absence of better evidence the market value of all the property of the company may be shown with the view to arriving at the proportionate value of the shares in controversy." Hewitt v. Steele, 118 Mo. 463, 475, 24 S.W. 440, and cases cited; Murray v. Stanton, 99 Mass. 345. * * *

Here, the evidence introduced by the plaintiff tended to show what the market value of the property was, for the purpose of showing what would have been the real value of the preferred stock. It was the duty of the defendant, if he claimed that this value was excessive, to introduce evidence in reduction of such value, in accordance with the principle applied in the leading case of *Armory v. Delamerie*, 1 Strange, 505. There, the plaintiff, being a chimney sweeper's boy, found a jewel, and carried it to the shop of a goldsmith, who, under pretense of weighing it, took out the stones and returned only the socket, and the plaintiff sued in trover. Chief Justice Pratt said:

"As to the value of the jewel, several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth; and the chief justice directed the jury that, unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did." * * *

[The court held that the jury were justified in awarding substantial damages, and affirmed a judgment for the plaintiff.]

QUESTIONS:

1. What is meant by "market value," "real value," "actual value," "intrinsic value"? See Restatement, Contracts, § 329, with its Comment.
2. Would this be a proper case for the application of the rule stated in Restatement, Contracts, § 347?
3. Were the terms of the bargain too uncertain to make a valid contract?
4. What kind of evidence was available in order to prevent "blind guesswork" by the jury?

NOTE

See Restatement, Contracts, § 331.

In *Whitelaw v. United States* (D.C.) 9 F.(2d) 103 (1925), the plaintiff was wrongfully prevented from sealing and whaling in the Behring Sea during a whole season. It was held that he showed with sufficient certainty the approximate number of seals and whales that he would have captured. This involved evidence of the actual catch of other hunters that season in the Behring Sea, the number of skilled hunters in the plaintiff's crew, the average catch of such a hunter per day, and the state of the weather.

A sailor engaged for a whaling voyage who is discharged in breach of the contract can get damages for the value of his "lay" (his share of the profits that would have been realized from the sale of the catch that would have been made). *Brown v. Hicks* (C.C.) 24 F. 811 (1885), voyage wrongfully discontinued; *Parsons v. Terry*, 1 Lowell, 60, 18 Fed.Cas. 1269, No. 10,782.

KELLEY, MAUS & CO. v. LA CROSSE CARRIAGE CO.

Supreme Court of Wisconsin, 1903. 120 Wis. 84, 97 N.W. 674.

Action by Kelley, Maus & Co. against the La Crosse Carriage Company. From an adverse judgment, defendant appeals. Reversed.

Action for certain vehicle springs delivered by plaintiff to defendant under contract dated December 17, 1900, for 1,000 sets of springs, regular shapes and sizes, at 3¼ cents per pound at La Crosse, with privilege of 25 per cent. additional to March 1, 1901, subject to regular extras for springs other than standard. Answer admitted contract, alleged counterclaim, first, for payment of freight, and, second, for failure to deliver 52 sets of springs, and a third counterclaim alleging that plaintiff failed to deliver springs at the time required by the con-

tract, or within a reasonable time, whereby the business of defendant's factory was greatly interrupted, it was put to great expense in endeavoring to obtain springs in place of those which plaintiff should have delivered, and, generally, that it was subject to increased expense in operating its factory and in loss of time of employes by reason of want of springs, and that it lost many sales and the profits thereon, and also continuing loss of profits in its business, to the amount of \$3,500. Defendant offered evidence that it was an old-established manufacturer of vehicles, having a factory at La Crosse with an output of approximately 6,000 vehicles per year; that plaintiff for many years had been engaged in the business of selling material, supplies, and parts of vehicles to such factories; that in conducting such business it was necessary to contract for supplies to meet the prospective requirements of the year's business; that the turning of the year occurred about July 1st; that the custom of such establishments was to sell vehicles by soliciting orders from dealers throughout the country, by travelling men and mail; that, having a contract for springs for 6,000 vehicles with a manufacturer designated as the Lewis Company, that company, in December, suffered destruction of its factory, whereupon defendant applied to the plaintiff for a supply of springs for the rest of that season's business, and the latter entered into the contract for the number therein specified. Defendant offered to prove the familiarity of the plaintiff with the method in which such business was done, and that it was informed, at the time of contracting, of the character of defendant's business, and of the fact that it had orders for a considerable number of vehicles. It was conceded that a reasonable time for delivery of the springs was not later than about March 1, 1901; that the springs were not delivered, except a very small quantity of them, until the months of July, August, September, and November of that year. Defendant offered to prove the method of manufacture; that it had men, and all other material except springs, to have supplied its orders, both those which it had on hand in December at the time of the contract, and those which it afterwards took; that it was delayed and prevented from filling many such orders of both classes wholly by reason of the delay in obtaining springs, and that its profits upon such orders were \$5 per vehicle. It also offered to prove expenses for travel, etc., incurred in efforts to obtain springs, both from the plaintiff and from others also, after the plaintiff was in default, in order to diminish its loss; also the number of vehicles its factory would have produced but for want of the springs. The court excluded all these offers of proof, and ruled that no loss could be recovered upon orders which were not specifically communicated to the plaintiff at the time of making the contract. At the close of the evidence the amount of the plaintiff's bill was agreed upon, and the amount recoverable upon the first and second counterclaims, and the

jury were directed to find a verdict in favor of the plaintiff for its bill, less the amount on said first and second counterclaims, and to allow nothing to the defendant upon the third counterclaim. Upon such verdict judgment was rendered in favor of the plaintiff, from which the defendant appeals.

DODGE, J. (after stating the facts). The rule of law is general that he who breaks a contract is liable to compensate the other party for all damages occasioned by the breach, which might reasonably be expected to flow therefrom, under either ordinary circumstances, or peculiar circumstances of which the contractor is informed at the time of contracting. Such damages are deemed to have been contemplated by the parties. *Hadley v. Baxendale*, 9 Exch. 341; *Griffin v. Colver*, 16 N.Y. 489, 69 Am.Dec. 718; *Shepard v. Milw. G. L. Co.*, 15 Wis. 318, 82 Am.Dec. 679; *Guetzkow v. Andrews*, 92 Wis. 214, 66 N.W. 119, 52 L.R.A. 209, 53 Am.St.Rep. 909. Such liability is, of course, limited to damages which reasonable diligence of the other contracting party could not avert; hence results that, in case of failure to deliver a commodity purchasable in the open market, the general damages are limited to the difference between the market price and the contract price, for reasonable diligence will in such case obtain the contracted article at the market price. Another limitation upon special damages is that they must not be so uncertain and conjectural that they cannot, with practical safety, be ascertained. *Griffin v. Colver*, *supra*; *Shepard v. Milw. G. L. Co.*, *supra*; *Wright v. Mulvaney*, 78 Wis. 89, 46 N.W. 1045, 9 L.R.A. 807, 23 Am.St.Rep. 393; *Treat v. Hiles*, 81 Wis. 280, 50 N.W. 896. It is under this last limitation that prospective profits have in many cases been held not a proper measure of damages. If, however, the contemplated result of breach of a contract is to deprive the innocent party of profits, the defaulting party ought to compensate him therefor. Otherwise complete justice is not done, and the contract, which in ultimate analysis is the foundation of commerce, is robbed wholly or partially of its sanction. Only when the estimate of prospective profits involves such degree of speculation and uncertainty that it is likely to work injustice, rather than justice, should courts reject it if loss of profits is the result of the breach of the contract.

* * *

Attempting to apply these principles to the damages in the present case, some rules for ascertaining the damages recoverable become obvious: First, if the defendant, upon ascertaining the breach of this contract, with ordinary diligence, that is, the diligence which the ordinarily prudent and diligent man, or the great mass of mankind, under like circumstances, would have exercised, could have promptly obtained springs such as those specified in the contract in the open market, he can recover, as general damages, only the difference between the price at which he could so have obtained them and the

contract price, together with such special damages as he must nevertheless have suffered, such as necessary expenses in finding and procuring such other springs, or in his efforts, consistent with reasonable prudence and diligence, to expedite delivery of contract springs. Of course, defendant's acts in omitting to make purchases of springs which had to be manufactured before they could be furnished must be viewed in the light of all the circumstances, including the frequent assurances from plaintiff that it would ship soon, and probably earlier than the springs could be made elsewhere. Plaintiff cannot complain because defendant relied on such assurances and pretermitted efforts to buy elsewhere, if such would have been the conduct of ordinarily prudent persons under those circumstances. If, on the other hand, the evidence shall disclose that springs such as defendant contracted for were not purchasable in the open market, or were of designs specially adapted for defendant's vehicles and obtainable only by special order to some manufacturer, so that they were not obtainable by such diligence as above defined, and that, by plaintiff's failure to deliver at the time agreed, defendant was prevented from producing from its factory the number of vehicles which, but for the plaintiff's delay in delivering, that factory would, with reasonable certainty, have produced, and that defendant, with reasonable certainty, would have been able to sell all of such output during the then current season, in such case it is clear the defendant would have lost the difference between the cost of manufacture and the net selling price of the vehicles it was so prevented from manufacturing and selling. Such sum, then, it would be entitled to recover from plaintiff, if the latter had knowledge of such facts with reference to defendant's business, or to the vehicle manufacturing business generally, that its officers or agents, as reasonable men, should have contemplated that such injury might probably result from failure to supply springs at the time required by the contract. This is in effect allowing defendant the value of the use of its factory so far as that use was prevented by the breach of the contract, a method of measuring damages approved in *Hinckley v. Beckwith*, 13 Wis. 31. This method of measuring the damage is greatly more certain and comprehensive than that contended for by defendant, consisting of numerous elements. Thus the attempt to prove that defendant had orders for certain vehicles of which a part were canceled because of its delays in filling them, and to predicate thereon damages to the amount of the profits included in the price of the countermanded vehicles, involves the fallacious assumption that the profit on any such vehicles left on hand has been lost. Any such vehicles may afterwards have been, or may yet be, sold to others at the same or greater price. Again, the attempt, uncertain at best, to estimate the extent to which men in the several departments of the factory were kept in idleness by failure of season-

able delivery of springs, in order that their lost time might be recovered as a specific element of damage, is rendered wholly unnecessary, for that element will be included in the lost use of the factory and plant. Further, it is notable that allowance of both the last mentioned elements of damage would involve some measure of duplication. Still further, it appeared that defendant diminished its force somewhat, both in its factory and in its selling department. Now, if profits on countermanded orders were adopted, we see no reason why savings resulting from reduction of expenses must not be ascertained and deducted. That necessity disappears if we ascertain the value of the lost use of the whole establishment as measured by comparison of its output according to its capacity under usual circumstances and its output as impaired by plaintiff's default. That, in the case of a long-established business, past experience may establish with sufficient certainty what would have been the course and results of that business during a certain period of interruption, has support from *Hinckley v. Beckwith*, *supra*; *Shepard v. Gas Light Co.*, *supra*; *Shadbolt, etc., Co. v. Topliff*, 85 Wis. 513, 55 N.W. 854; *Schumaker v. Heinemann*, *supra*. It is also held that the events which do in fact occur may serve to render sufficiently certain the damages, if they are not so extraordinary or beyond expectation that they would not have been reasonably within the contemplation of the contracting parties. *Treat v. Hiles*, *supra*; *Guetzkow v. Andrews*, *supra*; *McCall v. Icks*, 107 Wis. 232, 83 N.W. 300.

In addition to the element of damage already discussed, denominated "lost use of factory," the defendant is also entitled to recover the expenses of any efforts made by it, consistent with due and reasonable diligence, to avert such general damages, in the way of certain journeys of officers and employ  s to Racine and to Chicago to expedite the shipment of springs under this contract, after plaintiff's default became apparent; also in the way of some other trips to find and purchase springs from others to supply the place of those plaintiff had failed to deliver on time, together with the necessary increased cost of any springs so purchased. This class of damage results from the duty of the defendant already mentioned to exercise due diligence to minimize its damages after learning that plaintiff would default. The expense of such efforts is directly attributable to the breach of the contract, and, being but the legal duty of defendant, was, of course, within the contemplation of the parties at the time of contracting.

As we have already intimated, the liability of the plaintiff for any damages depends on whether it ought reasonably to have contemplated that damages of the general character might probably result from a failure to deliver springs at the time agreed. This does not require that it must have exact knowledge or information in detail. One who sells to a merchant necessarily contemplates that he will

resell in the ordinary way, and at profits not unreasonably variant from the customary ones. One who sells to a manufacturer parts of vehicles, with a fixed time of delivery, must of necessity contemplate that their nondelivery at the time specified will inconvenience and disarrange the system of manufacturing. Especially is this true if he is familiar with the conduct of such factories generally. Hence it was entirely proper for defendant to have proved knowledge of the plaintiff's officers or agents as to the operation of such manufacturing plants, resulting either from its years of contact with such business, or from specific information given as to defendant's own situation or as to its sales, either made or expected, and the like, although the information did not extend to all the details, such as the persons to whom, or the prices at which, sales had been or were expected to be made. Factories are ordinarily operated at a profit, therefore a reasonable man may be assumed to contemplate that an interruption of the operation will cause loss to its owners. He need not know in detail just what loss, provided it be reasonable and within usual experience. *Guetzkow v. Andrews*, *supra*.

We have now indicated, at least generally, the elements which, in the light of the counterclaim and the evidence offered, may go to make up the damages recoverable under the third counterclaim, if the jury shall find the facts to warrant them. In so doing, we have by implication shown that very many of the exclusions of evidence assigned as error were erroneous, and we may dispense with discussion of most of such assignments, which are very numerous. Such rulings on evidence resulted from primary errors as to the rule of damages and of the extent to which plaintiff must have had knowledge in all the details, of the effects which its delay in delivery of springs would have on defendant. We may, however, briefly mention some of the classes of evidence which the court excluded:

As already said, the court should have admitted any evidence tending to prove even general knowledge on the part of the plaintiff of how the wagon business was carried on, either in manufacturing, selling, or obtaining the necessary supplies of material; whether such knowledge was derivable from its general familiarity with the wagon business, or from facts communicated to it at or prior to the time of the making of the contract.

Evidence of the custom of operating the factory, tending to show the manner in which, and extent to which, nonsupply of springs interrupted its operation and diminished its efficacy, was admissible.

Also evidence of the actual effect of absence of springs after the time at which the respondent was bound by contract to make delivery. This may involve the extent to which men were kept in idleness or the efficiency of their labor impaired, and the nonutility or lessened

utility of any springs received from the plaintiff after the contract period, and especially after the alleged close of the season.

Also proof of the capacity of the shop during the period of complete or partial interruption after the springs were due, confined, however, to that which was ordinary and usual.

We are unable to discover the relevancy, however, of the money value of the time of men lost by reason of want of springs, as it is not a proper specific element of recovery.

Another class of evidence which was clearly admissible was that tending to show that defendant had sufficient supply of materials and parts of wagons—other than springs—and of labor to keep its factory running to an extent not exceeding that which was usual and customary.

Also evidence to prove the fact of sales in excess of what the factory was able to produce with the shortage of springs. To this end the orders received, either before or after the contract, were relevant, provided they did not exceed such as should have been within the reasonable contemplation of the parties.

We, however, do not deem admissible proof of the profits on the specific vehicles included in these orders, for reasons already stated.

Another class of evidence which, generally, should have been admitted, was that bearing upon whether a market existed from which the defendant, with reasonable diligence, could have supplied itself promptly enough to have avoided other damage by merely paying some enhanced price for springs. In this is involved testimony which was offered that springs in quantity sufficient for factories such as this were ordinarily obtained and obtainable only by contract long enough in advance to enable their manufacture; also description of the springs contracted for, to the extent at least of showing whether they were peculiar in any of their details, so as to be especially adapted to the types of vehicles manufactured by defendant.

Evidence was also admissible to show the diligence exercised by the defendant, after it had reasonable ground to believe that plaintiff would default in seasonable delivery, in the way of attempting to obtain springs elsewhere or to expedite the shipments from plaintiff's place of manufacture, and therein to show representations and promises on the part of the plaintiff which might have induced it to forego efforts which it might otherwise have made; as, for example, in the release or partial release of its former contract with the Lewis Company of Michigan.

Defendant should also be permitted to prove expenses incurred in such reasonably diligent efforts to obtain springs after it ascertained that the plaintiff could not furnish them within the time limit of the contract. • • •

From the foregoing it is of course obvious that the court also erred in directing a verdict in favor of the plaintiff, denying the defendant all recovery upon its third counterclaim. Evidence had been introduced or offered to establish the breach of the contract, to establish, at least, various efforts on the part of the defendant to minimize the damages resulting from that breach, in the way of seeking to obtain springs both from the plaintiff and from others, and that it had succeeded to some extent. Evidence had also been admitted of certain expenses in so doing, although that as to other expenses had been excluded. There was also evidence certainly tending to establish general damages in the line of impairment of the output of the factory, as above discussed, and the long experience of plaintiff in dealing with factories of this general character, so that, even from the evidence actually admitted, the jury might have found facts to warrant some recovery.

Judgment reversed, and cause remanded for a new trial.

NOTE

GUETZKOW BROS. Co. v. ANDREWS & Co., 92 Wis. 215, 66 N.W. 119 (1896). A manufacturer broke its contract to supply the buyer with show cases and other special articles. The buyer had made contracts for the resale of these articles to exhibitors at the Chicago Worlds Fair, at an extraordinary profit of from 100 to 150 per cent. The manufacturer knew when he made his contract that the buyer had made resale contracts with exhibitors but had no reason to know the resale prices or the extent of the profit. There was no established market price for such goods. The court held that the buyer was not entitled to damages measured by the difference between the resale price and the contract price. The buyer failed to offer evidence as to the profit that the manufacturer had reason to expect would be made and was denied recovery of damages for breach.

GRIFFIN v. COLVER, 16 N.Y. 489 (1858). For a seller's delay in making delivery of an engine, the buyer sought to recover damages measured by the profits that he would have made by the use of the engine during the period of delay. The court preferred to measure the damages by the rental value of the use of the engine. There is a lesser degree of uncertainty in the evidence of such rental value than with respect to hoped-for profits. Even had the engine been delivered on time, many other factors would affect profits and losses of a business.

MESSMORE v. N. Y. SHOT & LEAD CO.

Court of Appeals of New York, 1869. 40 N.Y. 422.

The defendants contracted to sell and deliver to the plaintiff in New York 100,000 lbs. of Minie bullets at 7 cents per pound. At the time, the plaintiff had a written contract with the State of Ohio to supply it

with the same quantity of bullets at $7\frac{3}{4}$ cents per pound and cost of transportation to Ohio. Before contracting, the defendant was shown this written contract. The bullets supplied by the defendant were of mixed calibres and useless. The defendant refused to take them back and they were sold for $4\frac{1}{2}$ cents per pound, their reasonable value. When the defect was discovered the plaintiff could not get bullets in the New York market at less than $7\frac{3}{4}$ cents; and in Ohio the market price was 9 cents. Judgment was given for the difference between the contract price and the resale price, less the net amount received from the subsequent sale, plus the cost of transportation to Ohio paid by plaintiff. [Statement is supplied.] The following is from the opinion of MASON, J.

The general rule of damages, ordinarily, is the difference between the contract price and the market value of the article at the time and place of delivery fixed by the contract. This is not the invariable rule in all cases. The general rule is, that the party injured by a breach of a contract, is entitled to recover all his damages, including gains prevented as well as losses sustained, provided they are certain, and such as might naturally be expected to follow the breach. In commodities commonly purchasable in the market, it is safe to say that the purchaser is made whole, when he is allowed to recover the difference between the contract price and the value of the article in the market at the time and place of delivery; because he can supply himself with this article by going into the market and making his purchase at such price, and these are all the damages he is ordinarily entitled to recover, for nothing beyond this is within the contemplation of the parties when they entered into the contract.

This rule, however, is changed when the vendor knows that the purchaser has an existing contract for a re-sale at an advanced price, and that the purchase is made to fulfill such contract, and the vendor agrees to supply the article to enable him to fulfill the same, because those profits which would accrue to the purchaser upon fulfilling the contract of re-sale, may justly be said to have entered into the contemplation of the parties in making the contract. (Griffin v. Colver, 16 N.Y.R., 493.) This rule is based upon reason and good sense, and is in strict accordance with the plainest principles of justice. It affirms nothing more than that where a party sustains a loss by reason of a breach of a contract, he shall, so far as money can do it, be placed in the same situation with respect to damages, as if the contract had been performed.

SCHELL v. PLUMB.

Court of Appeals of New York, 1874. 55 N.Y. 592.

GROVER, J. The contract of the testator to support the plaintiff during her life and his violation thereof are found by the verdict. The judge held that upon these facts the plaintiff was entitled to recover, not only the expense of her support to the commencement of the action, but the entire amount of such expense during her life. To this the defendants excepted, insisting that if the plaintiff was entitled to recover at all, she could only recover for the time prior to the commencement of the action, or at most, to the time of the trial. Upon this question the authorities are somewhat conflicting; but an examination satisfies me that the rule adopted by the judge is sustained by those best considered. *Fish v. Folley*, 6 Hill, 54, was an action upon a covenant of the defendant's intestate with the plaintiff to furnish him with sufficient water from the intestate's mill-dam to carry his fulling mill and carding machine, unlimited in duration. It was held that a previous action in which damages were recovered up to the commencement of the action was a bar to a subsequent action for breaches after the commencement of the former action. Nelson, C. J., says in the opinion that the covenant stipulated for a continued supply of water to the plaintiff's mills, and in this respect may be appropriately styled a continuing contract; yet, like any other entire contract, a total breach put an end to it and gave the plaintiff a right to sue for an equivalent in damages. He obtained that equivalent, or should have obtained it in the former suit. This is in principle precisely analogous to the present case. Here the contract of the testator was to support the plaintiff during her life. That was a continuing contract during that period, but the contract was entire and a total breach put an end to it, and gave the plaintiff a right to recover an equivalent in damages, which equivalent was the present value of her contract. *Shaffer v. Lee*, 8 Barb. 412, was an action upon a bond conditioned to furnish the obligee and his wife with all necessary meat, etc., during both and each of their lives. It was held to be an entire contract, and that a failure to provide according to the substance and spirit of the covenant amounted to a total breach, and that full and final damages might be recovered for the future as well as the past. It is obvious that the right to recover a full equivalent upon a breach is the same when the contract is by parol as when it is evidenced by an instrument under seal. *Dresser v. Dresser*, 35 Barb. 573, was upon a like contract by parol, and it was held that upon a breach the entire damages might be recovered.

The counsel for the appellants insists that such cannot be the rule, for the reason as he insists, that it is impossible to ascertain the damages, as the duration of life is uncertain, and a further uncertainty

arising from the future physical condition of the person. *Guthrie v. Pugsley*, 12 Johns. 126, and *Wager v. Schuyler*, 1 Wend. 553, show that the former reason has no force. In each of these cases the value of a life estate in real estate was determined in actions upon the breach of covenants of warranty, as to which the uncertainty as to the duration of life was the same as in the present case. It may be further remarked that in actions for personal injuries the constant practice is to allow a recovery for such prospective damages as the jury are satisfied the party will sustain, notwithstanding the uncertainty of the duration of his life and other contingencies which may possibly affect the amount. The counsel for the appellants cites cases where it has been held that in actions for a continuing injury to real estate, damages can only be recovered to the commencement of the action, and that subsequent actions may be brought for damages sustained thereafter. This is the undoubted rule in this class of actions, but has no application to actions upon contracts which are entire. Cases are also cited applying the same rule in actions upon covenants to repair. *Beach v. Crain*, 2 N.Y. 86, 49 Am.Dec. 369, was of the latter class. *Ferguson v. Ferguson*, 2 N.Y. 360, was a case, as appears from the facts stated, of a partial and not total breach of the contract, in which it was correctly held that a recovery could only be had for the partial breaches that had occurred. * * *

Judgment affirmed.

QUESTIONS:

1. When can the injured party sue once for all? When must he? See Restatement, Contracts, §§ 312, 313, 316, 317.
2. When can he maintain several suits? When must he?
3. When does a judgment for damages for harm suffered only up to date of suit (or to date of trial) bar any further action?
4. Was not the length of the plaintiff's life so uncertain as to make the decision erroneous? See Restatement, Contracts, § 331.

SECTION 2.—AVOIDABLE HARM—SAVING OF EXPENSE

WIGENT v. MARRS.

Supreme Court of Michigan, 1902. 130 Mich. 609, 90 N.W. 423.

Action by Gardner A. Wigent against Thomas Marrs, administrator of the estate of Chloe R. McClung, deceased. There was a judgment in favor of defendant, and plaintiff brings error. Affirmed.

HOOKER, C. J. Plaintiff recovered a verdict and judgment in an action of assumpsit before a justice of the peace, which was reversed in the circuit court on appeal. The declaration was upon the common counts. The facts were undisputed, and in substance are as follows: In May, 1901, defendant's intestate gave a written order to plaintiff's agents for a monument to be erected upon her lot in the cemetery at the agreed price of \$100, the same to be completed between that date and June 30, 1901, unless unforeseen causes should prevent, and in that event, as soon thereafter as practicable. It was to be set upon a foundation to be erected by her. The contract was approved by the plaintiff on May 14th, of which Mrs. McClung was notified, and at the same time the monument was ordered to be made at the quarry. The latter part of June the plaintiff notified her to get the foundation ready, in response to which she wrote him that he need not bring that monument, as it did not come according to agreement. On July 5th plaintiff replied, stating that the monument was well under way, and he could not allow her to countermand her order; that it would be delivered as soon as completed, and would be strictly according to contract, and she was requested to have her foundation built as soon as possible. In response to this she wrote: "You have not done according to agreement at all. You was to have it up by the 30th of June at the farthest. We are not obliged to wait your motion, so, if you bring it, you may take it back." The plaintiff had the monument completed and set up upon a foundation erected by himself. This action was brought to recover the contract price and \$1.50 for the foundation, with interest from August 23, 1900.

It was shown that the delay was caused by unforeseen circumstances. No complaint was made of the workmanship, which was such that the monument could not be used for any other purpose. The defendant claims that the plaintiff, upon receipt of Mrs. McClung's letter, had no legal right to complete the contract and recover the price; that his only remedy was to recover in damages for a breach of the contract. Plaintiff, on the other hand, claims that it was competent to treat the contract as performed, and that he is entitled to recover the contract price upon the common counts. It is undisputed that defendant unqualifiedly renounced this contract before the monument was completed, and forbade its completion and erection upon her premises. Many authorities hold that she had the right to do this, and thereafter plaintiff's right of recovery would be limited to damages for the breach of the contract involved in the renunciation. In *Mechem, Sales*, § 1091, the author says: "The law is well settled that a party to an executory contract may always stop performance on the other side by an explicit direction to that effect, though he thereby subjects himself to the payment of such damages as will compensate the other for the loss he has sustained by reason of having his performance checked at that

stage in its progress." "The contract is not rescinded, but broken; and, immediately the other party has the right to deem it in force for the purpose of the recovery of his damages, he is under no obligation for that purpose to tender complete performance, nor has he the right to unnecessarily enhance the damages by proceeding after the countermand to finish his undertaking." *Id.* § 1092.

This subject is discussed in the case of *Hosmer v. Wilson*, 7 Mich., at page 305, 74 Am.Dec. 716, where Mr. Justice Christiancy says: "And it is certainly very questionable whether the party thus notified has a right to go on after such notice to increase the amount of his own damages. In *Clark v. Marsiglia*, 1 Denio (N.Y.) 317, 43 Am.Dec. 670, it was held he had no such right, and that the employer has a right (in a contract for work and labor) to stop the work, if he choose, subjecting himself to the consequences of a breach of his contract; and that the workman, after notice to quit work, has no right to continue his labor, and recover pay for it. This doctrine is fully approved in *Derby v. Johnson*, 21 Vt. 21." Mr. Justice Christiancy adds that: "This would seem to be good sense, and therefore sound law; and it would seem that any other rule must tend to the injury, and in many cases to the ruin, of all parties." In the case of *Danforth v. Walker*, 37 Vt. 244, the court said of a similar case: "While a contract is executory, a party has the power to stop the performance on the other side by an explicit direction to that effect by subjecting himself to such damages as will compensate the other party for being stopped in the performance on his part at that point or stage in the execution of the contract. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such increased damages of the other party." See, also, *Butler v. Butler*, 77 N.Y. 472, 33 Am.Rep. 648; *Clause v. Printing Press Co.*, 118 Ill. 612, 9 N.E. 201.

We are cited by plaintiff's counsel to the case of *Black v. Herbert*, 111 Mich. 638, 70 N.W. 138, as a case on all fours with the present case, but we think it is readily distinguishable. In that case, after renunciation the parties met by appointment, and the plaintiff was permitted to alter and set up the monument. It became, therefore, a question for the jury whether or not the contract had been performed. Renunciation must be more than mere idle talk of nonperformance; it must be a distinct, unequivocal, and absolute refusal to receive performance or to perform on his own part. *Mechem, Sales*, § 1087. The party attempting to renounce may withdraw his renunciation and have the contract performed (*Id.* § 1090), and it would seem that the defendant in that case did so. There are only two theories upon which the common counts could be relied upon in this case: First, upon the theory that the contract had been performed, and that the contract price was therefore recoverable; and, second, for the work and material used in the foundation built by the plaintiff. The undisputed facts

show that the contract was not performed on receipt of the renunciation, and there could be no recovery for the erection of the foundation, because the plaintiff was never requested to build it, but, on the contrary, was prohibited from doing anything further in performance of the contract. The only redress that the plaintiff would be entitled to recover would be damages for the breach of the contract if renunciation should be found to be unwarranted, which does not appear.

It follows that the judgment must be affirmed.

QUESTIONS:

1. Why did not the repudiation excuse performance of the condition of completion before suit?
2. Was the plaintiff's proper form of action at common law debt, special assumpsit, or indebitatus assumpsit?
3. Is the decision justified by Restatement, Contracts, §§ 335, 336?

NOTE

It is now almost invariably held that in case of a repudiation before performance by the other party is completed, such other party cannot increase his recovery by continuing to perform. He has a right to damages caused by the breach, enforceable in express assumpsit; also, in the alternative, a right to the value conferred upon the repudiator by part performance, enforceable in indebitatus assumpsit; but he has not a right to the contract price enforceable in debt, nor has he the power to create such a right by continued performance. *Clark v. Marsiglia*, 1 Denio (N.Y.) 317, 43 Am.Dec. 670 (1845), service contract; *Pierce v. Tennessee Coal, Iron & R. Co.*, 173 U.S. 1, 19 S.Ct. 335, 43 L.Ed. 591 (1899).

It is often held that the plaintiff is prima facie entitled to the full contract price as his damages, and that the burden is on the repudiator to show that the plaintiff either did mitigate the loss or reasonably could have done so.

In sales of goods, where title has passed, of course debt lies against a repudiating buyer. Many cases also hold that, where the goods are ready for delivery at the time of repudiation, the seller can vest title in the buyer against his will and then get judgment for the agreed price. See American Uniform Sales Act, § 63(3).

JAMESON v. BOARD OF EDUCATION.

Supreme Court of Appeals of West Virginia, 1915.
78 W.Va. 612, 89 S.E. 255, L.R.A.1916F, 926.

Action by Hallie Janes Jameson against the Board of Education, etc. Judgment for plaintiff, and defendant brings error. Reversed, and judgment entered for defendant.

WILLIAMS, P. Plaintiff recovered a judgment against defendant for \$609.67, the amount of seven months' wages, claimed to be due her on a contract of employment as teacher of music in the public schools of the cities of Benwood and McMechen, in the school district of Union, Marshall county, and by this writ of error defendant seeks a reversal.

Plaintiff declared upon the special contract, averring that she was employed by defendant for a period of nine months, beginning on the 11th of September, 1911, and continuing for nine school months, on an agreed salary of \$75 per month, payable monthly; that throughout the term of employment she stood ready to perform her part of the contract; that she appeared at the schools on the morning of each school day and demanded of the respective superintendents thereof that her work be assigned her; and that she did actually perform her part of the contract. The declaration contains also the common counts in *assumpsit*. The only breach averred is the failure and refusal of defendant to pay the wages for the last seven months of the schools.

Defendant pleaded the general issue, and also tendered a special plea, which the court rejected on motion of plaintiff. It averred that plaintiff had theretofore sued defendant and recovered a judgment against it for \$150, on account of salary claimed by plaintiff for the first two months of school, ending, respectively, on the 6th of October and the 3d of November, 1911; that it was proven, on the trial of that action, that defendant had revoked or attempted to revoke plaintiff's appointment as music teacher, and had refused to permit her to teach, and that she had not, in fact, taught, though she held herself in readiness to do so; and that said judgment is still in force. Wherefore defendant prayed judgment whether plaintiff ought to have or maintain her present action.

The case was tried by the court in lieu of a jury, upon an agreed statement of facts, from which it appears that the plaintiff was not permitted by defendant to teach; that it sued out a writ of injunction to prevent her from continually appearing at the schools for the purpose of teaching, which writ was later dissolved on her motion. It thus appears that plaintiff actually performed no part of the contract, although she was at all times ready to do so, but that she was prevented from performing by defendant.

There was a total breach of the contract by defendant's refusal to permit plaintiff to perform her part of it. Her right of action for that breach was then complete, and it was not necessary for her to appear at the schools each day and demand opportunity to perform the contract. She could not thereby make her cause of action any more perfect than it was the moment she was informed that defendant had refused to be bound by the contract. Her suit is not for damages for a breach of the contract of employment, but is a suit for wages claimed

to be due under the contract, for services which were never actually performed. She seeks to treat the contract as subsisting until the end of the term, and broken only in respect of the promise to pay her the agreed monthly wages. This she cannot do. Having performed no services whatever, she cannot recover upon the promise, as if wages were earned. Her only right of action is for a breach of the contract. It is insisted that she is entitled to recover on account of constructive service; that, being always ready and willing to perform the contract, she should be regarded in law as having actually performed it. That doctrine was first announced by Lord Ellenborough in *Gandell v. Pontigny*, 4 Campbell, 375, a nisi prius case decided in 1816, in which he held that a servant employed for a quarter and wrongfully discharged before the end thereof might recover upon an indebitatus assumpsit count for wages for the entire quarter.

Although that doctrine was followed in a few later cases, it has long since been repudiated as unsound both in England and in a majority of the states of the Union. The Court of King's Bench in 1828 held that: "If the contract between master and servant be the usual one for a year, determinable at a month, the servant, if turned away improperly, cannot recover on a count stating the contract to be for an entire year; and he cannot, on the common count for wages, recover for any further period than that during which he had served." *Archard v. Hornor*, 3 Car. & P. 349. See, also, *Smith v. Hayward*, 7 Ad. & E. 544, 112 Eng.Rep. 575; *Goodman v. Pocock*, 15 Q.B. 576.

In the case last cited plaintiff hired for a year, and was wrongfully dismissed in the middle of a quarter. He brought an action for his wrongful dismissal; the declaration containing a special count therefor. The jury were instructed not to take into account the services actually rendered during the broken quarter, as they were not recoverable except upon an indebitatus count, and they gave damages accordingly. He then brought a second action to recover on an indebitatus count for services rendered during the broken quarter, and the court held that it could not be maintained. In his opinion, at page 580, Lord Campbell says: "He might then have rescinded the contract, and have recovered pro rata on a quantum meruit. But he did not do this; he sued on the special contract, and recovered damages for a breach of it. By this course he treated the contract as subsisting; and he recovered damages on that footing. It is said that he recovered in that action in respect of no services except those of the past quarters. I receive with profound respect the opinion which the illustrious judge who tried the former action is said to have expressed: but I have a clear opinion, and I must act upon it, that the jury, in assessing damages for the wrongful dismissal, ought to have taken into the account the plaintiff's salary up to the time of his dismissal. It is said there is now no plea to raise the point. The plea of non assumpsit is quite sufficient. It

obliges the plaintiff to show a debt due; and that could be only by showing that work was done for which payment could be claimed under the common count."

Coleridge, J., in his opinion in the same case, says: "In a case like this the servant may either treat the contract as rescinded and bring *indebitatus assumpsit*, or he may sue on the contract, but he cannot do both; and, if he has two counts, he must take the verdict on one only. Here the plaintiff elected to sue on the contract; and he cannot now sue in this form."

The following English cases are to the same effect: *Elderton v. Emmens*, 6 C.B. 160, 136 Eng.Rep. 1213, affirmed in House of Lords, 13 C.B. 495, 138 Eng.Rep. 1292; and *Beckham v. Drake*, 2 House of Lords Cases, 579.

The constructive service doctrine was followed for a while by the courts of New York, but was later repudiated. The Court of Appeals of that state, in *Howard v. Daly*, 61 N.Y. 362, 19 Am.Rep. 285, expressly disapproves the doctrine of *Gandell v. Pontigny*, *supra*, and overrules the earlier New York decisions. In that case plaintiff was employed to act at the Fifth Avenue Theater, in such capacity and manner as defendant might direct, and was to be paid a salary of \$10 a week during the season, beginning about September 15, 1870, and continuing until about July 1, 1871. There, as in this case, plaintiff was prevented by the defendant from entering upon the discharge of her engagement, and, in fact, never rendered any actual service. The court held that she could not maintain an action for wages, but could sue only for breach of the contract, and that it was not necessary to tender her services after the breach. * * *

The peculiar doctrine of successive liability for loss of wages, as if upon a contract of continuing indemnity, announced by the Minnesota court in *McMullan v. Dickinson*, 60 Minn. 156, 62 N.W. 120, 27 L. R.A. 409, 51 Am.St.Rep. 511, to be the proper rule, where a servant has been wrongfully discharged, we do not find to be followed by any other court. Such a rule produces a multiplicity of suits for one and the same wrong, and tends to encourage idleness in the discharged servant. Although wrongfully discharged, a servant still owes a duty, both to himself and to society, to be diligent in trying to secure other employment. A recovery once had, whether it be upon a count for damages for a breach of the contract or upon an *indebitatus assumpsit* count for services which could have been rendered, bars subsequent recovery. For the breach of an entire contract the party aggrieved has a right to recover in the one action all damages, prospective as well as past. 2 Sedgwick (9th Ed.) § 636g; *Willoughby v. Thomas*, 24 Grat. (Va.) 521; *Lamoreaux v. Rolfe*, 36 N.H. 33; *Wilkinson v. Dunbar*, 149 N.C. 20, 62 S.E. 748; *Sutherland v. Wyer*, 67 Me

64; *Litchenstein v. Brooks*, 75 Tex. 196, 12 S.W. 975, and *Monarch Cycle Mfg. Co. v. Mueller*, 83 Ill.App. 359.

That the contract in this case was entire needs no discussion. Plaintiff's declaration alleges that she was employed for a period of nine months—a school year. Having declared on the special contract for wages which she claimed to be due thereunder, the performance of the services for which they were to be paid is put in issue by the general plea, and the agreed facts prove that plaintiff actually performed no services whatever, and therefore her suit must fail, unless her declaration may properly be regarded as a suit for damages for the breach of the contract for her employment. This question we need not determine, for the reason that, if it could be so regarded, her former recovery is a complete bar to the present action.

The judgment will be reversed, and, it being apparent from the agreed facts that plaintiff could not make out any better case if a new trial should be awarded, judgment will be entered here for defendant.

QUESTIONS:

1. If plaintiff had continued to teach, with consent of defendant, could the plaintiff have maintained separate suits for unpaid wages? Was the contract "entire"? See Restatement, Contracts, §§ 313, 317.
2. After her wrongful discharge, could the plaintiff have maintained suit for quantum meruit? See Restatement, Contracts, § 347.
3. Would judgment for quantum meruit have barred a later suit for damages for subsequent loss? See Restatement, Contracts, §§ 381, 384.
4. Was it the plaintiff's duty to look for another job? See Restatement, Contracts, § 336.
5. Was \$75 the exact exchange agreed upon for each month's service?

NOTE

Two judges dissented, holding in a vigorous opinion (here omitted) that the plaintiff could maintain several actions for damages, though not adopting the constructive service doctrine.

There is a direct conflict as to whether several actions are maintainable for breach of contracts of this kind.

In *Ryan v. Mineral County High School Dist.*, 27 Colo.App. 63, 146 P. 792 (1915), the school board elected plaintiff as principal of the high school at a salary of \$1,200. It later repudiated this and offered him a position as principal of a grammar school at the same salary. He refused this. It was held that he was entitled to nominal damages only.

TORKOMIAN v. RUSSELL et al.

Supreme Court of Errors of Connecticut, 1916. 90 Conn. 481, 97 A. 760.

Action by Baron J. Torkomian against William E. Russell and another. From a judgment for plaintiff, defendants appeal. Reversed, and new trial ordered.

WHEELER, J. The finding recites that: On November 1, 1913, the defendants were dealers in automobiles in Waterbury and agents for the sale of the Lozier make of automobile. On said day the plaintiff and the defendants entered into a written contract by the terms of which the defendants agreed to sell the plaintiff a Lozier 6 automobile, to deliver the same between April 15 and May 1, 1914, and to accept in part payment a used Studebaker car at the agreed price of \$700, and to give the plaintiff their note for \$700 payable to plaintiff or order on demand in consideration of the Studebaker car. The plaintiff in consideration of the promises of the defendants agreed to pay \$3,250 for the Lozier car and not to demand payment of the \$700 note unless the defendants failed to deliver the Lozier car. From about the beginning of 1914, down to the delivery period, the plaintiff repeatedly expressed his unwillingness to take the Lozier 6, and desired defendants to substitute another car, which they refused to do. The defendants were ready and willing to deliver the Lozier 6 at the delivery period; but, by reason of plaintiff's expressed unwillingness to accept the car if delivered, the defendants did not make actual physical delivery. Up to May 1, 1914, and at no time thereafter, did the defendants have a Lozier car in their possession for delivery to the plaintiff, and they took no steps to procure a car for the plaintiff and to deliver the same to him. * * *

The agreement expressly provides that the note is not to be demanded unless the defendants failed to deliver the car at the period named. The defendants pleaded, and it is found, that the plaintiff had notified the defendants for upwards of five months and down to the period of delivery named that he would not accept the Lozier 6. The defendants were entitled to act upon the assumption that the plaintiff meant what he said, and they were not required to go through the idle ceremony of making a physical tender. They did all that they were obliged to do when, having the means of getting the car, they "were ready and willing to deliver the Lozier 6 automobile at the time specified for delivery in said contract." *Adams v. Turner*, 73 Conn. 38, 46, 46 A. 247; *Smith v. Lewis*, 26 Conn. 110, 118. There has been no failure on the part of the defendants to deliver this car, and the judgment, so far as the action upon the note was concerned, should have been for the defendants.

The remaining reasons of appeal that require consideration are based upon the measure of damages for the defendants adopted by the trial court. In count 1 of the complaint the plaintiff seeks to recover for the defendants' breach of their contract, and in count 2 upon the \$700 note. The defendants alleged under their special defense to both counts and as a basis of recovery on their counterclaim, that the plaintiff had notified them that he would not accept the car contracted for, if tendered, and, further, that they had lost in consequence of this breach of contract by the plaintiff seven hundred dollars. The defendants, if entitled to recover under their counterclaim, were entitled to recover under our common law such sum as would put them, so far as it can be done by money, in the same position they would have been in if the contract had been performed.

In the absence of special circumstances requiring a different rule, the damages recoverable by a vendor for refusal to take goods contracted for is the difference at the time and place of delivery, between the contract price and the market price. *Jordan Marsh & Co. v. Patterson et al.*, 67 Conn. 480, 35 A. 521. But we recognize that this rule is not an unbending one, that the circumstances may require its modification in order to effectuate the cardinal purpose, "just compensation for the loss incurred." And the loss must be such as "may reasonably be supposed to have been in the contemplation of the parties at the time they made the contract." *Jordan Marsh & Co. v. Patterson et al.*, 67 Conn. 480, 35 A. 521. Section 64 of the Sales Act (Public Acts 1907, c. 212) reaffirms our rule for measuring damages in case of breach of a contract of sale by the contractee or vendee.

The market price to these defendants of a Lozier 6 was undoubtedly less than its selling price, since they were selling agents who purchased, and took title to the cars they disposed of. Section 64 provides as a measure of damages the difference between the contract price and the market price "in the absence of special circumstances showing proximate damage of a greater amount." The circumstance that these defendants were selling agents and purchased cars at a rate lower than the market price of the cars to the public made the ordinary measure of damages inadequate. The defendants lost by the plaintiff's breach the difference between the contract price and what the car ready for physical delivery to the plaintiff would have cost them, which would have been the purchase price of the car plus the expense, if any, of delivery and of making it ready for delivery. This is the application to the facts of this case of section 64. It requires the person who has failed to keep his contract of sale to pay the loss caused to the contractor who has kept his contract. *Lee v. Harris*, 85 Conn. 212, 82 A. 186. The defendants, as vendors or contractors, were entitled to show what a Lozier 6 car would have cost them in the same way a manufacturer might show the cost of an article manufactured by him.

The defendants would thus recover the profits they would have made had the plaintiff carried out his contract. In such a case profits are not speculative, but certain and ascertainable, and the legitimate fruits of the contract. *Roehm v. Horst*, 178 U.S. 1, 21, 20 S.Ct. 780, 44 L.Ed. 953; *Dimmick v. Hendley*, 117 Md. 458, 84 A. 171; *Poppenberg v. Owen & Co.*, 84 Misc.Rep. 126, 146 N.Y.S. 478. * * *

Since the defendants retained the Studebaker car and the agreed price of this car was \$700, the plaintiff should be allowed this sum, and the defendants should be allowed their profit had the plaintiff fulfilled his contract. The judgment should have been for the difference between these sums and for the plaintiff if the \$700 exceeded the profit, and for the defendants if the profit exceeded the \$700.

There is error, the judgment is reversed, and a new trial ordered. In this opinion the other Judges concurred.

QUESTIONS:

1. Did the dealer commit a breach of contract, either by failure to deliver the Lozier or by failure to pay the \$700 note?
2. Was the plaintiff's refusal to take the Lozier an anticipatory breach?
3. Why should not the dealer's measure of damages be the contract price of the car less its market value? Would this have put the dealer in as good a position as full performance would have done?

HOLLERBACH & MAY CONTRACT CO. v. WILKINS.

Court of Appeals of Kentucky, 1908. 130 Ky. 51, 112 S.W. 1126.

Action by J. Arch Wilkins against the Hollerbach & May Contract Company. Judgment for plaintiff, and defendant appeals. Affirmed.

BARKER, J. This is an action for the breach of an alleged contract between appellee and appellant for the sale and delivery by the former to the latter of 4,000 cubic yards of broken rock to be used in constructing lock and dam No. 6 in Green river. Appellee alleged in his petition that appellant, a corporation, had secured the contract from the United States government to construct the lock and dam in question, and that in the construction of this work is needed about 4,000 cubic yards of broken stone of dimensions not less than one-half cubic foot nor larger than what a man could handle; that he entered into a contract with appellant by which he undertook to furnish it with the stone, and it agreed to pay him therefor 60 cents per cubic yard delivered on barges in Green river; that, after making this contract with him, the appellant willfully and arbitrarily broke it, and refused to permit him to go on with it. The damages were laid in the petition at \$1,-

250, and were said therein to consist of \$250 expended in opening up the quarry in order to get out the stone, and \$1,000 which the appellee could have made in profit had he been allowed to execute his contract as made with appellant. The appellant in its answer denied the existence of the contract, and this was the real issue between the parties, although there are several questions discussed in the briefs. A trial of the case resulted in a verdict in favor of appellee for \$500 and from the judgment based upon that verdict this appeal is prosecuted. * * *

The court did not err in not instructing the jury that it was the duty of the appellee, even if there was a breach of the contract, to use reasonable diligence to sell the stone contracted for to other parties. The principle for which counsel for appellant contend has no application to a contract like the one under discussion. It is true, where there is a contract for personal services, and there is a breach, the party whose services are to be engaged may not sit down and supinely permit the amount of his damages to grow. It is his duty to seek employment elsewhere, and the other party is only liable to the extent of the injury after the exercise of ordinary diligence by the complainant to obtain other employment still leaves him a sufferer by reason of the breach. In the case in hand the appellee had a rock quarry, and, although it might be true that he could have sold 4,000 cubic yards of rock to another party, that would not have diminished his damages in not being allowed to carry out his contract with appellant, because he was entitled, if he could, to sell all the rock in his quarry; and it in no wise minimized the damages he may have sustained by the breach of appellant's contract that he might, perchance, have sold 4,000 yards of broken rock to some one else. This is quite different from a contract for personal services. There the contract cannot be performed for two different parties, and, when the employer refuses to carry out his contract for the personal services of the servant, the latter must look for another employer, and thus reduce the damages, arising from the breach, as much as possible.

We do not mean to be understood as limiting the application of the principle of avoidance of damages to breaches of contracts for personal service; on the contrary, the rule is of much broader application, and it would, perhaps, not be going too far to say that the duty of those complaining of violations of contracts to minimize their damages as much as the exercise of reasonable diligence will accomplish is the general rule appertaining to the right to recover damages therefor. The complainant should reduce his damages whenever the principle can be applied without sacrificing any substantial right. A fair illustration of the general application of the rule may be found in the supposition that the breach of the contract under discussion had been by appellee's refusing to deliver to appellant the stone contracted for. It would in the supposed case have been the duty of appellant to go out

into the market and buy the stone, and it could only hold appellee liable for the difference between the contract price and what it had to pay for the stone on the market. This, from the very nature of the case, would cover all the damage it sustained by the breach of the contract. But the same principle is not applicable to the breach of contract complained of in this record. Appellee was entitled to enjoy the benefit of the profits of his contract with appellant, and, if he could have made as beneficial a contract with another, he was entitled to the benefits of that also. In other words, he was entitled to carry forward as many such contracts as he could make, and, if he succeeded in making more than one, he was entitled to both profits. Receiving the profits of one such contract would not tend to recoup his loss by reason of the breach of another. Sedgwick on Damages (8th Ed.) § 608. It was not necessary for the appellee to expressly offer to go on with the contract after the breach. He was informed by the appellant that it had contracted for the stone from another party, and it was therefore useless for him to make a formal tender of the stone to it. The law does not require the doing of a useless act.

Upon the whole case no substantial error was committed against appellant, and the judgment is therefore affirmed.

QUESTIONS:

1. Why was not the measure of damages the contract price of the 4,000 yards less their market value?
2. Should the plaintiff recover the contract price with no deductions whatever? See Restatement, Contracts, §§ 335, 336.

PAYZU, Limited, v. SAUNDERS.

In the Court of Appeal. [1919] 2 K.B. 581.

The defendant contracted to deliver certain installments of silk to the plaintiff, each installment to be paid for within thirty days, with a specified discount. The first installment was delivered, but the check sent in payment therefor was never received, and actual payment was thus greatly delayed. The defendant erroneously believed that the delay was caused by the buyer's inability to pay, and therefore refused to deliver any more silk, except on payment of cash. The plaintiff refused to pay cash and sued for breach.

The court held that under the Sale of Goods Act mere nonpayment not accompanied by repudiation did not justify the refusal of the defendant to deliver. The plaintiff appealed on the question of damages.

BANKES, L. J. At the trial of this case the defendant, the present respondent, raised two points: First, that she had committed no

breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of $2\frac{1}{2}$ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned judge has given judgment upon that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this Court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. Upon this point *McCardie, J.*, referred to *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673, 689, where Lord Haldane, L.C., said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James, L.J., in *Dunkirk Colliery Co. v. Lever* (1878) 9 Ch.D. 20, 25: 'What the plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract. The person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'" It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondent had treat-

ed his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON, L. J. I am of the same opinion. Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach," and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, per Lord Haldane, L.C., [1912] A.C. 673, 689. Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

Appeal dismissed.

QUESTIONS:

1. Why was not the defendant's repudiation justified?
2. Is not the requirement as to avoidance of injury unreasonably humiliating to the plaintiff?

NOTE

"Duty" to Mitigate Damages. In *Rock v. Vandine*, 106 Kan. 588, 189 P. 157 (1920), the defendant made a counterclaim for damages caused by inferior flour supplied by the plaintiff. The flour was unfit for bread as usually made, but was later used by the defendant as a permitted war-time substitute for flour. Mr. Justice Burch said:

"The plaintiff says it was the defendant's duty to mitigate his damages by using the flour in the way which would occasion the least possible loss. The defendant claimed nothing on account of loss of custom before he was permitted to make inferior bread under the substitute regulation. When the regulation became effective, he did use the flour in the most beneficial way.

"In this connection it may be observed that, according to the classification of jural relations proposed by the late Prof. Hohfeld, of Yale University, the term 'duty' is misapplied in the statement of the plaintiff's contention relating to the defendant's counterclaim. The classification follows:

Jural Opposites	{ right	privilege	power	immunity
	{ no right	duty	disability	liability
Jural Correlatives	{ right	privilege	power	immunity
	{ duty	no right	liability	disability

Hohfeld, *Fundamental Legal Conceptions*, p. 65; 26 *Yale L.Jour.* 710.

"According to this classification, which appears to be sound, and which, if observed, ought to conduce to clarity of thought and precision of expression, the defendant rested under no duty to the plaintiff to mitigate damages by using the flour to the best advantage. If so, he himself would have been subject to an action for damages resulting from breach of the duty. The correct statement would be that the defendant rested under legal disability to counterclaim for damages which he might have prevented."

See *Restatement, Contracts*, § 336.

SEGALL v. FINLAY et al.

Court of Appeals of New York, 1927. 245 N.Y. 61, 156 N.E. 97.

Action by Harry Segall, doing business under the trade-name and style of Butler-Ward & Co., against George H. Finlay and others. Judgment for plaintiff on report of a referee (126 Misc. 625, 213 N. Y.S. 540) was affirmed by the Appellate Division, First Department (218 App.Div. 723, 218 N.Y.S. 895), and defendants appeal. Affirmed.

O'BRIEN, J. In February, 1923, appellants were dealers in sugar in New York, and respondent was a sugar broker in Chicago. On the 27th and 28th of that month telephone conversations occurred and telegraph messages were exchanged between them in respect to a proposed sale of sugar for future delivery. The complaint alleges a contract whereby defendants agreed to sell and deliver to plaintiff 4,000 tons at 5½ cents per pound cost and freight New York. The referee has found on sufficient evidence, and the Appellate Division has affirmed by a divided court subsequent to July 15, 1926, that the conversations as confirmed by the messages constitute a contract whereby defendants promised to make such a sale for future delivery, that plaintiff complied in all respects with his agreement, that defendants

repudiated it on the day it was made, and that plaintiff accepted the repudiation as final on March 12th.

The only issue seriously to be considered relates to damages. Between February 28th, the date of repudiation by defendants, and March 12th several communications were exchanged between the parties and their attorneys. On the second date plaintiff accepted the repudiation as final and notified defendants that he would hold them responsible for all loss and damage. Under the agreement, defendants were entitled to delay until April 30th to begin transportation from Cuba, for the contract was "at 5½ cents cost and freight New York, April shipment from Cuba." By the usual means of transportation the cargo would, in that event, have arrived at New York May 8th. A sugar exchange exists in New York, where forward contracts for future delivery could be made. The difference between the contract price and the market value or the market price of a similar contract was \$22,400 on February 28th and \$50,400 on March 12th. The difference between the contract price and the market price on April 30th was \$106,400. The market value on those dates was the same in Cuba and New York. The difference between the contract price and the market price in New York on May 8th was \$84,000. This agreement belongs to the class known as open market contracts. Such contracts for future delivery cover an actual quantity of sugar and this one ran against a specific cargo, or was, at least, a contract for part of a specific lot of sugar. Its terms, the same as those included within the last contract which had been executed between the parties, provide that insurance was to be covered by the seller, and was to be charged to the buyer at the customary rate. In short, it was an agreement to transfer property in a specific lot of sugar which was to leave Cuba April 30th and to arrive at New York May 8th, the buyer to pay a price which includes cost and freight (Williston on Sales [2d Ed.] p. 621), and also to reimburse the seller for insurance.

Plaintiff urges that the measure of damages is the difference between the contract price and the market price at the time when the sugar *ought to have been delivered* and that such a time was April 30. Defendants argue that the measure is the difference, on the date of the anticipatory breach, between the contract price and the market price of a similar contract for April delivery and that such a date was February 28th.

February 28th is not the proper date for fixing damages. It is true that defendants repudiated the agreement on that day, but for two weeks thereafter the plaintiff attempted to conduct negotiations with them for the purpose of inducing them to fulfill it. Not until March 12th did he entirely relinquish all hope of success, and only then did he accept the repudiation as final. It did not ripen into a complete breach before plaintiff's election to treat it as such. The view seems to pre-

vail that, as long as plaintiff reasonably entertained hope of compliance and had not accepted the repudiation as final, no anticipatory breach had occurred. *Roehm v. Horst*, 178 U.S. 1, 20 S.Ct. 780, 44 L. Ed. 953; Williston on Sales, § 585. Nor do we think that March 12th, the date of the breach, ought to be regarded as proper. To select that date would require a disregard of section 148 of the Personal Property Law (Cons. Laws, c. 41). That section provides by subdivisions 1 and 3 that, where the property in the goods has not passed to the buyer and where there is an available market for them, the measure of damages is the difference between the contract price and the market price of the goods *at the time when they ought to have been delivered*. No one can reasonably contend that the goods ought to have been delivered either on February 28th or March 12th. The inquiry leads to a consideration of the question whether the date for the fixation of damages is April 30th, when the sugar should have left Cuba, or May 8th, when it should have arrived in New York. The answer to this question is controlled by the intention of the parties relating to the time and place of *delivery*. No property in the goods ever passed to the buyer, for even the sellers had no title at the times they made and repudiated their contract.

This contract in many respects resembles a c. & f. contract. Except for the provision relating to insurance it would constitute nothing else. The agreement that marine insurance from shore to shore, including risk of lighters, should be charged to the buyer, renders difficult any other inference than one of an intent that the buyer would be responsible for loss during the voyage, that the sellers would divest themselves of responsibility when the sugar left the shore of Cuba, and that delivery was contemplated there. Under the contract, therefore, Cuba must be considered the place, and under the stipulation April 30 was the time when the delivery ought to have been made. Such presumptions as ordinarily arise from commercial usage respecting c. & f. contracts (Williston on Sales [2d Ed.] pp. 621, 624) prevail in this case.

The judgment should be affirmed, with costs.

QUESTIONS:

1. Is the measure of damages for an anticipatory breach different from that for a breach at the date agreed upon for performance? See Restatement, Contracts, § 338.
2. Was it not the plaintiff's duty on February 28 to buy sugar in the market for delivery April 30, so as to avoid unnecessary loss?
3. Is the court's theory as to the date of breach correct? See Restatement, Contracts, §§ 318, 320.

NOTE

Compare *Melachrino v. Nickoll & Knight*, [1919] 1 K.B. 693, where, in advance of the time for delivery, a seller repudiated a contract to sell cotton seed. The buyer at once accepted the repudiation as final. Prices declined, so that at the date set for delivery the market price was less than the contract price. Only nominal damages were given. The court said:

"In my opinion the true rule is that where there is an anticipatory breach by a seller to deliver goods for which there is a market at a fixed date the buyer without buying against the seller may bring his action at once, but that if he does so his damages must be assessed with reference to the market price of the goods at the time when they ought to have been delivered under the contract. If the action comes to trial before the contractual date for delivery has arrived the Court must arrive at that price as best it can.

"To this rule there is one exception for the benefit of the defaulting seller—namely, that if he can show that the buyer acted unreasonably in not buying against him the date to be taken is the date at which the buyer ought to have gone into the market to mitigate damages."

In *Kadish v. Young*, 108 Ill. 170, 43 Am.Rep. 548 (1883), it was held that, where the seller did not accept the buyer's anticipatory repudiation as final, the contract remained as before and the seller's right to damages was not limited by the market price at the date of repudiation. The seller was held to be safe in waiting and tendering performance as agreed, without making another forward contract for the sale of a similar quantity. It may be questioned whether the injured party should ever be required to make a risky "forward contract," speculative in character, in order to mitigate loss. Suppose it increases the loss! *Stephen M. Weld & Co. v. Victory Mfg. Co.* (D.C.) 205 F. 770 (1913). See Restatement, Contracts, § 338; Uniform Sales Act, § 67; Beale, *Damages upon Repudiation*, 17 Yale L.Jour. 443; also Comment, 17 Yale L.Jour. 611; Williston, *Sales*, § 589.

SECTION 3.—RECOVERY OF EXPENDITURES AS DAMAGES

UNITED STATES v. BEHAN.

Supreme Court of the United States, 1884.
110 U.S. 338, 4 S.Ct. 81, 28 L.Ed. 168.

Appeal from the Court of Claims.

BRADLEY, J. Behan, the appellee and claimant, filed a petition in the court below, setting forth that on the twenty-sixth of December, 1879, one John Roy entered into a contract with C. W. Howell, major of en

gineers of the United States army, to make certain improvements in the harbor of New Orleans (describing the same), and that the claimant and two other persons named became bondsmen for the faithful performance of the work; that on February 10, 1881, the contract with Roy was annulled by the engineer office, and the bondsmen were notified that they had a right to continue the work under the contract if they desired to do so, and that the claimant complied with this suggestion and undertook the work; that he went to great expense in providing the requisite machinery, materials, and labor for fulfilling the contract, but that in September, 1881, it being found, by the report of a board of engineers, that the plan of improvement was a failure, without any fault of the claimant, the work was ordered to cease; that thereupon the claimant stopped all operations, and disposed of the machinery and materials on hand upon the best terms possible, and sent to the war department an account of his outlay and expenses, and the value of his own time, claiming as due to him, after all just credits and offsets, the sum of \$36,347.94, for which sum he prayed judgment. The claimant afterwards filed an amended petition, in which the various transactions and his operations under the contract were set forth in greater detail, showing, among other things, that the amount of his expenses for machinery and tools, for materials, and for labor and operations carried on, after deducting the proceeds realized from the sale of the plant remaining when the work was suspended, amounted to the sum of \$33,192.90. The petition further alleged that the claimant could have completed the work contemplated by the contract by a further expense of \$10,000, and that the amount which would then have been due therefor would have been \$52,000, leaving a profit to him of \$8,807.10. The petition concluded as follows: "Your petitioner therefore respectfully shows that his reasonable and necessary expenditures upon the work above described amounted to \$33,195.92, which sum represents the losses actually sustained by petitioner by reason of the defendants' breach of the contract. And petitioner further sets forth that the reasonable and legitimate profits which he might have obtained but for the said breach of contract may be properly computed at \$8,807.10, assuming \$52,000 as the amount to be paid for the completed work. And petitioner further shows that he has not received one dollar from the defendants on account of said work, but that his claim and accompanying accounts, presented to the engineer department, have been transmitted to this court by the secretary of war. Your petitioner therefore alleges that he is entitled to receive from the United States the sum of forty-two thousand dollars (\$42,000) over and above all just credits and offsets. Wherefore he prays judgment for that amount."

The court of claims found the material facts to be substantially as stated in the petition. The contract of Roy is set forth in full in the

findings, from which it appears that the contracting party was required to furnish and lay down an artificial covering of cane-mats over the sloping portion of the riverbed of the Mississippi in front of the third district of New Orleans, to extend outwards to a depth in the river not exceeding 100 feet, and to be paid therefor at the rate of 65 cents per square yard. The court finds that Roy prosecuted the work under the contract during the year 1880, but his progress not being satisfactory to the engineer officers, the contract was formally annulled and the bondsmen notified, as stated in the petition. In March, 1881, Behan, the claimant, gave notice to Maj. Howell that he would undertake the work, and at his request the major gave him a description of the work to be done, estimated as not exceeding 77,000 or 80,000 square yards, which, at the contract price, would amount to from \$50,000 to \$52,000.

The court further finds as follows: "The contract was of such a character as to require extensive preparations and a large initial expenditure. The claimant made the necessary preparations for carrying on the work to completion, and in procuring boats, tools, materials, and apparatus for its prosecution. He engaged actively in carrying out the contract on his part, incurred large expenditure for labor and materials, and had for some time proceeded with the work when the undertaking was abandoned by the defendants and the work stopped, without fault of the claimant, as set forth in the following letters:" Then follows a copy of correspondence between the officers and the department of engineers, showing that a board of engineer officers was appointed to examine and report upon the plan of improvement under which the work of the claimant was being carried on, and that this board, on the twenty-third of September, 1881, reported their unanimous opinion that the object sought to be accomplished by the improvement had not been attained, and that under the then existing plan of operations it could not be attained. On the twenty-ninth of September, 1881, the claimant received notice to discontinue the work, which he did at once, and gave Maj. Howell notice to that effect, and called his attention to the exposed situation of the machinery, materials, and other property on hand, and requested instructions respecting the same. No instructions appear to have been given.

The court then finds as follows: "The claimant thereupon closed up his work and sold the materials which he had on hand. Nothing has been paid to him for work, materials, or losses. The actual and reasonable expenditures by the claimant in the prosecution of his work, together with his unavoidable losses on the materials on hand at the time of the stoppage by the defendants, were equal to the full amount claimed therefor in his petition—\$33,192.20. It does not appear from the evidence thereon on the one side and the other whether or not the claimant would have made any actual profit over and above expendi-

tures, or would have incurred actual loss had he continued the work to the end and been paid the full contract price therefor.

“Conclusion of Law.

“Upon the foregoing findings of facts the court decides as a conclusion of law that the claimant is entitled to recover the sum of \$33,-192.20.”

The government has appealed from this decree, and complains of the rule of damages adopted by the court below. Counsel contend that, by making a claim for profits, the claimant asserts the existence of the contract as opposed to its rescission; and that in such case the rule of damages, as settled in *Speed's Case*, 8 Wall. 77, 19 L.Ed. 449, is “the difference between the cost of doing the work and what claimants were to receive for it, making reasonable deduction for the less time engaged, and for release from the care, trouble, risk, and responsibility attending a full execution of the contract.” And when such a claim is made, they contend that the burden of proof is on the claimant to show what the profits would have been; and as the court of claims expressly finds that it does not appear from the evidence whether or not the claimant would have made any profits, or would have incurred loss, therefore the claimant was not entitled to judgment for any amount whatever.

The manner in which the subject was viewed by the court of claims is shown by the following extract from its opinion: “Whatever rule may be adopted in calculating the damages to a contractor when, without his fault, the other party, during its progress, puts an end to the contract before completion, the object is to indemnify him for his losses sustained and his gains prevented by the action of the party in fault, viewing these elements with relation to each other. The profits and losses must be determined according to the circumstances of the case and the subject-matter of the contract. The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part, and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable to him, had he been permitted or required to go on and complete his contract, may be taken in consideration. * * * The amount of the claimant's unavoidable expenditures and losses already incurred are set forth in the findings. But we can give him nothing on account of prospective profits, because none have been proved. So, for the same reason, we can deduct nothing from his expenditures on account of prospective losses which he might have incurred had he not been relieved from completing his contract. This leaves his expenditures as the only damage proved to have resulted to him from the defendant's breach of contract, and are, therefore, the proper measure of damages under all the circumstances of the case.”

We think that these views, as applied to the case in hand, are substantially correct. The claimant has not received a dollar, either for what he did, or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses.

The *prima facie* measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely,—First, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract. The second item, profits, cannot always be recovered. They may be too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires. But when, in the language of Chief Justice Nelson, in the case of *Masterson v. Mayor of Brooklyn*, 7 Hill, 69, they are “the direct and immediate fruits of the contract,” they are free from this objection; they are then “part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the fulfillment of any other stipulation.” Still, in order to furnish a ground of recovery in damages, they must be proved. If not proved, or if they are of such remote and speculative character that they cannot be legally proved, the party is confined to his loss of actual outlay and expense. This loss, however, he is clearly entitled to recover in all cases, unless the other party, who has voluntarily stopped the performance of the contract, can show the contrary.

The rule, as stated in *Speed’s Case*, 2 Ct.Cl. 429, is only one aspect of the general rule. It is the rule as applicable to a particular case. As before stated, the primary measure of damages is the amount of the party’s loss, and this loss, as we have seen, may consist of two heads

or classes of damage—actual outlay and anticipated profits. But failure to prove profits will not prevent the party from recovering his losses for actual outlay and expenditure. If he goes also for profits, then the rule applies as laid down in *Speed's Case*, and his *profits* will be measured by "the difference between the cost of doing the work and what he was to receive for it," etc. The claimant was not bound to go for profits, even though he counted for them in his petition. He might stop upon a showing of losses. The two heads of damage are distinct, though closely related. When profits are sought a recovery for outlay is included and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits. When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed. It does not lie, however, in the mouth of the party, who has voluntarily and wrongfully put an end to the contract, to say that the party injured has not been damaged at least to the amount of what he has been induced fairly and in good faith to lay out and expend (including his own services), after making allowance for the value of materials on hand; at least it does not lie in the mouth of the party in fault to say this, unless he can show that the expenses of the party injured have been extravagant, and unnecessary for the purpose of carrying out the contract. * * *

It is to be observed that when it is said in some of the books that where one party puts an end to the contract the other party cannot sue on the contract, but must sue for the work actually done under it, as upon a *quantum meruit*; this only means that he cannot sue the party in fault upon the stipulations contained in the contract, for he himself has been prevented from performing his own part of the contract upon which the stipulations depend. But, surely, the willful and wrongful putting an end to a contract, and preventing the other party from carrying it out, is itself a breach of the contract for which an action will lie for the recovery of all damage which the injured party has sustained. The distinction between those claims under a contract which result from a performance of it on the part of the claimant, and those claims under it which result from being prevented by the other party from performing it, has not always been attended to. The party

who voluntarily and wrongfully puts an end to a contract, and prevents the other party from performing it, is estopped from denying that the injured party has not been damaged to the extent of his actual loss and outlay fairly incurred. * * *

We think that the judgment of the court of claims was right, and it is affirmed.

QUESTIONS:

1. Was this a suit for damages or for restitution?
2. Would the proper form of action at common law for the recovery of the amount expended be special assumpsit or indebitatus assumpsit?
3. Would the plaintiff's recovery be affected if the defendant should prove that full performance by the plaintiff would have cost more than the full contract price?
4. Is the following formula correct: Actual Expenditures plus Expected Net Profit equals Full Contract Price minus Cost of Completion?

NOTE

Restatement Contracts, § 333, is entitled "When Damages May Be Measured by Expenditures in Part Performance;" and § 346 is entitled "Damages for Breach of a Construction Contract."

At this point, compare *Globe Refining Co. v. Landa Cotton Oil Co.*, ante, and the NOTE following it.

GROSSE v. PETERSEN, 30 Cal.App. 482, 158 P. 511 (1916). The defendant contracted to manufacture soap for the plaintiff, by the plaintiff's secret formula, with an ingredient supplied by the plaintiff. The defendant delivered inferior soap, not according to the formula and containing too little of the special ingredient. The plaintiff sued for damages, alleging that he had paid \$4,167 to the defendant for the inferior soap delivered, and had expended \$3,344 for the special ingredient supplied to the defendant and \$5,066 in creating a market for his soap. In the opinion it is said that the evidence showed that the plaintiff had spent \$10,577, no break-down as to the purposes for which it was spent being stated. The plaintiff had received \$6,942 from sales of the soap delivered to him. The court held that a verdict for \$3,500 was justified.

In this case the profits that the plaintiff would have made but for the defendant's breach can not be determined. Not being able to measure his damages by the value of the promised performance or the amount of "gains" prevented by the breach, it is reasonable to measure his recovery by the amount of his expenditures that the defendant had reason to foresee, less the amount of his receipts. The defendant knew

the purpose for which he was employed to make the soap; and he had ample reason to foresee the three kinds of expenditure alleged in the complaint. The first amount mentioned was paid directly to the defendant. The second amount was spent for materials to be used by the defendant.

As to the third amount, spent for advertising, something more must be said. No doubt the defendant had reason to foresee such expenditures in reliance on his promise; and it may be supposed that the amount alleged was not excessive. But the expenditure for advertising was not in the course of performance of the contract by the plaintiff, and is therefore not within the rule in Restatement, Contracts, § 333. It is, however, within the most general rule of all, as to compensatory damages for losses caused and gains prevented by the breach. Restatement, § 329. The expenditure for advertising was not caused by the defendant's breach; but it was his breach that caused this expenditure to become futile by preventing the possibility of reimbursement through profitable sales. The recovery of such an expenditure as damages for breach should not be allowed except so far as the breach has caused it to be a net loss. Doubts as to this "net" should be resolved, within limits, in favor of the injured party.

Suppose that the plaintiff had built himself a fine house in reliance on the defendant's promise to manufacture the plaintiff's soap, as the defendant well knew. The defendant's breach does not affect the market value of the house, although it may affect the plaintiff's ability to maintain it. Should any part of the cost of the house be included in the damages awarded?

NOTE

Consider the cases dealing with Substantial Performance in Chapter 6, Conditions. Can a builder who has rendered substantial performance (but less than full and exact performance) maintain an action for the full agreed price? Is such a builder's recovery restricted to the reasonable value of what he has done, not exceeding the contract price? Does the defendant in such a case have a counterclaim for damages and how should they be measured? See especially *Nolan v. Whitney*, ante, p. 620; *Jacob & Youngs v. Kent*, ante, p. 623; Restatement, Contracts, § 346.

OTHER REMEDIES FOR BREACH OF CONTRACT

The previous edition of this casebook contained a few cases dealing with the remedies of Restitution and Specific Performance. They are omitted from this edition merely because the time allowed to a first year course on Contracts is too short to deal with them adequately and other courses dealing with them are everywhere offered. The student is advised, even though it is no substitute for the comparative

study of cases, to read all of those portions of Chapter 12 of the Contracts Restatement that deal with Restitution, Specific Performance, and Election of Remedies.

The reading of the Restatement, which has the appearance of being a series of crystallized rules and doctrines, must not lead to the serious error of ascribing to our system of law a degree of certainty and definiteness that is greater than it actually has, either in its formal statement or in its application to living cases. The law of Remedies, like all the rest of the law, consists of tentative working rules that are inductively drawn from the thousands of judicial decisions rendered over hundreds of years. They represent, with a greater or less degree of accuracy, the efforts of the courts to give judicial sanction to the existing social mores as to the keeping of promises, both by preventing breaches of contract so far as is reasonably possible and by compelling satisfactory reparation for breaches that have already occurred.

It is not always realized that most courts of the present day have both the power and the duty to administer remedial law with a high degree of flexibility, having at their command a number of different remedies among which to choose the one or more most suitable to the particular case. The narrow limitations that were inherent in the old complex system of courts, each with its restricted jurisdiction and special procedure, and in the "forms of action" that prevailed in the courts of common law, have been in large measure abolished. To attain fully the purposes of the modern system, it is necessary to know all the remedies that are available, the nature and extent of each of them, and their relations to each other.

In distinguishing Restitution from Damages, as a remedy for breach of contract, the Restatement, Contracts, § 347, Comment *b*, says: "When the remedy given for breach of a contract is money damages, the amount awarded is determined with the purpose of putting the injured party in as good a position as he would have occupied, had the contract been fully performed by the defendant. In granting restitution as a remedy for breach, however, the purpose to be attained is the restoration of the injured party to as good a position as that occupied by him before the contract was made. It is obvious that neither remedy may fully attain the purpose for which it exists. In some cases the remedy of restitution involves the restoration to the plaintiff of a specific thing (see section 354); but in the great majority of cases this remedy merely requires a payment in money by the defendant of the value of the consideration received by him from the plaintiff as a part or full performance of the contract. The consideration so received may be of any kind, commonly consisting of services rendered, forbearance given, money or other property transferred, or the use of property temporarily enjoyed."

DECLARATORY JUDGMENTS AND DECREES

In case of repudiation or other vital breach by one party, it is often possible for the other party to get a declaratory decree that he is himself thereby discharged from duty. Such a decree is one form of "remedy" for breach of contract; but it is merely declaratory of already existing legal relations, the existence of which is determined by the facts that have occurred. Whether these facts are thus operative is a question to be answered by applying the rules that are considered in other chapters herein.

In like manner, it is sometimes possible to obtain a declaratory decree that there has been no vital breach and that the party alleging such breach is still bound by the contract. It is not often that such a decree as this has been sought.

These declaratory decrees, although not creating new legal relations, are nevertheless judicial in character. They decide an issue, either of fact or of law, and cause it to be *res judicata*. Such judgments and decrees are often provided for by statute; but they were known to the law in many classes of cases independently of statute.

SECTION 4.—PENALTIES AND LIQUIDATED DAMAGES

JAQUITH v. HUDSON

Supreme Court of Michigan, 1858. 5 Mich. 123.

Hudson and Jaquith dissolved partnership and executed a written agreement whereby Jaquith transferred his interest in the business and its assets to Hudson and the latter gave his promissory note for the agreed price. The writing contained this provision: "Jaquith agrees that he will not engage in the mercantile business in Trenton, for the space of three years, upon the forfeiture of one thousand dollars, to be collected by Hudson as his damages." In a suit by Jaquith on Hudson's note, the latter counterclaimed for the one thousand dollars as damages. It was proved that Jaquith had re-opened business within 80 rods of the old store in less than three months and was continuing operation; but no proof was offered as to the amount of injury caused thereby. Hudson's counterclaim was sustained. [The statement of facts is condensed.]

CHRISTIANCY, J. * * * The second exception raises the single question, whether the sum of one thousand dollars, mentioned in the

covenant of Jaquith not to go into business in Trenton, is to be construed as a penalty, or as stipulated damages—the plaintiff in error insisting it should be construed as the former, the defendant as the latter.

We shall not attempt here to analyze all the decided cases upon the subject, which were read and cited upon the argument, and which, with others, have been examined. It is not to be denied that there is some conflict, and more confusion, in the cases—judges have been long and constantly complaining of the confusion and want of harmony in the decisions upon this subject. But, while no one can fail to discover a very great amount of apparent conflict, still it will be found, on examination, that most of the cases, however conflicting in appearance, have yet been decided according to the justice and equity of the particular case. And while there are some isolated cases (and they are but few), which seem to rest upon no very intelligible principle, it will be found, we think, that the following general principles may be confidently said to result from, and to reconcile, the great majority of the cases both in England and in this country:

First. The law, following the dictates of equity and natural justice, in cases of this kind, adopts the principle of just compensation for the loss or injury actually sustained; considering it no greater violation of this principle to confine the injured party to the recovery of less, than to enable him by the aid of the court, to extort more. It is the application, in a court of law of that principle long recognized in courts of equity, which, disregarding the penalty of the bond, gives only the damages actually sustained. This principle may be stated, in other words, to be, That courts of justice will not recognize or enforce a contract, or any stipulation of a contract, clearly unjust and unconscionable; a principle of common sense and common honesty so obviously in accordance with the dictates of justice and sound policy, as to make it rather matter of surprise that courts of law had not always, and in all cases, adopted it to the same extent as courts of equity. And, happily for the purposes of justice, the tendency of courts of law seems now to be towards the full recognition of the principle, in all cases.

This principle of natural justice, the courts of law, following courts of equity, have, in this class of cases, adopted as the law of the contract; and they will not permit the parties by express stipulation, or any form of language, however clear the intent, to set it aside; on the familiar ground, "*coventus privatorum non potest publico juri derogare.*"

But the court will apply this principle, and disregard the express stipulation of parties, only in those cases where it is obvious from the contract before them, and the whole subject-matter, that the principle of compensation has been disregarded, and that to carry out the ex-

press stipulation of the parties, would violate this principle, which alone the court recognizes as the law of the contract.

The violation, or disregard, of this principle of compensation, may appear to the court in various ways,—from the contract, the sum mentioned, and the subject-matter. Thus, where a large sum (say one thousand dollars) is made payable solely in consequence of the non-payment of a much smaller sum (say one hundred dollars), at a certain day; or where the contract is for the performance of several stipulations of very different degrees of importance, and one large sum is made payable on the breach of any one of them, even the most trivial, the damages for which can, in no reasonable probability, amount to that sum: in the first case, the court must see that the real damage is readily computed, and that the principle of compensation has been overlooked, or purposely disregarded: in the second case, though there may be more difficulty in ascertaining the precise amount of damage, yet, as the contract exacts the same large sum for the breach of a trivial or comparatively unimportant stipulation, as for that of the most important, or of all of them together, it is equally clear that the parties have wholly departed from the idea of just compensation, and attempted to fix a rule of damages which the law will not recognize or enforce.

We do not mean to say that the principle above stated as deducible from the cases, is to be found generally announced in express terms, in the language of the courts; but it will be found, we think, to be necessarily implied in, and to form the only rational foundation for, all that large class of cases which have held the sum to be in the nature of a penalty, notwithstanding the strongest and most explicit declarations of the parties that it was intended as stipulated and ascertained damages.

It is true, the courts in nearly all of these cases profess to be construing the contract with reference to the intention of the parties, as if for the purpose of ascertaining and giving effect to that intention; yet it is obvious from these cases, that wherever it has appeared to the court, from the face of the contract and the subject-matter that the sum was clearly too large for just compensation, here, while they will allow any form of words, even those expressing the direct contrary, to indicate the intent to make it a penalty, yet no form of words, no force of language, is competent to the expression of the opposite intent. Here, then, is an intention incapable of expression in words; and as all written contracts must be expressed in words, it would seem to be a mere waste of time and effort to look for such an intention in such a contract. And as the question is between two opposite intents only, and the negation of the one necessarily implies the existence of the other, there would seem to be no room left for construction with

reference to the intent. It must, then, be manifest that the intention of the parties in such cases is not the governing consideration.

But some of the cases attempt to justify this mode of construing the contract with reference to the intent, by declaring, in substance, that though the language is the strongest which could be used to evince the intention in favor of stipulated damages, still, if it appear clearly, by reference to the subject-matter, that the parties have made the stipulation without reference to the principle of just compensation, and so excessive as to be out of all proportion to the actual damage, the court must hold that they could not have intended it as stipulated damages, though they have so expressly declared. See, as an example of this class of cases, *Kemble v. Farren*, 6 Bing. 141.

Now this, it is true, may lead to the same result in the particular case, as to have placed the decision upon the true ground; viz., that though the parties actually intended the sum to be paid, as the damages agreed upon between them, yet it being clearly unconscionable, the Court would disregard the intention, and refuse to enforce the stipulation. But, as a rule of construction, or interpretation of contracts, it is radically vicious, and tends to a confusion of ideas in the construction of contracts generally. It is this, more than anything else, which has produced so much apparent conflict in the decisions upon this whole subject of penalty and stipulated damages. It sets at defiance all rules of interpretation, by denying the intention of the parties to be what they, in the most unambiguous terms, have declared it to be, and finds an intention directly opposite to that which is clearly expressed—“*divinatio, non interpretatio est, quae omnino recedit a litera.*”

Again the attempt to place this question upon the intention of the parties, and to make this the governing consideration, necessarily implies that, if the intention to make the sum stipulated damages should clearly appear, the court would enforce the contract according to that intention. To test this, let it be asked, Whether, in such a case, if it were admitted that the parties actually intended the sum to be considered as stipulated damages, and not as a penalty, would a court of law enforce it for the amount stipulated? Clearly, they could not, without going back to the technical and long exploded doctrine which gave the whole penalty of the bond, without reference to the damages actually sustained. They would thus be simply changing the names of things, and enforcing, under the name of stipulated damages, what in its own nature is but a penalty.

The real question in this class of cases will be found to be, not what the parties intended, but whether the sum is, in fact, in the nature of a penalty; and this is to be determined by the magnitude of the sum, in connection with the subject-matter, and not at all by the words or the understanding of the parties. The intention of the parties cannot

alter it. While courts of law gave the penalty of the bond, the parties intended the payment of the penalty as much as they now intend the payment of stipulated damages; it must, therefore, we think, be very obvious that the actual intention of the parties, in this class of cases, and relating to this point, is wholly immaterial; and though the courts have very generally professed to base their decisions upon the intention of the parties, that intention is not, and can not, be made the real basis of these decisions. In endeavoring to reconcile their decisions with the actual intention of the parties, the courts have sometimes been compelled to use language wholly at war with any idea of interpretation, and to say "that the parties must be considered as not meaning exactly what they say." *Horner v. Flintoff*, 9 M. & W. 678, per Park, B. May it not be said, with at least equal propriety, that the courts have sometimes said what they did not exactly mean?

The foregoing remarks are all to be confined to that class of cases where it was clear, from the sum mentioned and the subject-matter, that the principle of compensation had been disregarded.

But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore better able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage, or what sum will amount to a just compensation. The reason, therefore, for allowing the parties to ascertain for themselves the damages in this class of cases, is the same which denies the right in the former class of cases; viz., the courts adopt the best and most practicable mode of ascertaining the sum which will produce just compensation.

In this class of cases, where the law permits the parties to ascertain and fix the amount of damages in the contract, the first inquiry obviously is, Whether they have done so in fact? And here, the intention of the parties is the governing consideration; and in ascertaining this intention, no merely technical effect will be given to the particular words relating to the sum, but the entire contract, the subject-matter and often the situation of the parties with respect to each other and

to the subject-matter, will be considered. Thus, though the word "penalty" be used (*Sainter v. Ferguson*, 7 M.G. & S. 716; *Jones v. Green*, 3 Y. & Jer. 299; *Pierce v. Fuller*, 8 Mass. 223), or "forfeit" (*Nobles v. Bates*, 7 Cow. 307), or "forfeit and pay" (*Fletcher v. Dycke*, 2 T.R. 32), it will still be held to be stipulated damages, if, from the whole contract, the subject-matter, and situation of the parties, it can be gathered that such was their intention. And in proportion as the difficulty of ascertaining the actual damage by proof is greater or less, where this difficulty grows out of the nature of such damages, in the like proportion is the presumption more or less strong that the parties intended to fix the amount.

It remains only to apply these principles to the case before us. It is contended by the plaintiff in error, that the payment of the one thousand dollars mentioned in the covenant of Jaquith is not made dependent solely upon the breach of the stipulation not to go into business in Trenton, but that it applies equally—first, to the agreement to sell to Hudson his interest in the goods; second, to sell his interest in the books, notes, accounts, etc.; and, third, to the agreement to dissolve the partnership. But we can perceive no ground for such a construction. The language in reference to the sale of the interest in the goods, books, notes, accounts, etc., and that in reference to the dissolution, is not that of a sale in futuro, nor for the dissolution of the partnership at a future period, but it is that of a present sale and a present dissolution—"does hereby sell," and "the copartnership is hereby dissolved," is the language of the instrument. It is plain, from this language, from the subject-matter, and from all the acts of the parties, that these provisions were to take, and did take, immediate effect. There could be no possible occasion to provide any penalty or stipulated damages for the nonperformance of these stipulations, because this sale and dissolution would already have been accomplished the moment the contract took effect for any purpose; and, until it took effect, the stipulation for the one thousand dollars could not take effect, or afford any security; nor would Hudson be bound or need the security. But it remained to provide for the future. If Jaquith were to be at liberty to set up a rival store in the same village, it might seriously affect the success of Hudson's business; and we are bound to infer, from the whole scope of this contract, that Hudson would never have agreed to pay the consideration mentioned in it, nor to have entered into the contract at all, but for the stipulation of Jaquith "that he will not engage in the mercantile business in Trenton, for himself or in connection with any other one, for the space of three years from this date, upon the forfeiture of the sum of one thousand dollars, to be collected by said Hudson as his damages." This stipulation of Jaquith not to go into business, is the only one on his part which looks to the future; and it is to this, alone, that the language

in reference to the one thousand dollars applies. Any other construction would do violence to the language, and be at war with the whole subject-matter.

The damages to arise from the breach of his covenant, from the nature of the case, must be not only uncertain in their nature, but impossible to be exhibited in proof, with any reasonable degree of accuracy, by any evidence which could possibly be adduced. It is easy to see that while the damages might be very heavy, it would be very difficult clearly to prove any. Their nature and amount could be better estimated by the parties themselves, than by witnesses, courts, or juries. It is, then, precisely one of that class of cases in which it has always been recognized as peculiarly appropriate for the parties to fix and agree upon the damages for themselves. In such a case, the language must be very clear to the contrary, to overcome the inference of intent (so to fix them), to be drawn from the subject-matter and the situation of the parties; because, it is difficult to suppose, in such a case, that the party taking the stipulation intended it only to cover the amount of damages actually to be proved, as he would be entitled to the latter without the mention of any sum in the contract, and he must also be supposed to know that his actual damages, from the nature of the case, are not susceptible of legal proof to anything approaching their actual extent. That the parties actually intended, in this case, to fix the amount to be recovered, is clear from the language itself, without the aid of a reference to the subject-matter,—“upon the forfeiture of the sum of one thousand dollars, to be collected by the said Hudson as his damages.” It is manifest from this language that it was intended Hudson should “collect,” or, in other words, receive this amount, and that it should be for his damages for the breach of the stipulation. This language is stronger than “forfeit and pay,” or “under the penalty of,” as these might be supposed to have reference to the form of the penal part of a bond, or to the form of action upon it, and not to the actual “collection” of the money.

It is, therefore, very clear, from every view we have been able to take of this case, that it was competent and proper for the parties to ascertain and fix for themselves the amount of damages for the breach complained of, and equally clear that they have done so in fact. From the uncertain nature of the damages, we can not say that the sum in this case exceeds the actual damages, or that the principle of compensation has been violated. Indeed, it would have been perhaps difficult to discover a violation of this principle had the sum in this case been more than it now is; though, doubtless, even in such cases as the present, if the sum stated were so excessive as clearly to exceed all reasonable apprehension of actual loss or injury for the breach, we should be compelled to disregard the intention of the parties, and treat the sum only as a penalty to cover the actual damages to be exhibited

in proof. In this case the party must be held to the amount stipulated in his contract.

NOTE

After a breach of contract has occurred, creating a claim for damages, the courts have encouraged arbitration and have favored compromises. If, however, the amount of a claim is liquidated and certain, the courts have generally refused to enforce a promise by the creditor to accept less than the amount due as full satisfaction or a promise by the debtor to pay more than the amount due. See *Foakes v. Beer* in Chapter 2. Claims for damages for an existing breach are practically always unliquidated; and a mutual agreement fixing the amount of damages to be paid in full settlement is in accord with the public interest and is enforceable. See Chapter 9, Discharge of Contract, for the law as to Accord Executory and Accord and Satisfaction.

The same can not be said with respect to provisions, agreed upon at the time a contract is being made, for the arbitration of disputes that may arise in the future or fixing an amount of money that shall be paid in case of a future breach. A distinction is drawn between "penalties" and "liquidated damages." For centuries it has been common practice to secure the payment of borrowed money, or the rendition of some other performance, by the execution of a bond with a penalty. For centuries, also, on failure of the payment or performance thus secured, the courts enforced the penalty prescribed. This was so at common law, although enforcement of such a bond as was given by Antonio to Shylock could be avoided. The magic of the written word, reinforced by the even greater magic of a waxen seal, was far too great for either private citizen or judge to disregard. Eventually, however, the Lord Chancellor broke the magic spell. One who borrowed £100 and gave bond in the penal sum of £200 to be paid on failure to repay the amount borrowed on the agreed day, was given relief from the penalty in equity. The creditor would be prevented by injunction from getting or enforcing a judgment at law for the £200. It is the Chancellor's law that is the law of today; and as between private contractors a penal bond creates only an obligation to indemnify the obligee for the loss that may be suffered by reason of non-performance of the condition of the bond.

A similar principle is applicable to a provision in an ordinary contract for the payment of a specified amount of money in case of a future breach. If the amount so specified is disproportionate to the injury that the subsequent breach may cause, it will be called a "penalty" and will not be enforced. If, however, the injury if it shall occur will be uncertain in amount and difficult of being made certain by evidence, and if the amount agreed upon in advance appears to be an honest and reasonable pre-estimate of the future injury by the parties themselves, the contract provision is enforceable. The question has arisen in many thousands of cases; and there has been some variation in the stated rules by which the line between a penalty and liquidated damages has been drawn. See *Restatement, Contracts*, §§ 339, 340.

A provision for the payment of a specified sum of money for each day's delay in the completion of a building as required by the contract has often

been enforced, the injury suffered by failure to obtain the use of the building generally being difficult to estimate. The amount so payable must bear some reasonable relation to the value of the building and to the purposes for which it is to be used, or it will not be enforced. A contractor who has totally abandoned performance will not be compelled to go on paying the agreed amount forever.

A contract with a provision for liquidated damages in case of breach is not a contract for the performance of either of two alternatives. A court may regard the promised damages as inadequate to do complete justice and decree specific performance in accordance with the primary obligation.

An agreed valuation of property, to be paid in return for its transfer or in case of its injury or loss, is not a provision for either a penalty or liquidated damages, unless other factors show that the form of valuation was used in order to conceal a different intention.

See *Topeka v. Industrial Gas Co.*, 135 Kan. 646, 11 P.2d 1034 (1932), and *Kansas City v. Industrial Gas Co.*, 138 Kan. 755, 28 P.2d 968 (1934), for cases in which judgment for the full penalty of a surety bond was sustained because the bond was given as required by a contract for the construction of a pipe line for natural gas, the contract declaring that the amount of the bond should be liquidated damages. Bond and contract were construed together.

When payment of a specified sum of money is provided for in a contract, the following questions are worth consideration. Was the amount intended by the parties as

- (1) the agreed price or value of specific property or service?
- (2) one of two alternatives either of which is the agreed exchange for a return promise or performance?
- (3) an agreed pre-estimate of the harm that will be caused by a breach, to be paid and accepted in full satisfaction?
- (4) an amount specified in *terrorem* with the purpose of assuring the rendition of some other desired performance—that is, a penalty?
- (5) as a mere limitation of the extent of risk that is assumed?

If the intention is found to be as in (1), it is practically always made legally effective.

Even if the language of the contract corresponds with (2), extrinsic evidence may convince the court that the intention was as in either (3) or (4). If the specified amount is greatly disproportionate to the reasonable value of the other alternative, this weighs strongly in the direction of (4).

If the intention is found to be as in (3), it will be made legally effective unless the amount is so disproportionate to the harm that could reasonably be foreseen (or to the harm that is actually caused) that its enforcement would be punishment, not compensation.

Whatever the actual intention may have been, if enforcement will make the provision operate as in (4), and not as compensation for harm, it will not be enforced.

If the intention is found to be as in (5) it will be given legal effect. In a surety bond, the amount of the bond limits the liability of the surety, though not that of the principal obligor on his primary contract; but even a principal obligor can limit the extent of his liability in damages for nonperformance, by properly expressing such intention.

CHAPTER 9

DISCHARGE OF CONTRACTUAL DUTIES

SECTION 1.—RELEASE AND COVENANT NOT TO SUE

BRADEN et al. v. WARD.

Supreme Court of New Jersey, 1880. 42 N.J.L., 518.

A judgment for \$1,941.89 had been obtained, and this was a proceeding for the enforcement of that judgment. The judgment debtor had paid \$1,200 to the creditor in satisfaction of this judgment and had been given a release under seal.

REED, J. * * * They contend further, however, that there has been no satisfaction of this judgment. This contention is based upon the fact that Braden received only \$1,200 for a judgment for \$1,941, and the rule is invoked that the payment of a less sum will not satisfy a debt. *Cumber v. Wane*, 1 Smith's Lead.Cas. 439; *Daniels v. Hatch*, 21 N.J.L. 391, 47 Am.Dec. 169.

One of the exceptions to this rule is when the payment is acknowledged by a release under seal. "But if the obligee or feoffee do at the day receive a part, and thereof make an acquittance, under his seal, in full satisfaction of the whole, it is sufficient by reason of the deed amounteth to an acquittal." Co.Litt. 212b.

There was such an acquittal given by Braden to Ward & Rutherford.

The relators contend, again, that the character of a sealed instrument has been so changed by the act of 1875 (Rev. p. 387, § 52) that the acquittance has lost its common-law signification.

The act reads, that "In every action upon a sealed instrument, or where a set-off is founded on a sealed instrument, the seal shall be only presumptive evidence of a sufficient consideration, which may be rebutted, as if such instrument was not sealed."

I do not think this act aids the relators. If this statute includes within its operation sealed instruments like the release attacked, and it were permissible to inquire into its consideration, I do not see how it would invalidate this acquittance.

This act received a construction in the case of *Aller v. Aller*, 40 N. J.L. 449. It was in that case held that the design of the act was not

to change the character of a sealed instrument not shown to be fraudulent or illegal. It was held that a voluntary gift made under seal was enforceable—that in sealed instruments where it was evident no consideration was intended, the absence of a consideration was not essential.

By the same reasoning, when it appears that the consideration which the parties intended to pass, actually did pass, the instrument is valid. That is the admitted fact concerning the consideration for this release.

But the act was never intended to operate upon, and its terms do not include a release under seal. This release is not a sealed instrument upon which an action is brought, nor upon which a set-off is founded. This seems too obvious for discussion.

If any authority for such a view is requisite, it is found in the construction placed upon it by the courts of New York, whence this act comes.

It is found set out in the opinion in the case of *Calkins v. Long*, 22 Barb. (N.Y.) 99, where the act is construed, and also in the case of *Gilleland, Ex'r, v. Failing*, 5 Denio (N.Y.) 308.

In *Stearns v. Tappin*, 5 Duer. (N.Y.) 294, it was expressly held that the statute did not apply to a release under seal.

NOTE

Just as the sealing and delivery of a promise in writing were operative at common law to make the promise enforceable, so also the sealing and delivery of a writing expressly releasing another person from some specified obligation, or in any clear language discharging a claim against him, was legally operative according to its terms even though no consideration was given in exchange. As has appeared previously herein, the law of sealed instruments has been greatly affected by statutes in most jurisdictions. Statutes that declare a seal to be totally inoperative destroy this method of making a gift discharge. Such a statute may be accompanied, however, by another statute giving to any release in writing the same effect that it would have had at common law if it had been under seal.

If a release that is not under seal is executed in exchange for a sufficient consideration, it is now operative according to its terms, although at early common law the primary obligation created by a contract under seal could not be thus discharged. See Restatement, Contracts, §§ 402-404. There would seem to be no good reason for refusing to hold that an unsealed release for which no consideration is given will be made operative by a substantial change of position by the released party in reasonable reliance on it. A rule to this effect could easily be drafted by analogy to Restatement, Contracts, § 90, applicable to promises. To a limited extent, this is recognized by Restatement, Contracts, § 415, which states that a duty may be discharged by the obligee's refusal to receive performance when due or his assent to its omission as soon as

there has been a material change of position by the obligor in reliance thereon. But this section is expressly limited to "a duty under a unilateral or independent contractual obligation other than one to transfer land or to pay money."

STIEBEL v. GROSBERG, 202 N.Y. 266, 95 N.E. 692 (1911). The action was brought to recover the amount of a promissory note. The defendant set up in defense a written release, signed, sealed and delivered by the plaintiff. On the trial the plaintiff testified that the defendant had applied to him for a release, stating, in substance, that he had been sick and had lost all that he had; that one of his creditors had commenced action against him; that he could not pay and would be compelled to go into bankruptcy unless he could stave it off; that he considered the plaintiff's claim a debt of honor which he would pay when he was able to do so; that he wanted a release which he would only use provided he was forced into bankruptcy; if he did not have to go through bankruptcy, he would return it. He further proved that the defendant had not been forced into bankruptcy.

The court answered the following question in the affirmative: Can a written release under seal be shown to have been delivered conditionally upon the happening of an event in the future, with an oral agreement that it should be returned in case the event did not happen?

QUESTIONS:

1. Is parol evidence admissible to prove that a written contract, unconditional on its face, was made conditional on some event by express agreement at the time of delivery? See *Pym v. Campbell*, ante p. 504, and *Atlas Petroleum Co. v. Cocklin*, ante p. 501.
 2. If bankruptcy had occurred would the plaintiff have had a valid claim therein for the amount of the note?
 3. On the facts as proved, was there a temporary suspension of the plaintiff's right to payment of the note?
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GIBBONS v. VOUEILLON, 8 C.B. 483 (1849). In an action by a creditor for the collection of his debt, the defendant pleaded that the plaintiff and other creditors had executed their agreement under seal to the effect that the defendant should be permitted to carry on his business for five years without making payment of the debts, and that if any creditor should molest him by bringing suit for collection during the five years the defendant should be instantly released from the debt sued for and should be able to plead the sealed agreement in bar of the

suit. The plaintiff brought this suit within the five year period; and the court held that the defendant pleaded a good defense thereto.

QUESTIONS:

1. Was the defendant's debt discharged at the moment that the agreement was executed?
 2. If the plaintiff had forbore to press for payment for five full years, could he then have maintained an action for the debt?
 3. Did the agreement operate as a temporary suspension of the plaintiff's right to payment?
 4. Was the agreement a conditional future release, with a condition precedent to its operation as a release? See Restatement, Contracts, §§ 402-404.
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DOWSE v. JEFFERIES.

In the Court of Common Pleas, 1594. 1 And. 307.

Dowse brought action of debt against Jefferies on obligation. The defendant pleaded in bar that the plaintiff by his deed indented since the making of the obligation granted to the defendant that he would not prosecute or molest the said defendant Jefferies by reason of the said obligation before the feast of St. John the Baptist, 1590, and demanded judgment. To this there was a demurrer, and the court adjudged that it was no bar, but rather a covenant of which the defendant could take advantage in his own behalf and not otherwise, and so the words and the intent of the covenant appear to be; for it does not appear that he is never at any time to sue the defendant on this obligation, but that he is not to sue him before a certain day, there being a great difference between these two cases. Where the covenant is like this one, until a certain time only, the damage is not so great as in the case where suit is never to be brought. In the one case damages are not to be recovered except in accordance with the harm that the defendant suffers by the suit's being brought before the proper time, and in the other case for the entire amount of the obligation and other loss sustained by the suit and recovery on the obligation. In the latter case, in order to avoid circuity of action, there is ground for allowing the covenant to be pleaded in bar of the action, but not in the former case; for in such a case it would not accord with either the words or the intent of the party plaintiff.

NOTE

See *Aloff v. Scrimshaw*, 2 Salk. 573 (1689), "The ground of the decision in this case appears to be that a personal action once suspended by the act of the party is gone forever; therefore the covenant must be either an

absolute discharge, or a mere covenant; the former of which, being manifestly repugnant to the intent, shall not be implied." S. c., *Ayloff v. Scrimshire*, Carth, 63, 1 Show. 46.

LACY v. KINNASTON.

In the King's Bench, 1702. Holt, K.B. 178.

This case is not stated in the books; but only that it was held by HOLT, C. J., that a perpetual covenant never to take any advantage of a deed or covenant, is a release or defeasance of that deed or covenant; as where a man enters into an obligation to another, who covenants never to take any advantage, or to sue him upon that bond; here if afterwards an action of debt should be brought upon it, in such case the obligor may plead this covenant in bar to the action, for the obligee by his covenant hath deprived himself of all the remedy he could have upon this bond. But if A. B. and C. D. are jointly and severally bound in a bond to E. F. who covenants never to sue C. D. upon that bond; this is no release or defeasance of the bond, because it doth not discharge the right, only the remedy against C. D. for he still hath a right of action against the other obligor; and therefore if the obligee should bring an action of debt upon this bond against C. D. he is put to his action of covenant against the obligee, upon the covenant entered into.

QUESTIONS:

1. Did the covenant operate as a temporary suspension of the debt?
See Restatement, Contracts, § 405?
2. If the defendant uses the covenant only as the basis of a counter-claim, what is the measure of his damages?

FORD v. WILLIAM BEECH.

In the Exchequer Chamber, 1848. 11 Q.B. 852.

PARKE, B., in this vacation (February 3d), delivered the judgment of the Court.

This is a writ of error brought to reverse a judgment of her Majesty's Court of Queen's Bench. The declaration is in assumpsit, and contained five counts. The first count is upon a promissory note, dated May 28th, 1839, made by the defendant, for the sum of £140 and interest, payable to the plaintiff twelve months after date; the second count is also on a promissory note, made by the defendant, for the sum of £200, payable with interest to the plaintiff, two years after date. It

is unnecessary to advert to the other counts in the declaration, or to the pleadings connected with them. Judgment has been given upon them for the defendant; and no question arises in respect of that judgment.

The defendant pleaded, to the first count, that he did not make the note therein mentioned, and the like plea to the second count. Upon these pleas issues were joined, and verdicts have been found upon them for the plaintiff. The defendant also pleaded, to both the first and second counts, that, after the making of the notes in those counts respectively mentioned, and after the same notes respectively became due, it was agreed, between the plaintiff, the defendant and one Alfred Beech, that the said Alfred Beech should and would, at the request of the plaintiff, pay to the plaintiff, in trust for Elizabeth Beech, the sum of £200 for her own sole use and benefit, or the sum of £25 per annum so long as the sum of £200 should remain unpaid, which sum of £25 should be paid quarterly as therein mentioned; and that the rights and causes of action of the plaintiff upon and in respect of the said two several notes should be suspended so long as the said A. B. should continue to pay the said sum off £6 5s. every quarter; the payments to commence as therein set forth. The plea proceeds to aver that the said A. B. duly paid the annual sum of £25 quarterly according to the agreement. The plaintiff, in his replication to this plea, traversed the allegation of the payments alleged to have been made by Alfred Beech of the annual sum of £25; and a verdict was found for the defendant upon the issue joined upon that traverse. And, judgment having been given by the Court of Queen's Bench for the defendant upon the verdict so found, the present writ of error has been brought to reverse that judgment, upon the ground that, non obstante veredicto upon the matters in that plea, judgment ought to have been given for the plaintiff upon both the first and second counts. The plaintiff has brought his writ of error, praying for a reversal of this judgment.

And, upon the argument before us, the learned counsel for the plaintiff has contended that the plea of the defendant to the first and second counts of the declaration is bad, and sets forth no matter which is in law a bar to his right of recovery upon those counts. Upon the part of the plaintiff, the validity of the agreement mentioned in the plea is not denied; but it has been insisted, in the argument before us, that the agreement does not in point of law operate as a suspension of the plaintiff's right of action or power to sue for the recovery of the notes mentioned in the first and second counts in the declaration; and that the plea, which sets up the agreement in bar of the present action, is bad, and furnishes no answer to the action, although such agreement may give the defendant a claim to damages by reason of the plaintiff suing in breach of it. The defendant, on the other hand, has contended before us that the legal operation of the agreement is to sus-

pend the plaintiff's right of action so long as A. B. shall continue to make the quarterly payments; and such agreement has therefore been well pleaded in bar. The question for the decision of the Court is, therefore, what is the legal effect of the agreement between the parties, set forth in the plea; that is, whether the agreement operates as a legal suspension of the plaintiff's right to sue upon the notes so long as A. B. shall continue to make the quarterly payments; or whether the effect of the agreement is limited to the rendering the plaintiff liable to an action for damages in the event of his suing contrary to its terms.

In adjudicating upon the construction and effect in law of this agreement, the common and universal principle ought to be applied; namely, that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent. And applying this rule, the question is, what sense and meaning must be given to the word "suspended," used by the parties. It is quite clear that it was not the intention of the parties that the agreement should have the effect, from the moment of its being signed, of utterly and forever and in all events extinguishing the plaintiff's claim and demand upon the notes, and of ever maintaining an action for the recovery; or, in other words, that it should operate as a release of the money due upon them. This is plain from the words which import that the plaintiff might sue upon the notes when A. B. should cease to make the quarterly payments mentioned in the agreement.

It is a very old and well-established principle of law, that the right to bring a personal action, once existing and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive. It is said in *Platt v. The Sheriffs of London* [Plowd. 35, 36]: "And if a personal thing is once in suspense, or the person of a man once discharged for a personal thing, it is a discharge forever." And in *Lord North v. Butts* [2 Dyer, 139b, 140a (39)] it is said: "A thing personal suspended, or action personal suspended for an hour, is extinct and gone forever, when it is by the act and consent of the party himself who has the thing suspended." And in *Woodward v. Lord Darcy* [Plowd. 184] it is said: "For a personal action once suspended by the act or agreement of the party is always extinct and then if a personal thing cannot be had but by action, if the action is extinguished, the thing itself is extinguished." The principle thus laid down is repeated throughout the text-books of authority, and recognized and applied through a long course of decision. And in *Cheetham v. Ward* [1 Bos. & P. 630, 633] it is said by Lord Chief Justice Eyre that the principle is "now acknowledged, that where a personal action

is once suspended by the voluntary act of the party entitled to it, it is forever gone and discharged."

To construe the agreement, therefore, to operate as a legal suspension or bar of the plaintiff's right to sue until the quarterly payments should cease, would have the effect of precluding him from ever suing at all, and of giving to the agreement the effect of an immediate release of the demand upon the notes, and an extinction of the debt. It follows that giving such meaning and effect to the word suspended, used in the agreement, would be contrary to the intention of the parties: and it is a well-approved rule of law that, where parties have used language which admits of two constructions, the one contrary to the apparent general intent and the other consistent with it, the law assumes the latter to be the true construction. * * *

Applying the rules of construction before referred to to the present case, and in order best to effectuate the intention of the parties, it is necessary to construe the agreement to mean that the plaintiff agreed to forbear his suit until the quarterly payment should cease to be made; and that the effect of such agreement on his part was, not to suspend his right of action in the meantime, but to subject him to an action for damages in the event of his suing contrary to his agreement. * * *

The only case in which a covenant or promise not to sue is held to be pleadable as a bar, or to operate as a suspension, and by consequence a release or extinguishment of the right of action, is where the covenant or promise not to sue is general, not to sue at any time. In such cases, in order to avoid circuity of action, the covenants may be pleaded in bar as a release, note (1) to *Fowell v. Forrest* [2 Wms. Saunders, 47 gg], for the reason assigned, that the damages to be recovered in an action brought for suing contrary to the covenant would be equal to the debt (*Smith v. Mapleback* [1 T.R. 441, 446]) or sum to be recovered in the action agreed to be forborne. * * *

By holding the plea in question a valid bar, injustice would be done to the plaintiff, who would lose his demand upon the notes, contrary to the intention of the parties; but, by construing the agreement not to operate as a suspension of the plaintiff's right of action upon the notes, but as giving a remedy to the defendant by a cross action to recover damages to the extent of the injury sustained by the defendant by the plaintiff suing in breach of the agreement, no injustice is done to the defendant.

Nor is such a construction inconsistent with the class of authorities in which matters were allowed to be pleaded in bar in order to avoid circuity of action, because such decisions are limited to cases in which, from the nature of them, the damages to be recovered must be supposed to be equal in both actions; *Smith v. Mapleback* [1 T.R. 441, 446], which does not apply to the present instance, as the damages to

which the defendant could be entitled as against the plaintiff, by reason of his suing upon the notes before a discontinuance of the quarterly payment, can in no view be assumed to be equal to the plaintiff's demand.

Neither is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security payable in future for and on account of an antecedent demand cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law, in favor of the law merchant; see note (c) to *Holdipp v. Otway* [2 Wms. Saunders, 103b]. * * *

In the result, we are of opinion that the plea in question is bad in substance, and that the judgment which has been pronounced upon it in favor of the defendant must be reversed, and a judgment entered for the plaintiff, non obstante veredicto, upon the confession and insufficient avoidance in the plea.

Judgment accordingly.

QUESTIONS:

1. Is this decision in conflict with Restatement, Contracts, § 405?
2. Was the agreement with Alfred Beech a valid contract?
3. Did that agreement create in William Beech a right not to be sued?
4. If the holder of a note contracts with the debtor to renew the note at maturity, would this be a defense to an action on the note brought by the holder in breach of his promise to renew? See *West v. Jones*, 7 Boyce (Del.) 509, 108 A. 675 (1919).

BEECH v. FORD.

In the High Court of Chancery, 1848. 7 Hare, 208.

The plaintiff, William Beech, was the maker of two promissory notes, one for £140, and the other for £200, both dated the 28th of May, 1829, of which the defendant, John Ford, was the payee and holder. John Ford having threatened to sue William Beech upon the notes, Alfred Beech, his brother, interposed, and an agreement was entered into, which was in the following terms:

"I hereby consent to pay Mr. John Ford, in trust for my sister Elizabeth Beech, the sum of £200, for her sole use and benefit, or the sum of £25 per annum, so long as the £200 shall remain unpaid. This sum of £25 yearly is to be paid every quarter, and should two quarters remain

in arrear, such arrears will be considered as a violation of the agreement; and this I promise to do as a consideration for money advanced to my brother William Beech on two bills of his acceptance, bearing date May 28th, 1839, to John Ford, so that the bills and interest on them be suspended and rendered inoperative, so long as I continue to pay the said sum of £6, 5s. sterling every quarter to Mr. John Ford; but, on the payment of £200 to Mr. Ford at any one time, all further claim pertaining to the said bills on my brother William Beech is to cease, and the said bills are to be given up by Mr. Ford. Should my sister Elizabeth Beech decease, such sum of £6 5s. per quarter to be still paid to Mr. Ford, to be at his disposal to allow to any member of my family whom he may think proper. The payments to commence from the 25th of December 1843. Alfred Beech."

"January 31st, 1844.—To this agreement I am a consenting party.—J. Ford."

William Beech was privy to this agreement.

Disputes afterwards arose between William and Alfred Beech and Ford, and on the 19th of August, 1844, Ford commenced an action in the Queen's Bench against William Beech, to recover the sum of £440.

The £440 was made up of principal and interest on the two notes for £140 and £200, and of a sum of £15 claimed to be due to Ford on another transaction.

The bill was filed in December, 1844, by William and Alfred Beech against John Ford and Elizabeth Beech, alleging the performance of the agreement on the part of the plaintiff Alfred; and, in particular, that it was arranged between the plaintiffs and Ford that the sum of £6 5s. per quarter, mentioned in the agreement, should be paid by Alfred Beech to Elizabeth Beech herself, instead of being paid to Ford for her use; and that, between the date of the agreement and the 25th of June, 1844, when the second quarterly sum became payable, Alfred Beech had, in pursuance of the arrangement, paid or caused to be paid to Elizabeth Beech divers sums of money, amounting in the whole to more than the £12 10s. The bill prayed a decree for the specific performance of the agreement of the 31st of January, 1844, and that the sum of money to be paid by Alfred Beech might be secured for the benefit of the defendant, Elizabeth Beech; that, if necessary, a trustee might be appointed in the room of Ford; that Ford might be restrained by injunction from proceeding with his action upon the two promissory notes; and that the notes might be delivered up to be canceled.

The defendant, Ford, by his answer, denied that any arrangement had been made between himself and Alfred Beech for the payment of the quarterly sum by the latter directly to his sister Elizabeth; and, on the contrary, the defendant, Ford, said that he had always stipulated that such payments, which were his bounty to Elizabeth Beech, should be received by himself, and administered or paid to her by himself.

The cause came on for hearing in June, 1847; when it appeared that William Beech, the defendant at law, had obtained a verdict in the action, upon which judgment had been given by the Court of Queen's Bench in his favor; it appeared, also, that the defendant, Ford, had brought his error to reverse the judgment, on the ground that, *non obstante veredicto*, upon the matters in the plea, judgment should have been given for the plaintiff in the action. The cause was directed to stand over until the decision of the question at law should be known, the plaintiff, Alfred Beech, to be in the meantime at liberty to pay the defendant, Elizabeth Beech, £6 5s. quarterly, in part satisfaction of the agreement, without prejudice to any question between the parties.

The judgment of the Court of Queen's Bench was afterwards reversed in the Exchequer Chamber. The Court of Error held that the agreement of the 31st of January, 1844, could not be pleaded in bar to the action upon the notes; that the right to bring a personal action once existing, and by act of the party suspended for ever so short a time, is extinguished and discharged, and can never revive; and that the construction of the agreement, from the apparent intention of the parties, was not to suspend the right of Ford to recover on the notes, but to entitle Beech to bring a cross-action against Ford, in case of the breach of the agreement by the latter. See the case *Ford v. Beech*, in the Queen's Bench Reports for November, 1847, and February, 1848 [the preceding case herein]; and the authorities cited in the judgment delivered by Wilde, C. J.

The cause was again brought on to be heard, in June, 1848, after the reversal of the judgment in *Ford v. Beech*. * * *

THE VICE-CHANCELLOR [SIR JAMES WIGRAM]. The defendant, John Ford, was the payee and holder of two promissory notes, one for £140 and the other for £200, both dated the 28th of May, 1829, made and signed by the plaintiff, William Beech, and by him delivered to John Ford. From the circumstances attending the making of those notes, as well as from the terms of the agreement of the 31st of January, 1844, it appears that John Ford was a person who took great interest in the welfare of the family of the Beeches, and more especially of the defendant, Elizabeth Beech. But as these circumstances (although they explain the relative position of the parties) have not appeared to me to have any legitimate bearing upon the law of this case, I abstain from noticing them in detail. The plaintiff, Alfred Beech, is a brother, and the defendant Elizabeth Beech, is a sister of plaintiff, William Beech.

When the cause first came on for hearing before me the plaintiffs in equity had obtained a verdict at law, which they considered equivalent to a decision in their favor; the defendant in equity had carried the case to the Court of Error, and the question before that Court was then

pending. It appeared to me, with reference to the state of the proceedings at law, that the whole question might possibly be determined at law, and I directed the cause to stand over. The proceedings at law have since terminated by a judgment of the Court of Error in favor of the plaintiff at law, reversing the judgment of the Court below. The effect of that judgment, as I understand it, has been to determine that the performance by the plaintiff, Alfred Beech, of the agreement of the 31st of January, 1844, cannot at law be pleaded in bar to an action by Ford upon the notes, and that Alfred Beech, if damnified by such action, must seek compensation by a cross-action. I am now, therefore, to consider the effect of the agreement of the 31st of January, 1844, in this Court.

In stating my view of this case I am anxious to guard against being supposed to decide that the mere circuitry of cross-actions is sufficient to give an equity. But I apprehend that where an agreement is made, the direct substance of which can be had in this Court, it is not necessarily an answer to a bill for the performance of such an agreement to say that the parties may have compensation in damages equivalent in value to what this Court can give by its decree. A court of law, in this case, cannot give the parties the direct benefit of the agreement, because it cannot give Ford the benefit of his claim against William Beech without depriving him of it altogether. But if this Court can preserve to all the parties the benefit of the agreement the case may be proper for its interposition.

The question upon the agreement (whatever difficulty there may be in answering it) may, I apprehend, be thus stated: Is it to be considered as a new agreement between Alfred Beech and Ford, the substance of which was that Alfred should, at the instance of Ford, provide for his sister Elizabeth the annuity or gross sum mentioned in the agreement; that such provision should be a substitute for the two notes owing from William Beech to Ford; and that the notes should thenceforth be a security only for the performance of that agreement? or was the substance of the agreement this, that, if it were not performed by Alfred, with legal exactness—i. e., the very day—Ford's original right against William would revive, notwithstanding any number of payments regularly made by Alfred, under the agreement of January, 1844?

It appears to me that the former is the correct view of the case. The substance of that for which Ford contracted was a benefit to Elizabeth Beech, in consideration of his relinquishing his claim against William. The substance of that for which Alfred Beech contracted was the relief of William from his liability upon the notes. This being the substance of the agreement of January, 1844, by treating the notes as a security thereafter for the performance of it I secure to Ford all he contracted for; I relieve Alfred from no liability but that which might

attach upon a neglect to make a money payment on the very day on which, by law, it was due (see *Bowser v. Colby*, 1 Hare, 109, and cases there cited); and the agreement is complied with in all respects by giving to Ford a revival of his rights against William, for the purpose of enforcing the performance by Alfred of his part of the agreement. This a court of law cannot do, as it cannot modify its judgment as this Court may do. If the notes had been given at the time the agreement was entered into I cannot doubt that such would have been the construction of the agreement. As the agreement was altogether new on the part of Alfred I cannot think that the circumstance of the notes having existed before the agreement alters the case.

What I take to be the effect of the agreement by no means proves that Ford was wrong in bringing his action upon the notes. It is obvious, with reference to the effect given to that agreement in the Court of Error, that, in order to secure to Ford the benefit of the agreement given as a security, it might be necessary for him to proceed to judgment upon the notes, though not to execution, except to the extent necessary for enforcing the security, as I have mentioned.

It was objected that there was a want of consideration for the agreement; and that William was not a party to it, and therefore was not entitled to sue. I cannot give any weight to these objections. I have not any doubt of the sufficiency of the consideration; and, although William was not a party to the agreement, it is admitted that it was made with his privity, and he has a distinct interest in seeking that it may be enforced. Alfred might certainly have sustained the bill alone; but it is not necessary now to express any opinion what the result of the objection might have been if the question of misjoinder had been raised by demurrer. At the hearing of the cause the Court is not bound to allow the objection that a party has been made a plaintiff, if there be no difficulty in making a final decree, notwithstanding the misjoinder.

The costs of the proceedings at law must follow the event. In this Court the defendant, Ford, has been unsuccessful in the case which he attempted to set up. The defendant did not say that he intended to sue only for the benefit of Elizabeth Beech. He insisted upon his right to sue on the notes, not merely to the extent of enforcing the security, but absolutely, and of being the administrator of his own bounty, so far as he had contracted for a bounty to Elizabeth. In this contention he has failed; and, according to the rule strictly followed by the Lord Chancellor, he must pay the costs.

The defendant, Elizabeth Beech, by her counsel admitting payment of the annuity or annual sum of £25 in the agreement, etc., up to this date, this Court doth order that the sum of £200, in the said agreement mentioned, be paid to the said defendant, Elizabeth Ann Beech, by the plaintiff, Alfred Beech, on or before the 10th day of August next;

and thereupon it is ordered that satisfaction of the judgment in the action at law in the pleadings mentioned, brought by the defendant, John Ford, against the defendant, William Beech, upon or in respect of the two promissory notes in question in this cause, be entered up. And it is ordered that the defendant, John Ford, do deliver up the two promissory notes to the plaintiff, William Beech, to be cancelled. Order for taxation of the costs of the plaintiffs of this suit, and setting off the same against the sum of £50, 15s., the taxed costs of the defendant, Ford, in the action at law, and for payment of the balance. Liberty to apply.

Affirmed by the LORD CHANCELLOR [LORD COTTENHAM].

QUESTIONS:

1. What was the effect of this decision upon that in *Ford v. Beech*, ante?
2. Was William Beech a party to the contract with Alfred Beech?
3. Did the contract with Alfred Beech create any right or privilege in William Beech? in Elizabeth Beech?
4. If Ford were suing Beech in a court of today having both common law and equity jurisdiction, applying a system of law that is the result of the joinder of common law and equity, what judgment or decree should be rendered?

ROBINSON v. GODFREY, 2 Mich. 408 (1852). Godfrey had a **claim** for labor and materials in building the steamer *Globe*, with a specific lien thereon enforceable by attachment. Robinson, the owner of the boat, was promised by Godfrey, for a sufficient consideration, that he would not proceed to enforce the lien before the end of September. On August 18, in violation of this promise, Godfrey sued out an attachment. In order to release the boat therefrom Robinson had to give a bond with sureties. The present suit by Godfrey is against the obligors on this bond and is regarded as a continuation of the attachment proceeding. Robinson pleaded the promise of Godfrey as a bar to this suit. [Statement supplied.]

DOUGLASS, J., said: "Were this question *res integra*, we imagine no Court would long hesitate as to how it should be determined. It seems to us very clear, upon principle, that whenever a creditor agrees with his debtor, upon good consideration, that he will never or not for a specified time, pursue against him either any or all of the remedies which the law gives for the enforcement of a particular demand, the agreement is not collateral to the original contract of indebtedment, giving merely a claim for damages in case of its breach, but operates directly upon the contract, and as the case may be, destroys or modifies

the legal rights and obligations which grow out of it. The right of the creditor is simply a right by means of established legal remedies, to recover such damages as the law gives for breach of contract. The correlative obligation of the debtor is what the law, through the instrumentality of these remedies, will oblige him to pay or perform. The law applied to the contract is the measure of each. An agreement never to sue annihilates both. . . . It is, in effect, a release; and it has always been pleadable in bar as a release. As the rights and obligations growing out of a contract of indebtedment are thus extinguished by an agreement never to sue, so and for the same reason they are modified by an agreement not to sue for a limited time. Such an agreement, if the intent of the parties is carried into effect, extinguishes the right of the creditor to enforce and the obligation of the debtor to make payment until the time limited expires. It is therefore an extension of the time of payment or performance of the contract—a giving time to the debtor. Between an agreement to give time and an agreement not to sue for a limited time, we can perceive no difference, except in the language used by the parties to express their intentions.”

The Court then discussed cases that hold that if a creditor gives to his debtor a binding extension of time without the surety's assent he thereby discharges the surety, the reason given being that the creditor could not maintain suit during the period of extension and that the surety, if forced to pay the debt, would likewise be prevented from maintaining suit for reimbursement. It was rightly believed that these suretyship cases are inconsistent with the doctrine of *Ayl-offe v. Scrimshire*, cited *supra*, that a right of action can not be temporarily suspended without discharging it forever. This doctrine, therefore, the court flatly disapproved, thinking that it had been laid down in mistake of antecedent authorities and that some subsequent authority was to the contrary. The Court made no reference to *Ford v. Beech*, *supra*, although it had been decided four years earlier. Had it been aware of the decision of Lord Chancellor Cottenham and Vice Chancellor Wigram in *Beech v. Ford*, *supra*, it might have similarly made use of its own powers as a court of equity. But the action before the Court was in the form of an action at common law on the bond; and it held that Robinson's agreement to forbear until the end of September was a legally effective bar to the action.

Under the Codes of Procedure at the present time, facts that would have constituted a good equitable defense or ground for an injunction in Chancery can be given the same effect by properly pleading them in an answer to the creditor's complaint. It is no longer necessary for the defendant to file a separate bill for an injunction or for specific performance. As in *Beech v. Ford*, the court can decree that the ac-

tion shall be stayed or dismissed, on condition of payment by the debtor in accordance with the terms of the creditor's extension agreement.

NOTE

Three years later, in *MORGAN v. BUTTERFIELD*, 3 Mich. 615 (1855), the question in the Godfrey case, *supra*, was reopened. An action was brought to enforce payment of an overdue promissory note. The defendant pleaded an agreement in writing whereby he had assigned to the plaintiff his claim against an insurance company as collateral security, and the plaintiff in consideration thereof had promised not to sue on the note until he had used all legal means to collect from the insurance company. He further alleged that the plaintiff had taken no legal steps to collect. The court, by Douglass, J., reviewed its reasoning in the Godfrey case and reaffirmed its decision, specifically noting "the great and accumulating weight of precedent against our decision" (citing 17 cases). It held, however, that the defense should have been made by a plea in bar and not by a plea in abatement.

Apparently, these two cases did not directly affect the current of decision or the "taught law." Without doubt it would give great satisfaction to that Michigan court of nearly 100 years ago to read Restatement, Contracts, sec. 405, in which its position is completely approved. The notion, applied in *Ayloffe v. Scrimshire*, Carth. 63, 1 Show. 46, 2 Salk. 573 (1689), that a right of action can not be temporarily suspended without discharging it forever, never had any sufficient reason for existence.

In *BAURER v. DEVENIS*, 99 Conn. 203, 121 A. 566 (1923), *infra* p. 1011, the plaintiff brought suit to foreclose a mortgage given by the defendant to secure payment of a note that had been assigned to the plaintiff. The defendant pleaded that in consideration of the assignment of the note the plaintiff had promised the assignor (then holder of the note) not to demand payment for the period of one year. The court discussed fully the question whether a third party can enforce a contract made by two other parties for his benefit. It held that the plaintiff's promise not to demand payment for one year operated to bar the action until expiration of the year, without saying a word or citing an authority as to the legal effect of a contract not to sue for a temporary period. One hundred years earlier, in a case on all fours with this one, the Maryland court had made a similar decision. *Clopper v. Union Bank of Md.*, 7 Har. & J. 92 (1826).

SECTION 2.—SURRENDER AND CANCELLATION

SLADE et al. v. MUTRIE.

Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 19, 30 N.E. 168.

Action by George H. Slade and others against James Mutrie on a note. There was a judgment for defendant, and plaintiffs except. Exceptions overruled.

FIELD, C. J. The counsel for the defendant concedes that by the law of this commonwealth the payment of a part of the debt after the whole debt has become payable is not a sufficient consideration to support a promise not under seal to discharge the remainder of the debt. *Tyler v. Association*, 145 Mass. 134, 137, 13 N.E. 360; *Lathrop v. Page*, 129 Mass. 19; *Grinnell v. Spink*, 128 Mass. 25; *Potter v. Green*, 6 Allen, 442; *Harriman v. Harriman*, 12 Gray, 341; *Brooks v. White*, 2 Metc. 283, 37 Am.Dec. 95; *Foakes v. Beer*, L.R. 9 App.Cas. 605. The judge ruled that, "if the plaintiffs, at the time they received the sum of one hundred and twenty-five dollars from the defendant, and gave him a receipt in full of all demands therefor, surrendered to the defendant the note in suit with the intention that the same should be canceled, and that the debt thereby evidenced should be extinguished, and intended to give to the defendant the balance of the debt, and that the payment made was to be in full for said debt, then the plaintiffs cannot recover on the note." The jury, in returning a general verdict for the defendant, must have found that the note was surrendered by the plaintiffs to the defendant that it might be canceled, and that the plaintiffs intended, by delivering the note to the defendant to give him the note, and discharge the remainder of the debt. For certain purposes a bill of exchange or a promissory note is regarded in this commonwealth not merely as evidence of a debt, but as the debt itself. They may be the subject of a gift, but to constitute a gift there must be a delivery by the owner to the donee, with the intention of passing the title. *Grover v. Grover*, 24 Pick. 261, 35 Am.Dec. 319; *Sessions v. Moseley*, 4 Cush. 87; *Bates v. Kempton*, 7 Gray, 382; *Chase v. Redding*, 13 Gray, 418. See *Sheedy v. Roach*, 124 Mass. 472, 26 Am.Rep. 680; *Pierce v. Bank*, 129 Mass. 425, 37 Am.Rep. 371; *Taft v. Bowker*, 132 Mass. 277; *McCann v. Randall*, 147 Mass. 81, 17 N.E. 75, 9 Am.St. Rep. 666; *Cochrane v. Moore*, 25 Q.B.Div. 57; *Seminary v. Robins*, 128 Ind. 85, 27 N.E. 341, 12 L.R.A. 506. It follows from this that the delivery of a promissory note by the holder to the maker, with the intention of transferring to him the title to the note, is an extinguishment of the note, and a discharge of the obligation to pay it. *Hale v. Rice*, 124 Mass. 292; *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29);

Ellsworth v. Fogg, 35 Vt. 355; Vanderbeck v. Vanderbeck, 30 N.J. Eq. 265; Jaffray v. Davis, 124 N.Y. 164, 170, 26 N.E. 351, 11 L.R. A. 710.

Exceptions overruled.

QUESTIONS:

1. Can a gift of a note be made by delivery of it to a donee?
2. How does a gift by the creditor to the obligor differ from a gift to a third party?
3. Is the decision based upon the common law, equity, or the law merchant?
4. When and why is a promissory note "regarded as the debt itself"?

NOTE

See in accord Restatement, Contracts, § 432. The destruction of a note by the holder with intent to make a gift operates as a discharge.

The Negotiable Instruments Law (Mass.St.1898, c. 533, § 122; Consol. Laws N.Y. c. 38, § 203) now provides that a written renunciation shall discharge a party to a negotiable instrument the same as a surrender of the instrument itself.

LICEY v. LICEY.

Supreme Court of Pennsylvania, 1848. 7 Pa. 251, 47 Am.Dec. 513.

Licey and others, administrators of Fretz, brought this action of debt, and declared on a bond, the profert of which was excused by averring possession unlawfully obtained by the obligor, who had torn off the seal.

At the trial before Krause, P J., the plaintiffs gave in evidence the bond, of which the signature and seal had been torn off. The defendant proved admissions by the obligee that she had given the bond to the obligor to do what he pleased with it.

The court, on the authority of 2 Kent's Com. 439, was of opinion an assignment, or transfer, actually executed, was essential, and directed a verdict for the plaintiff.

GIBSON, C. J. There is a ground on which, however, the cause was not ruled below, that is fatal to the judgment. If the defendant's evidence be true, the bond in suit was given up by the obligee to be cancelled, and it was cancelled. Was not the debt, therefore, gone? There is a plain and well-founded common-law distinction, in this particular, between things which lie in livery and things which lie in grant. As the former pass by force of the livery, of which the deed is only evidence, they cannot be revested by destroying the instrument,

for a right can be dissolved only by means which created it; but, as the latter exist only by force of the deed, they necessarily cease to exist when it no longer sustains them. So far was this carried in respect to things which depend on a deed, that an accidental destruction of the seal was held, in the earlier cases, to destroy the right, though a different rule prevails at present, by which the donee is allowed to show the truth. But cancellation, *eo animo*, will now, as it ever has done, destroy any right which stands exclusively upon the instrument. Thus a lease for years might have been surrendered by cancellation before the statute of frauds, which now requires it to be done, at least, by a note in writing. But the very case before us is put as an instance of the principle in the last London edition of Sheppard's Touchstone, 70. "And if a deed," it is said—"nay, a bond—be delivered up to the party that is bound by it to be cancelled, and it is so, or if he that hath the deed doth, by agreement between him and the other, cancel the deed by either of these means the deed (provided no estate passed by it) is become void." Even if a bond thus delivered, but not cancelled, come again to the hands of the obligee, though it be valid at law the obligee will be relieved in equity: *Cross v. Powel*, Cro. Eliz. 483; and see *Vin.Abr.Faits*, X, 2, 3, 4. These authorities are decisive of the principle. * * *

Judgment reversed, and venire de novo awarded.

QUESTIONS:

1. Was the delivery to the debtor or the destruction by the debtor operative as a discharge?
2. Would destruction of a note or bond by the holder, without the debtor's knowledge, operate as a discharge?
3. Would destruction of a note or bond, and also of a mortgage on land held as security, extinguish both the debt and the mortgagee's interest in the land? See *Peck v. Lee*, 110 Conn. 374, 148 A. 133 (1930).
4. If the seal of the bond had been eaten off by mice and rats, would the debt be discharged? See *Michell v. Stockwith*, Gouldsb. 83 (1588), ante, p. 431; *Bayly v. Garford*, March's Rep. 125.

ATTORNEY GENERAL v. SUPREME COUNCIL A. L. H.

In re LAW.

Supreme Judicial Court of Massachusetts, 1910. 206 Mass. 183, 92 N.E. 147.

Information by the Attorney General, at the relation of the Insurance Commissioner, against the Supreme Council American Legion of Honor, to wind up the affairs of defendant, a fraternal beneficiary as-

sociation. From a decree disallowing a claim based on a certificate issued to Francis M. Law, claimant appeals. Reversed.

LORING, J. Law's Case (claim 156) is another of the 17 appeals from the decree of October 29, 1909. See *Attorney General v. American Legion of Honor (Hall's Case)*, 206 Mass. 158, 92 N.E. 136.

In this case the member died on June 9, 1902, and on September 22, 1902, the beneficiaries were paid \$2,000 and surrendered the certificate for cancellation.

The local collector made an affidavit that after the adoption of by-law 55 the member paid him "an assessment, or perhaps more than one on the old basis, and that he sent it or them to the defendant at Boston," that it or they were refused, but the member "continued to tender me full payment on every assessment," and on his remittance blanks to the Supreme Secretary "I made a note of this tender."

No evidence to control the facts so testified to was introduced. We think that this was a sufficient protest to preserve the rights of the member and that he is now entitled to share in the emergency fund for the difference between what was paid the beneficiaries and what is now due (see *Dunlavy's Case*, 206 Mass. 168, 92 N.E. 140, and cases there cited), unless this claim has been released by the surrender of the certificate for cancellation.

It is laid down on *Byles on Bills* (13th Ed.) 199, that: "It is a general rule of law, that a simple contract may before breach be waived or discharged, without a deed and without consideration; but after breach there can be no discharge, except by deed, or upon sufficient consideration." This was stated in *Dobson v. Espie*, 2 H. & N. 79, 83, to be an accurate statement of the law. To that effect see *Foster v. Dawber*, 6 Ex. 839; *Leake on Contracts*, 654; *Addison on Contracts* (10th Ed.) 160.

It is true that the surrender of a negotiable instrument operates as a release. *Slade v. Mutrie*, 156 Mass. 19, 30 N.E. 168; *Larkin v. Hardenbrook*, 90 N.Y. 333, 43 Am.Rep. 176; *Ellsworth v. Fogg*, 35 Vt. 355; *Draper v. Hitt*, 43 Vt. 439, 5 Am.Rep. 292; *Vanderbeck v. Vanderbeck*, 30 N.J.Eq. 265; *Young v. Power*, 41 Miss. 197; *Stewart v. Hidden*, 13 Minn. 43 (Gil. 29). See, also, *Simons v. American Legion of Honor*, 178 N.Y. 263, 268, 70 N.E. 776. But that rule depends upon the law merchant. *Foster v. Dawber*, 6 Ex. 839; *Cook v. Lister*, 13 C.B. (N.S.) 543, 592; *Dobson v. Espie*, 2 H. & N. 79, 83; *Byles on Bills* (13th Ed.) 199, 200; *Leake on Contracts*, 565, 654; *Addison on Contracts* (10th Ed.) 160.

We are of opinion that the rule applied in *Slade v. Mutrie*, 156 Mass. 19, 30 N.E. 168, does not apply to common-law contracts.

The sum to which these beneficiaries are now entitled is to be found as follows: From \$5,000 with interest to August 12, 1904, there is to be deducted (1) the amount of the difference between the assessments due on the \$5,000 basis (without interest where tender was made) and the assessments paid with interest from the several dates on which they were paid to August 12, 1904; and (2) the sum already paid to the beneficiaries.

Decree accordingly.

QUESTIONS:

1. If the certificate of the fraternal order was under seal, as it probably was, is the correctness of this decision affected?
2. Is there a good reason for distinguishing between a formal unilateral contract and an informal written one, in respect of discharge by surrender? See Restatement, Contracts, § 432.
3. If a written bilateral contract is destroyed or canceled by mutual consent, would either party be discharged? Suppose that the holder of the document destroys it without the other's consent. See Restatement, Contracts, §§ 406, 434.
4. Why should not the "law merchant" apply to "common-law contracts"?
5. Is Restatement, Contracts, sec. 432, contra to this decision?

SECTION 3.—PAROL EXONERATION AND RESCISSION

MARK STEWARD'S CASE.

In the King's Bench, 1586. 4 Leon. 106.

An assumpsit before action brought may be discharged by word, otherwise after action brought.

CONIERS AND HOLLAND'S CASE.

In the King's Bench, 1588. 2 Leon. 214.

In an action upon the case assumpsit, by Coniers against Holland, the defendant pleaded, that after the promise, that the plaintiff had discharged him of it: and by WRAY, Chief Justice. It is a good plea, and so it hath been often ruled, and it was late the case of the

Lord Chief Baron, against whom in such an action, such a plea was pleaded, and he moved us to declare our opinions in Serjeant's-Inn: and there, by the greater opinion, it was holden to be a good plea; for which cause, the Court said to Buckley, who moved the case, that the plea is good, and judgment was entered accordingly.

QUESTION:

Assuming that a plea of discharge, in general terms, is a sufficient one, without alleging the specific facts operating as such a discharge, what are the facts that must be proved in order to sustain the plea?

EDWARDS v. WEEKS.

In the Common Pleas, 1678. 1 Mod. 262.

Action upon the case. The plaintiff declares, that the defendant, in consideration that the plaintiff would deliver to him such a horse, promised to deliver to the plaintiff in lieu thereof another horse, or five pounds upon request: and avers, that the plaintiff had delivered to the defendant the said horse, and had requested him, &c. The defendant pleads, that the plaintiff, before the action brought, discharged him of that promise, but says not how: to which the plaintiff demurred.

Strode, Serjeant. If he had pleaded a discharge before the request made, the plea had been good without shewing how he discharged him: but after the request once made, a verbal discharge is not sufficient; and he cited the case of Langden v. Stokes, Cro.Car. 384, and the Year Book of 22 Edw. 4, 40 b.

The Court agreed and gave judgment for the plaintiff, nisi causa, &c.

QUESTIONS:

1. Why is it harder to discharge a unilateral duty after breach than before breach, if it is in fact?
2. Why should not the verbal discharge be regarded as an executed gift of the horse that the plaintiff had delivered?

EDWARDS v. CHAPMAN.

In the Court of Exchequer, 1836. 1 Mees. & W. 231.

Indebitatus assumpsit, in the sum of £200, for the price and value of goods sold and delivered.

Plea, as to the price and value of 850 pairs of trimmings, parcel of the said goods in the said declaration mentioned, to wit, the sum of £180 12s., parcel &c., that the said goods, parcel, &c., were sold and delivered by the plaintiff to the defendant, in pursuance of a certain contract before then made between the plaintiff and the defendant; and that afterwards, and before the commencement of the suit, to wit, on &c., it was agreed between the plaintiff and the defendant that the said contract should be wholly rescinded and annulled, and the same was then wholly rescinded and annulled accordingly. Verification.

General demurrer, and joinder in demurrer.

Cowling, in support of the demurrer. It is admitted by the plea that the goods were sold and delivered to the defendant, and have been kept by him, and therefore it is quite immaterial whether the contract has been rescinded or not.

R. V. Richards, contra. The cause of action arises from the contract for the sale of the goods, and not from the delivery of them; and if the parties agree to rescind and annul the contract, which the plaintiff by demurring admits to have been the case, no action can be maintained.

PARKE, B. A duty arises from the contract of sale, which cannot be got rid of without an accord and satisfaction.

Judgment for the plaintiff.

QUESTIONS:

1. Did the agreement to "rescind" include a promise to return the goods? Suppose it had?
2. Why would the agreement have been operative as a discharge if the goods had not yet been delivered? See Restatement, Contracts, § 410.
3. Is the distinction between unilateral and bilateral better than that between "before breach" and "after breach," with respect to discharge?

NOTE

In *Foster v. Dawber*, 6 Ex. 839 (1851), Baron Parke said: "When the receipt in full was given, it was prima facie evidence against the plaintiff that the amount stated in it was paid. It was not conclusive evidence. * * * Now, it is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by release under seal, or by performance of the obligation."

In *Mayor, etc., v. Butler*, 3 Lev. 237, (1685), the court said: "It was argued for the defendant, that a promise by parol may be discharged by parol. *Cro.Ch.* 383, *Langden v. Stokes*, *Cro.Ja.* 483, *Hartford v. Pile*, and *Ibid.* 160, the opinion of Justice Haughton, *Sty.* 8, 2 *Leon.* 214, so here the

first promise is discharged by the account, and the promise thereupon. But the whole Court were contrary; they agreed on a promise merely executory of both parts, as the cases cited before are; any thing may be discharged by parol; as if I promise you 5s. if you will go to Paul's, before you go I may discharge you from the going, and thereby the other shall be discharged from paying the 5s. for no debt was due before the going, nor any thing executed either by the one, or the other; but in the case at Bar there was a debt due and executed in the plaintiffs, and that could not be discharged without a release."

That a voluntary waiver may be inoperative to discharge a contract duty before breach, and yet may prevent performance from continuing to operate as a condition precedent, see *Jobst v. Hayden Bros.*, 84 Neb. 735, 121 N.W. 957, 50 L.R.A.,N.S., 501 (1909); *Becker v. Becker*, 250 Ill. 117, 95 N.E. 70, Ann.Cas.1912B, 275 (1911).

GARNSEY v. GARNSEY.

Supreme Judicial Court of Maine, 1917. 116 Me. 295, 101 A. 447.

HALEY, J. An action of assumpsit on a contract in writing of the following tenor:

"Sanford, Maine, May 2, 1898.

"For value received we jointly, but not severally, promise to pay to our mother, Mary J. Garnsey, annually, during her life, an amount equal to the interest paid by the Kennebec Light & Heat Company on \$3,800 face value five per cent. bond, maturing in the year 1918.

"F. A. Garnsey.

"A. E. Garnsey."

The action is brought by Mary J. Garnsey, the promisee named in the contract, against Almon E. Garnsey, one of the signers, and Julia A. Garnsey, administratrix of the estate of Fred A. Garnsey, the other joint promisor. The case is before this court upon report. * * *

It is the claim of the defendant Julia A. Garnsey, administratrix, that the plaintiff has released her as administratrix of her husband from the contract, even if there was a sufficient consideration when given by the two sons to the mother. She testifies: That at one time the plaintiff told her she did not want her to pay the obligation, "didn't expect me to pay; she didn't need it, and I needn't worry anything about it; she was going to give it to me. She said she was going to give it to Almon; she was giving it to me; she intended to use us just alike; that on several times the plaintiff stated that she did not expect her to pay it, and didn't want her to." Upon the other hand, the plaintiff is positive she never told her she did not expect her to pay anything on it and did not want her to, and that she never said any such thing, and that she did expect it.

The circumstances of the case tend to support the testimony of the plaintiff. But, even if she did say that which Julia A. Garnsey claims she said to her, it was not a release of the estate of Fred A. Garnsey from the obligation that he had signed. It was, at most, if the defendant's version is right, a mere verbal promise without consideration and of no binding effect. In order for it to release the estate of Fred A. Garnsey from the contract made and signed by him, it was necessary to be a promise upon a sufficient consideration. There was no consideration moving from any one to Mary A. Garnsey to release the estate of Fred A. Garnsey from his contract. A mere statement by a creditor that he intends to release, or that he does release, a debtor, there being no consideration moving from any one for the promise, the debt is not thereby discharged. The debt was created by contract for a sufficient consideration. It can be discharged by contract for a sufficient consideration, but a naked promise to release without consideration is not a discharge. * * *

The mandate must be judgment for plaintiff for \$190 annually for the years declared upon, with interest at 5 per cent on the payments when they became due to the date of the writ, and interest on the total from the date of the writ to the date of judgment of the May term, 1917, to be cast by the clerk.

Judgment for plaintiff as per rescript.

QUESTIONS:

1. Could Mary have discharged her sons by surrendering or canceling the document?
2. Is consideration required for a valid discharge of duty as much as for the creation of duty by a promise?

NOTE

In *Young v. Power*, 41 Miss. 197 (1866), a creditor said to her debtor: "Don't put yourself to any trouble about what you owe me; if I never need it, I will never call on you for it." The creditor died without needing the money, and her executor sued to compel payment and got judgment. The court said: "It appears from the evidence that the declarations of the testatrix, which are relied on as a forgiving of the debt due her by the defendant, were altogether gratuitous, and that the promise was without valuable consideration, and that the forgiving, in terms, was not complete and absolute, but that some further act was requisite to consummate it. The matter, therefore, rested in her discretion, and depended on her mere volition."

GRAY v. BARTON.

Court of Appeals of New York, 1873. 55 N.Y. 68, 14 Am.Rep. 181.

This action was brought to recover the balance of an account alleged to be due from defendant to plaintiff. The facts are sufficiently stated in the opinion.

GROVER, J. The judgment cannot be reversed upon the ground of a compromise between the parties. There was some evidence tending to show that the defendant doubted the correctness of the account rendered by the plaintiff, and that for the purpose of satisfying himself asked to examine his books; and some tending to show that he denied the authority of his wife, by whom the goods had been purchased from the plaintiff, to purchase them upon his credit; but the referee having given judgment for the plaintiff, this court cannot assume that either of these facts was found by him. Besides, the evidence does not show any compromise by the parties either of a demand which was disputed by the defendant, or for the discharge of an admitted indebtedness upon payment by the defendant of a less sum. The evidence proved, and the referee has found that the defendant being indebted to the plaintiff, he proposed to give him the debt; that the latter said a gift would not stand in law; that the plaintiff said if the defendant would give him a dollar that would make it lawful, and then proposed if the defendant would give him a dollar he would give him the entire debt; whereupon the defendant did give the plaintiff a dollar for the purpose of satisfying the whole debt, which the plaintiff accepted, and balanced his books as follows:

Wm. Burton, cr. by cash on account.....	\$ 1 00
Gift to balance account.....	820 91

And that the plaintiff, for the purpose of carrying out the arrangement gave the defendant a receipt, of which the following is a copy: "Received of William Burton one dollar, in full, to balance all book accounts up to date of whatever name and nature." The referee further found that it was the intention of both parties that the plaintiff, by such acts so done, should and did give to the defendant the whole of said debt for \$1; which sum was paid and received for the sole purpose of discharging the entire debt. From which facts the referee deduced the following legal conclusions: That there was no valid compromise or accord and satisfaction of the debt; that it was not a valid gift in law of the debt from the plaintiff to the defendant; that the plaintiff was entitled to recover of the defendant the amount of the debt less the \$1 paid. The only construction of the findings of fact is, that a gift of the entire debt by the plaintiff to the defendant was intended to be made, and was made, if the facts were sufficient to consti-

tute a legal gift. No compromise of a disputed demand or of an admitted debt, upon payment of less than the amount, was talked of, agreed upon, or at all within the contemplation of the parties. That intention clearly was that the plaintiff should give the entire debt to the defendant, and that he should accept the same as a gift from him. The dollar was given not in payment, but merely to satisfy defendant of its validity. The debt was then due, and the counsel of the respondent cites numerous cases where it has been held that a payment of a less sum upon a debt actually due cannot satisfy or discharge the entire debt, but only so much as is paid, although agreed to be received in satisfaction of the whole. The cases to this effect are uniform from *Fitch v. Sutton*, 5 East, 230, to *Ryan v. Ward*, 48 N.Y. 204, 8 Am.Rep. 539; *Bunge v. Koop*, 48 N.Y. 225, 8 Am.Rep. 546.

The reasons upon which these cases were determined were, that it was not good as an accord and satisfaction, as it was obvious that a smaller sum could not satisfy a greater; that when the debt was due payment of a part by the debtor was no consideration for a promise of the creditor to discharge the residue, as the creditor received nothing to which he was not entitled, and there being no consideration for any such agreement, it was a nude pact and void. To discharge the debt, it was held that there must be a release under seal. Although the reason why the use of a seal would effect a discharge while the same writing not sealed would not produce such result is rarely alluded to, yet it is perfectly obvious; at common law the seal was conclusive evidence of a sufficient consideration, and hence, when attached to a release of a debt, was conclusive of a sufficient consideration therefor. This rule of evidence has been modified by statute to some extent. 2 R.S. 406, § 77. This modification does not extend to releases. The question in this case is, not whether there was an accord and satisfaction, or a valid compromise of the debt, but whether there was a valid gift of it by the plaintiff to the defendant. Hence the authorities in regard to the two former do not apply.

The counsel for the respondent insists that the defendant cannot avail himself of the latter for the reason that it was not set up in the answer; but no such objection was raised upon the trial. Had it then been taken it might have been obviated by procuring an amendment if necessary. Omitting to make it upon trial was a waiver. The question whether there was a valid gift of the debt upon the facts proved and found is involved in the case and must be determined. A gift may be defined as a voluntary transfer of his property by one to another without any consideration or compensation therefor. To make it valid the transfer must be executed, for the reason that there being no consideration therefor no action will lie to enforce it. To consummate a gift there must be such a delivery by the donor to the donee as will place the property within the dominion and control of the latter with

intent to transfer the title to him. The question is, was there such a delivery of the debt by the plaintiff to the defendant, or what was equivalent thereto, in this case? In *Champney v. Blanchard*, 39 N.Y. 111, the defendant had in her hands money of the intestate, for which she had given the intestate a receipt. The intestate, on the day of her death, gave this receipt to the defendant, saying in substance she gave the defendant the money therein specified. This was held a valid *donatio causa mortis*. A delivery is equally necessary in such a gift as in one *inter vivos*. True there was, in strictness, no debt from the defendant to the intestate. The former held the money as trustee for the latter, but the case is an authority for the position that to constitute a gift a manual delivery of the thing given is not necessary, nor need it be present in all cases; that a delivery of the evidence of the right of the donor to the donee, with intent to transfer the title, is sufficient.

In *Westerlo v. DeWitt*, 36 N.Y. 341, 93 Am.Dec. 517, it was held that the delivery of a certificate of deposit unindorsed, with intent to transfer to the donee the money therein specified, was sufficient to constitute a valid gift of such money. It would necessarily follow that the delivery by the donor of the evidence of any debt against a third person, with like intent, would transfer the debt to the donee. In such cases the thing given is the debt, not the evidence; and yet a delivery of the latter, with intent to give the former, will effect that result. It would also follow that the delivery by a creditor of a note or bond and mortgage to his debtor, with intent to give him the debt, would be sufficient to transfer and discharge such debt. Kent (2 Com. 439), speaking of the delivery essential to a gift, says: that in this as in every other case delivery must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing given be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession but with the dominion of the property. If the thing given be a chose in action, the law requires an assignment or some equivalent instrument, and the transfer must be actually executed.

The debt in this case consisted of an account for goods sold. Had the plaintiff written upon a copy of the account that the same was canceled by a gift thereof to the defendant, and signed and delivered the same to the defendant with intent to make a gift thereof to him, and the latter had accepted it as a gift from him, can there be a doubt that the gift would have been effectual? It was all the delivery the subject was capable of. But in this case the plaintiff balanced his books by gift to the defendant. Had he stopped here, making no delivery of any thing to the defendant, the act would not have been of

any effect; nothing would have been delivered to him; and the books continuing in the possession of the plaintiff, the gift would not have been executed. But when, to complete his purpose of giving the debt, he executed and delivered to the defendant a receipt in full for the account, to effect the intention of the parties, the law will construe the instrument, if necessary, as an assignment of the account and of the right of action thereon to the defendant. My conclusion is that the gift of the debt was valid, and constituted a defense to the action; that the proof of want of consideration for the receipt given by the plaintiff was answered and avoided by the proof that it was given to consummate a gift of the debt by him to the defendant.

The judgment must be reversed and a new trial ordered, costs to abide the event.

All concur except RAPALLO and FOLGER, JJ., not voting.

Judgment reversed.

QUESTIONS:

1. How do you answer the rhetorical question asked by the court in the beginning of the last paragraph?
2. Which one of the creditor's acts was the operative discharge by gift? Or did it require them all?
3. Does any one of the rules in Restatement, Contracts, §§ 410-416, include or support this case?

NOTE

The development of the law with respect to discharge of contractual duties by voluntary renunciation or other form of executed gift (without a sealed release) has been irregular and uncertain. The American Law Institute felt obliged to construct a complicated set of rules; see Restatement, Contracts, §§ 410-416. These rules are so drawn as to exclude unilateral obligations to transfer land or to pay money. A gift discharge of these obligations can be made by a sealed release (section 402), or by the surrender or cancellation of certain formal documents (section 432). Of course, any discharge agreement may be made effective by the giving of a consideration of very small value or by such a change of position in reliance as would make section 90 of the Restatement applicable; such a discharge may be substantially a gift.

The decision in *Gray v. Barton*, *supra*, appears not to fall within any section of the Restatement; but it need not be disapproved on that account. Cases in accord with it are not wanting: *Ferry v. Stephens*, 66 N.Y. 321 (1876); *Carpenter v. Soule*, 88 N.Y. 251, 42 Am.Rep. 248 (1882); *McKenzie v. Harrison*, 120 N.Y. 260, 24 N.E. 458, 8 L.R.A. 257, 17 Am.St.Rep. 638 (1890); *Green v. Langdon*, 28 Mich. 221 (1873); *Holmes v. Holmes*, 129 Mich. 412, 89 N.W. 47, 95 Am.St.Rep. 444 (1902); *Hathaway v. Lynn*, 75 Wis. 186, 43 N.W. 956, 6 L.R.A. 551 (1889). See Ferson, "The

Rule in *Foakes v. Beer*," 31 Yale L.Jour. 15 (1921). In *Wilson v. Keller*, 9 Ill.App. 347 (1881), the court held a mere oral release inoperative, but said: "A verbal gift is necessarily an executed contract; and delivery of the subject-matter of the gift is of the essence of the title. There must be actual delivery, so far as the subject is capable of delivery * * * If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. * * * In the case before us, as the book account was against the appellee herself the delivery of a receipted copy of it, or of an acquittance, or possibly a copy of the account not receipted, if the intention to transfer was clearly shown, would be a delivery suited to the subject-matter of the gift; and probably an erasure of the charges from the account book would be regarded as an equivalent act."

It is generally stated, however, and it has often been held, that an unsealed written statement of discharge is inoperative in the absence of any consideration. The acceptance of a part payment of a debt as full satisfaction is still generally held not to be a complete discharge. In most such cases the possibility of making a parol executed gift was not being directly considered.

The analogy between a gift of property in some specific *res*, by delivery of the *res*, and a gift discharge of a debt is not very close, although such an analogy has been assumed by many courts, as it is in *Gray v. Barton*. This has led the courts, in passing on the validity of a gift discharge, to look for something that they can call "delivery," often being satisfied, however, with other overt expressions of donative intent because the subject of the gift is not capable of physical delivery. In the case of a chattel or a written document of title, there is an object capable of such a delivery; and the purpose of the gift is to create in the donee those manifold rights against third persons (called "property") that the donor had. In the case of a gift discharge of a debt, no rights against third persons are involved; the donor intends merely to extinguish his own right against his debtor and the latter's correlative duty to himself. This right-duty relation may indeed be evidenced by some document; and the delivery of that evidential document bears witness to the intention to discharge.

A gift discharge of a debt varies materially from an "assignment" to a third person of the right to payment. The latter merely substitutes a new creditor, to whom the debtor still has the duty of payment.

KING v. GILLETT.

In the Court of Exchequer, 1840. 7 Mees. & W. 55.

Assumpsit for the breach of a promise to marry the plaintiff in a reasonable time. The declaration was in the usual form, alleging mutual promises to marry. Plea, that after the making of the promise in the declaration mentioned, and before any breach thereof by the defendant, to wit, on, &c., the plaintiff wholly absolved, exonerated,

and discharged the defendant from his promise and the performance of the same. Verification.

Special demurrer, and joinder therein.

The following points of argument were stated in the margin:—The plaintiff will contend that a contract founded on mutual promises can only be rescinded before breach by mutual consent; and that a mere discharge by one of the parties, without any act of the other party, is incomplete. The defendant will contend that a promise may be discharged by parol before breach, and that it is not necessary in pleading to state the evidence of such discharge, or the special circumstances under which it arises, or that there was any consideration for the same.

ALDERSON, B. In this case we are of opinion that the plea is good, and that the demurrer must be overruled.

The question before the Court was this: Whether to an action founded on mutual promises to marry within a reasonable time, the defendant could plead that, before any breach of contract on his part, the plaintiff wholly exonerated him from the performance of that contract. And it was contended that the proper plea was, that before breach, the plaintiff and defendant by mutual agreement had rescinded the contract previously made between them. No doubt such a plea would be good; but on looking into the precedents to which we have been referred, we find that the form of the present plea has been adopted and held good in several cases. There are precedents in several of the books of entries, and there are two decided authorities, *Holland and Conier's case* (2 Leon. 214), and *Langden v. Stokes* (Cro.Car. 383). And we think this latter case explains the matter, and reconciles the present plea with general principles. It seems to have been treated there as a mere question of the form of plea—and so we think it is: for, although we are of opinion that this plea is good in point of form; yet we think the defendant will not be able to succeed upon it at *Nisi Prius*, in case issue be taken upon it, unless he proves a proposition to exonerate on the part of the plaintiff, acceded to by himself; and this in effect will be a rescinding of the contract previously made.

We think, therefore, that judgment must be given for the defendant; but the plaintiff should have liberty to amend on payment of costs.

Leave to amend accordingly.

QUESTIONS:

1. Is the plea of exoneration in this case equivalent to a plea of rescission?

2. Should the decision be the same if the exoneration agreement were after breach by the defendant? See Restatement, Contracts, § 410.
3. Can one party to a contract that is still bilateral in its operation make a gift discharge of his right against the other party while still remaining bound by his own reciprocal duty to that other?

HINES v. WARD BAKING CO.

Circuit Court of Appeals of the United States, Seventh Circuit, 1946.
155 F.2d 257.

LINDLEY, District Judge. Plaintiff appeals from a judgment entered on the pleadings in his suit to recover additional employment compensation from defendant. He urges that the court erred in, (1) holding as a matter of law that an executed modified employment contract requires no consideration; * * *

The undisputed facts, as culled from the pleadings upon which judgment was entered follow. Plaintiff became an executive employee of defendant under a contract beginning August 1, 1931, terminating at the end of five years, at an annual salary of \$35,000, payable in equal monthly installments on the last day of each month. On May 1, 1933, plaintiff wrote defendant that it was "agreeable" to him to accept a temporary 10% reduction in his salary, effective May 8, 1933, and, on May 20, 1933, that he understood that the reduction referred to in his letter of May 1 should apply for the balance of his contract period. Provided, however, that he be free to submit to the board of directors for its consideration at any time a partial or complete restoration of his salary to the rate specified in the contract "for the then unexpired balance of its term." From that date until July 31, 1936, plaintiff continued in defendant's employment, receiving, accepting and retaining compensation at the reduced figure in equal monthly installments without protest. The original five-year term having expired on July 31, 1936, plaintiff continued in defendant's employment for an additional year at the same reduced rate without further negotiation or arrangement of any character. On July 1, 1937, defendant wrote plaintiff that, although his contract had expired July 31, 1936, and had not been renewed and he had continued in the company's employment at the rate of compensation provided in the modified contract, his employment would terminate on July 31, 1937. On July 31, 1937, plaintiff acknowledged receipt of this letter; and on the same day defendant wrote plaintiff further that, although his employment had been terminated as of that day, the company desired him to do some special work for it in its labor relations for the compensation of \$100 per day and expenses, this arrangement to continue until such time as the company should determine to end it. On the same day

plaintiff replied that the proposition as set forth in this letter was "agreeable to him" and he thereafter continued in defendant's employment for some four years on this basis.

The District Court found that the letters of May 20, 1933, constituted a modified contract of employment under which plaintiff agreed to accept a lesser compensation for future services than that provided in his original contract; overruled plaintiff's contention that the modification was not effective for the reason that it lacked consideration and held that no consideration is necessary to support a modified agreement to accept a smaller sum for work to be done in the future than that originally specified, if thereafter it is fully executed. This holding we approve. Ordinarily an agreement modifying a former agreement by promising to accept a lesser sum in lieu of a liquidated, matured contracted amount is without consideration and void. The law of Illinois, in accord with the general authority, recognizes an exception that, where the modified contract is to be and actually is thereafter fully performed as to sums maturing after such new agreement, no consideration need be shown. Illinois holds that if the parties proceed to execute fully the modified agreement, so that nothing remains to be done by either party and it is no longer executory, the contract as executed will not be disturbed; that, so long as the modified agreement remains executory, the party waiving the greater amount and accepting the lesser has a right to repudiate the agreement and claim the full amount specified in his original contract; that while the modified agreement remains executory, one may rightfully demand full payment of the specified payments, but that, having the right to waive performance of the original agreement and carry the modified contract into effect, if he does so and fully performs and accepts the benefit of the new agreement, he cannot thereafter repudiate it and sue for the larger sum. * * *

QUESTIONS:

1. Taking the plaintiff's letter of May 1, 1933, as a promise to serve at a reduced salary, was there then or later any sufficient consideration for the promise?
2. Did the plaintiff's promise become enforceable by reason of the defendant's subsequent action in reliance on it?
3. Is the decision in conflict with the long line of cases headed by *Foakes v. Beer*, ante, Chapter 2?
4. Does this case illustrate and support Restatement, Contracts, § 416? If there was an "executed gift," what was the subject of the gift? Other cases are *Armour & Co. v. Anderson*, 114 Ind.App. 485, 51 N.E.2d 496 (1943); *United Dredging Co. v. U. S.*, 81 F.2d 118 (1936, C.C.A.), discharge of claim to payment for "extra work."
5. Is the defendant's defense with respect to salary after July 31, 1936, the same as that with respect to previous salary?

SECTION 4.—PAYMENT OR TENDER THEREOF

FLOWER'S CASE.

About 1600. Noy, 67.

A borrowed one hundred pound of F and at the day brought it in a bagg and cast it upon the table before F and F said to A being his nephew, I will not have it, take it you and carry it home again with you. And by the Court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of F and A might well wage his law. By the Court, otherwise it had been, if A had only offer'd it to F for then it was chose in action onely, and could not be given without a writing.

DIXON v. CLARK et al.

In the Court of Common Pleas, 1847. 5 C.B. 365.

Debt, the sum demanded being £26.

The defendants pleaded that as to part of the demand, to-wit, £5, the plaintiff ought not to recover any damages because, when that sum became due and before action brought, the defendant had made a tender of the £5.

Replication that at the time the tender was made a larger sum was due, to-wit, £13 15s.; that this was one entire sum and on one entire contract; and that the defendant had refused to pay the whole sum due.

Demurrer to the replication. Joinder.

WILDE, C. J. * * * The argument involved the general question, whether a tender of part of an entire debt is good; and several ancient and modern authorities bearing on this question were referred to, but no case directly in point was cited; nor have we been able to find any. On consideration, however, we are of opinion, upon principle, that such a tender is bad, and consequently that the replication is good.

In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is that the defendant has been always ready (*toujours prêt*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance by refusing to receive it. And, as in ordinary cases the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prêt*),

but must be accompanied by a proferret in curiam of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the uncore prist and proferret in curiam), yet he will answer the action, in the sense that he will recover judgment for his cost of defense against the plaintiff,—in which respect the plea of tender is essentially different from that of payment of money into court. And, as the plea is thus to constitute an answer to the action, it must, we conceive, be deficient in none of the requisite qualities of a good plea in bar. * * *

Besides the averment of readiness to perform, the plea must aver an actual performance of the entire contract on the part of the defendant, as far as the plaintiff would allow. And it is plain that where by the terms of it the money is to be paid on a future day certain, this branch of the plea can only be satisfied by alleging a tender on the very day. * * * Consequently, a plea by the acceptor of a bill, or the maker of a note, of a tender post diem, is bad, notwithstanding the tender is of the amount of the bill or note, with interest from the day it became due up to the day of the tender, and notwithstanding the plea alleges that the defendant was always ready to pay, not only from the time of the tender, but also from the time when the bill or note became payable. On the same reasoning it appears to us that this branch of the plea can only be satisfied by alleging a tender of the whole sum due under the contract, for that a tender of part of it only is no averment that the defendant performed the whole contract as far as the plaintiff would allow. * * *

Judgment for the plaintiff.

NOTE

As a matter of course, full performance as required by any legal duty operates to extinguish that duty. See Restatement, Contracts, § 386.

A debtor who owes several debts to the same creditor and makes a payment of less than their total sum can determine which of them shall be discharged by giving notice to the creditor at the time of such payment. For other rules as to the application of payments, see Restatement, Contracts, §§ 387-394.

A tender of money due does not operate as a discharge of a unilateral debt, nor does the creditor's refusal to receive it. That a tender may have the limited operation indicated in *Dixon v. Clark*, supra, the debtor must remain always ready (keep his tender good) and must pay the money into court when sued. Also, unless there is a waiver by the creditor or his advance refusal shows that it would be futile, the tender must be made at the right time and place, in the required form and amount without requiring the creditor to make change, and the money must be produced and accessible to the creditor.

As to when a duty to render a performance other than a payment of money is discharged by the obligee's refusal to receive or permit it, see Restatement, Contracts, § 415.

SECTION 5.—NOVATION—SUBSTITUTED CONTRACT

ROE v. HAUGH.

In the Exchequer Chamber, 1697. 12 Mod. 133.

B was indebted to A in the sum of £42, and C in consideration that A would accept C as his debtor for the £42 due from B, in the place and stead of B, undertook and promised A that he (C) would pay the said £42. A dies; his executors, on this promise, bring an assumpsit against C averring in their count, that A, the testator, trusting to the said promise of C had accepted the said C to be his debtor, without saying anything that he discharged B. Non assumpsit pleaded; verdict and Judgment for the plaintiff. Writ of error brought in the Exchequer Chamber. [Statement of the contract is translated from Latin.]

The error insisted on was that this is a void assumpsit, here being no good consideration, for except B was discharged, C could not be chargeable.

For which reason BLENCOWE, POWELL, and WARD were of opinion judgment should be reversed, but POWIS, NEVILL, LECHMERE, and TREBY that this being after verdict, they should do what they could to help it; to which end they would not consider it only as a promise on the part of C, for as such it would not bind him except B was discharged; but they would construe it to be a mutual promise—viz., that C promised to A to pay the debt of B and A on the other side promised to discharge B, so that though B be not actually discharged, yet if A. sues him, he subjects himself to an action for the breach of his promise.

The judgment was affirmed.

QUESTIONS:

1. Did A's acceptance of C's offer make a unilateral or a bilateral contract?
2. If A merely promised to discharge B, and did nothing more in performance of that promise, was the transaction between A and C a novation? See *Beech v. Ford*, ante, p. 836; *Baurer v. Devenis*, post, p. 1011.
3. Is Restatement, Contracts, § 427, applicable?
4. Was B's expression of assent necessary before any novation?

KLINKOOSTEN v. MUNDT.

Supreme Court of South Dakota, 1916.
36 S.D. 595, 156 N.W. 85, L.R.A.1918B, 111.

Action by Jacob Klinkoosten against William J. Mundt. From an order overruling plaintiff's motion for a directed verdict, and from a judgment for defendant, plaintiff appeals. Reversed and remanded.

McCoy, J. Plaintiff, as assignee of the original payee, brought this suit against defendant to recover upon a negotiable promissory note for \$25 executed and delivered by defendant to the Unitype Company. There was judgment in favor of plaintiff in the justice court, from which defendant appealed to the circuit court. In circuit court there was a verdict and judgment in favor of defendant. At the close of all the evidence plaintiff moved the court for a directed verdict in favor of plaintiff, on the ground that the undisputed testimony shows that plaintiff purchased the note in due course in good faith, in the ordinary course of business for value before maturity, and that the undisputed evidence shows no defense, in that it does not show a release or novation. The motion was denied, to which ruling plaintiff excepted. Plaintiff now assigns such ruling as error.

Defendant admitted the execution of the note. The defendant pleaded as a defense that prior to the transfer of said note to plaintiff the Unitype Company released defendant from the payment of said note and agreed in writing to accept as payor in lieu of defendant the Messenger Publishing Company. It appears from the evidence that at the time of the execution of said note defendant was the proprietor of a printing and publishing business, and purchased certain printing machinery from the Unitype Company, and gave 46 notes, amounting to \$1,450 in consideration of the purchase price of said machinery, the note in question being one of such notes. Under the contract for the purchase of said machinery it was provided that the title to such machinery should remain in the Unitype Company until the full payment of said notes. After the making of this contract, and before the maturity of said note, defendant sold and transferred his printing and publishing business and said machinery to the Messenger Publishing Company. About the time this sale and transfer were made to the Messenger Company, defendant wrote the Unitype Company that he had made such sale; that the Messenger Company had agreed to make new notes for those remaining unpaid for such machinery, and would assume the entire obligation of defendant, provided the Unitype Company would consent to take their notes. The Messenger Company also wrote the Unitype Company in substance as follows: We have purchased the interest of Mundt in his contract under which the Unitype typesetting machine was installed. We, therefore, assume the rights

and obligations of Mundt in the contract, and agree to pay the unpaid notes given by him, and carry out all his obligations under the terms of the agreement. It is agreed between Mundt and the Messenger Company that on completion of the payment of the balance of these notes and the carrying out in full of the terms of the agreement, you are to issue a bill of sale for said machinery to the Messenger Publishing Company.

This letter was signed by the Messenger Publishing Company by its president, and at the bottom thereof, over the signature of defendant, appeared the following: "The Unitype Company is hereby authorized to issue a bill of sale to the Messenger Publishing Co. for the above-described machine when all the terms of the contract have been fully met and all the notes given under the same duly paid." Also on the bottom of this letter appears the following: "Accepted. The Unitype Co., by E. J. Andrews, Treas."

The note in question was never paid. The Messenger Publishing Company never executed and delivered to the Unitype Company its notes in place of the notes given by defendant. In order to constitute novation, there must be either an express or implied agreement on the part of the creditor to substitute the new debtor in place of the original debtor, and also an express or implied agreement to release and discharge the original debtor. *Kelso v. Fleming*, 104 Ind. 180, 3 N. E. 830; *Carpy v. Dowdell*, 131 Cal. 495, 63 P. 778; *Dempsey v. Pforzheimer*, 86 Mich. 652, 49 N.W. 465, 13 L.R.A. 388; *Cornwell v. Megins*, 39 Minn. 407, 40 N.W. 610; *Piehl v. Piehl*, 138 Mich. 515, 101 N. W. 628; *Hanson v. Nelson*, 82 Minn. 220, 84 N.W. 742; *Lowe v. Blum*, 4 Okl. 260, 43 P. 1063; *Roberts v. Samson*, 50 Neb. 745, 70 N. W. 384; *Page, Contracts*, 958; 29 Cyc. 1132.

All that the Unitype Company ever assented to, as shown by the correspondence, was that the Messenger Publishing Company might assume the rights and obligations of defendant under the contract and make payment of the notes given by defendant, and when said notes had all been fully paid and satisfied, it would transfer title to the machinery to the Messenger Publishing Company. There was no assent or agreement, either express or implied, that the Messenger Company be substituted in place of defendant as a debtor to the Unitype Company. There was no assent or agreement, either express or implied, to discharge or release defendant. In most of the adjudicated cases where it has been held that implied novation had occurred there were circumstances such as the delivery to the original debtor of his notes and new notes taken in place thereof, or other circumstances, indicating an intention on the part of the creditor to accept the new debtor in place of the old, and to release and discharge the obligation as against the original debtor. No circumstances of that character appear in this case. We are of the view that the court erred in overruling the motion

to direct a verdict for plaintiff; no defense of release by novation having been shown.

The judgment and order appealed from are reversed, and the cause remanded.

SMITH, J. (concurring). * * * A contract of novation is effective between the original creditor and the new debtor. The original debtor, if sued upon the original obligation, may plead a valid contract of novation as an accord and satisfaction of his indebtedness. If a valid contract of novation is not proved, the defense of accord and satisfaction fails.

QUESTIONS:

1. Could Unitype Company assent to the "assignment" by Mundt to the Messenger Company without at the same time accepting the latter as substituted debtor?
2. Why was not Mundt's assent to the assignment by Unitype Company to Klinkoosten necessary?
3. Is there a novation when a bank depositor has his account changed to a new party on the books of the bank? See *Chippendale v. North Adams Savings Bank*, 222 Mass. 499, 111 N.E. 371 (1915); Restatement, Contracts, § 423.

NOTE

There is no novation, unless the original debtor is discharged. A mere assent by the creditor to the assignment of the contract by the original debtor, where such debtor had rights as well as duties, does not operate as a discharge.

An assignment of a contract becomes a novation, where the assignee has agreed to undertake the duties as a substitute for the assignor, and the other party has agreed to such substitution, not only in the matter of performance as a fact, but also in respect to the legal duty to perform. The assent of the creditor to this substitution can be shown by implication from conduct and circumstances, as well as by express words, and some courts appear to be liberal in drawing the inference.

PERRY & WALDEN v. GALLAGHER.

Court of Appeals of Alabama, 1919. 17 Ala.App. 114, 82 S. 562.

Assumpsit by J. L. Gallagher against Perry & Walden. Judgment for plaintiff, and defendants appeal. Affirmed.

Count 4 of the complaint is as follows:

Plaintiff claims of the defendants the further sum of \$32.50 for that on, to wit, December 1, 1914, the defendants promised to furnish plain-

tiff with lumber to the value of \$32.50, and that one Coleman Gann was indebted to plaintiff in the sum of \$32.50, and said defendants stated to plaintiff that they were indebted to Gann and that they would deliver to plaintiff said lumber; and plaintiff, in pursuance of said agreement, discharged said Gann from his said indebtedness, with the consent of said Gann, but the defendants failed then or refused to comply with said agreement and to deliver said lumber to plaintiff; and this relates to the same transaction as counts 1, 2, and 3, and plaintiff claims interest on said claim.

SAMFORD, J. The fourth count of the complaint, upon which the cause was tried, sets up a novation, and the insistence of appellant is that the complaint is subject to demurrer for the reason that it fails to allege that the defendants were indebted to the original debtor of plaintiff, and whom it is alleged the plaintiff discharged from further liability to him upon the express agreement of defendants to pay plaintiff the amount due, representing to plaintiff at the same time that they (the defendants) were indebted to plaintiff's original debtor in the amount which they were agreeing to pay. The complaint alleged a previous valid indebtedness due from the original debtor to plaintiff, an agreement of all the parties to the new contract or obligation, an agreement that it was an extinguishment of the old contract or obligation, and a new contract or obligation binding between the parties thereto. It was not necessary to allege a consideration passing to the defendants other than the release by plaintiff, at the instance of defendants, of the claim which he held against the original debtor. This was not a promise of the defendants to answer for the debt, default, or miscarriage of another, but was an original undertaking by them, where, on account of their promise, the plaintiff released the claim which he had theretofore held. The complaint was not subject to demurrer interposed. *Perry & Walden v. Gallagher*, 200 Ala. 68, 75 So. 396; *Hopkins v. Jordan* (Sup.) 77 So. 710; *McDonnell v. Ala. Gold Life*, 85 Ala. 414, 5 So. 120; 20 R.C.L. pp. 367, 368, § 10; *Underwood v. Lovelace*, 61 Ala. 155; *Howard v. Rhodes* (App.) 81 So. 362.

As has already been seen, it was not necessary to a novation that the defendants should have been actually indebted to plaintiff's original debtor, and therefore the court was not in error in giving the several charges in line with the excerpt from his oral charge as requested by plaintiff, and in refusing charges requested by defendants, asserting contra propositions, to wit:

"If Perry & Walden accepted the order given to Gallagher by Gann and agreed to pay it in lumber, and that Gallagher released Gann and took the debt on Perry & Walden, it would not be material whether or not Perry & Walden owed Gann."

"An essential element of every novation is a new contract to which all the parties agree." 20 R.C.L. p. 367.

If the agreement is had, it can make no difference that it was not perfected at the same moment between all of the parties, or that all were not present at the time. *McLaren v. Hutchinson*, 22 Cal. 187, 83 Am.Dec. 59. It is therefore essential in this case, in order to establish the plaintiff's contentions, that the evidence should show an agreement of all the parties to the terms of the new contract. This, however, was a question for the jury, and there was sufficient evidence upon which to base this finding. The refusal to give the general charge at the request of the defendant was not error.

The ruling of the court on the motion for a new trial, on the ground that the verdict of the jury is contrary to the evidence, will not be disturbed.

We find no error in the record, and the judgment is affirmed.
Affirmed.

QUESTIONS:

1. How was Gann discharged in this case?
2. Was Gann's assent necessary to a novation? See Restatement, Contracts, § 427.

NOTE

Where one partner retires and a creditor accepts the remaining partner as his sole debtor, there is a novation. For various forms a novation may take, see Restatement, Contracts, §§ 423-430.

TAYLOR v. HILARY.

In the Court of Exchequer, 1835. 1 Crompt., M. & R. 741.

Assumpsit. The declaration stated, that in consideration that the plaintiff, at the special instance and request of the defendant, would allow one Henry Holt to have goods as he might want them, not exceeding in the whole £200, the defendant undertook and promised the plaintiff to guarantee the payment of such goods; and the plaintiff averred that he, confiding &c., did afterwards, to-wit &c., sell and deliver to the said Henry Holt certain goods of great value, not exceeding in the whole £200, to-wit, of the value of £190, as he the said Henry Holt did want them; of which the defendant afterwards, to-wit, on &c., had notice. Breach, that Henry Holt had not paid for the said goods, or any part thereof, nor had the defendant, although often requested, paid for the same, or any part thereof. Plea, that after the making of the promise and undertaking in that count mentioned, and before any breach thereof, to-wit, on the day and year aforesaid, it was, at the special instance and request of the plaintiff, agreed by and

between the plaintiff and defendant that the plaintiff should supply to the said Henry Holt £200 worth of goods as he should want them, and that such goods should be paid for at the end of three months by a joint bill at four months accepted by the defendant; which agreement of the defendant to the plaintiff, before any breach of the promise and undertaking in the said count mentioned, accepted, in full discharge of that promise and undertaking, and thereby then wholly released and discharged the defendant from the further performance of that promise and undertaking. Verification.

To this plea the plaintiff demurred; and alleged as cause of demurrer, that there was no material difference between the agreement set out in the count and that set out in the plea, and that the only difference applied to the time of credit to be given; and that it did not appear by the said plea, but that the agreement therein mentioned had been fully carried into effect by the plaintiff, and the time of credit expired.

PER CURIAM. Before the breach of the first agreement a new agreement is entered into, varying the contract in an essential part, the time of payment. The latter, then is a substituted contract, and is an answer to an action upon the former. The plea is not a plea of accord and satisfaction, and does not therefore require an averment of performance.

QUESTIONS:

1. Was this a rescission (Restatement, Contracts, § 406), an inconsistent contract (Id. § 408), an accord and satisfaction (Id. § 418), a novation (Id. § 424)?
2. May it properly be included within more than one of those titles?

NOTE

Whether before or after breach, if there are mutual duties as yet unperformed a mutual agreement to discharge is valid. Restatement, Contracts, §§ 406, 410.

The terms of a written contract can be altered by the parol agreement of the parties, even though the written contract expressly provides that it can not be altered except by a writing. Restatement, Contracts, § 407.

MERRY v. ALLEN.

Supreme Court of Iowa, 1874. 39 Iowa 235.

The plaintiff brought this action to foreclose a mortgage given to secure ten promissory notes for \$2,000 each, the suit being to foreclose for the notes due.

The defendant, Allen, answered admitting the execution of the notes and mortgage by him and his co-defendant Richart, who, it is alleged, had conveyed his interest in the mortgaged premises to Allen. The answer further alleges that the plaintiff and the defendant, Allen, on the 30th day of January, 1871, executed an agreement, as follows:

Allen was to keep only a part of the land originally bought and to give his notes for different sums, with a new mortgage as security. Merry agreed to return the original notes and mortgage, the subject of the present action. The writing stated it was "for the purpose of a full and complete settlement."

The plaintiff replied that the new contract was never finally agreed upon and has never been performed by either party.

Verdict was for the defendant. Plaintiff appeals.

MILLER, C. J. I. It is insisted by the appellant's counsel, that the defendant has undertaken to plead an accord and satisfaction in bar of the plaintiff's action, but that he fails to allege full performance on his part. At the common law it is well settled, that an accord without satisfaction is no bar to a suit on the original obligation. If, however, the accord be founded upon a new consideration, and accepted as satisfaction, it operates as such and will take away the remedy upon the old contract. See *Hall v. Smith*, 15 Iowa, 584, and authorities cited.

In the case before us the new agreement pleaded in the answer is not properly an accord. It is rather in the nature of a rescission of a former contract, and the substitution therefor of a new and different one, based upon a new consideration. The original contract was for the sale to the defendant of certain real and personal property for a consideration in money, to be paid to the plaintiff. The new agreement stipulates for the rescission of the former contract; a re-conveyance by the defendant of most of the land and personal property purchased under the first contract, the delivery up of the notes made by defendant to plaintiff, and various other stipulations on part of each of the parties.

This new agreement being based upon a new consideration, if accepted by the plaintiff as a compromise of, or in substitution for, the indebtedness of the defendant under the original contract would have the effect to take away any right of action which the plaintiff previously had on the first contract. There was, therefore, no error in the refusal of the court to give the instructions asked by the plaintiff touching this question. The court properly left it to the jury to determine whether this new agreement was entered into by the parties. In other words, whether this agreement or the one alleged by the plaintiff was the actual contract made by the parties, and accepted by plaintiff as a compromise of the defendant's indebtedness to her.

II. It is insisted that the verdict is not sustained by sufficient evidence.

Upon appellant's theory of the law, that it was necessary for the defendant to show a full and complete performance on his part of the new agreement, it is possible that the verdict could not be upheld. But, in the view we have taken of the case, it was only necessary that the defendant should show that this new agreement was entered into by the parties. In other words, that he should show the making of the agreement by both parties. By its terms it purports to be for the compromise of an indebtedness from the defendant to the plaintiff, and the substitution of a new contract upon a new consideration extinguishing such indebtedness. It was not required of the defendant that he should show that he had fully performed on his part the new agreement. The defense was complete by proving the making and acceptance of the new contract. That the evidence was sufficient to warrant the jury in thus finding, we entertain no doubt.

If the defendant has failed to comply with the new agreement, plaintiff's remedy is on that agreement.

The foregoing view fully disposes of the case, and relieves us from a discussion of the other questions presented by counsel for appellant, which in our opinion are not material.

The judgment of the court below will be affirmed.

QUESTIONS:

1. Should the decision be the same if the defendant had committed a total breach of the second contract? See Restatement, Contracts, § 418; *Elton Cop Dyeing Co. v. Broadbent*, 122 L.T. 142 (1919).
2. Is a compromise that is as yet executory always a substituted agreement?
3. How can one tell whether a new agreement is a substituted contract and an immediate discharge of former duty, or is an executory accord providing for a future discharge by a substituted performance? See Restatement, Contracts, § 419.

UNITED STATES NAVIGATION CO., INC., v. BLACK DIAMOND LINES, Inc.

Circuit Court of Appeals of the United States, Second Circuit, 1942.
124 F.2d 508.

Libels by the United States Navigation Company, Inc., against the Black Diamond Lines, Inc., to recover damages for breach of alleged oral charters. From final decrees in admiralty, 37 F.Supp. 1005, dismissing the libels with costs, libellant appeals.

Reversed.

The libels alleged that on December 27, 1939, the parties entered into oral agreements whereby the appellee agreed to let, and the appellant to hire, the steamers Black Hawk and Black Tern for a period of "two to about five months trading South Africa, Capetown/Beira range, South America or the Far East." * * * At the time of making the oral charters it was also agreed that the terms of the oral charters should be reduced to writing and signed by the parties. Thereafter appellee's broker who had brought about the agreements reduced the oral charters to writing, containing all the terms that had been agreed upon orally. But the appellee, in breach of its agreement, refused to sign these written charters and refused to permit the appellant to have the use and hire of the vessels unless the latter signed written charterparties containing a provision which had not been agreed upon before, viz., a limitation of appellant's use and hire of the vessels to only one round voyage to South Africa, Capetown/Beira range, or South America or the Far East. By reason of this threatened breach of the oral charters appellant on or about January 17, 1940, delivered to appellee incorrect writings signed by appellant, together with notifications in writing that the written charters did not correctly state the agreed periods and trading limits and that its signature was made under protest and with reservation of its rights. Appellee received these writings and retained them without objection. Thereafter the steamers entered into appellant's employment and each made a round voyage from New York to South Africa, Capetown/Beira range and return within the period and trading limits of the oral charter but, in breach of the original oral agreements, the appellee refused to perform the same for the remainder of the agreed periods of about five months and withdrew the vessels from appellant's service. By reason of the above breaches of the oral agreements appellant was compelled to charter other vessels for the balance of the charter periods and within the trading limits thereof, all to its damage, for which recovery is sought.

Before L. HAND, AUGUSTUS N. HAND, and C. E. CLARK, Circuit Judges.

AUGUSTUS N. HAND, Circuit Judge. The charter hire was at the rate of \$26,000 per month and each vessel made one voyage to South Africa and returned, the Black Hawk to Norfolk, Va., and the Black Tern to Baltimore, Maryland. The voyage of the first vessel took from February 15, 1940, to May 2, and the voyage of the second from March 7 to June 15. Concededly there was opportunity under the original oral charters for two round voyages, only one of which libellant was granted under the terms of the written charterparties that were imposed upon the latter against its will. The exceptions to the libels on the ground that each failed to state a cause of action involved the assumption of the truth of the facts stated in them. Under

this assumption it seems probable that the respondent was anxious to shorten the length of the charters and that the new charters it forced upon the libellant were only signed by the latter because no other course was open if it was to have any use of the vessels, and it was under a duty to mitigate damages.

The District Judge held that in the execution of the charterparties the libellant "abandoned its rights under the oral contract as signed," sustained the exceptions and dismissed each libel. While the situation is not free from doubt, upon the record before us this result seems inequitable and we think the decrees may be and ought to be reversed and the causes should proceed to issue and trial.

In our opinion the signed charterparties were without consideration and even if, because of the provisions of the New York Statute, Section 33(2) of the Personal Property Law, Consol.Laws, c. 41, no consideration was necessary, they were not a substitute for the prior oral charters because they only covered a part of the subject-matter embraced in the original agreements and the latter remained in effect to the extent that they were not included in the written charters. The notifications which accompanied the latter were addressed by the appellant to the appellee and read as follows:

"In view of your January 15th letter and your other statements that you will not let us have the use of these vessels when their current charters expire unless we sign the charter parties in the form demanded by you—which do not correctly state the periods and trading limits which we agreed upon—we return them herewith duly signed by us, under protest, and reserve our rights in the premises."

The documents that were signed differed from the oral charters only in limiting the term to a single round voyage, whereas the oral ones gave the libellant the option of obtaining a term of five months which would enable it to perform two voyages. Under the oral agreements the libellant was only bound to take the vessels for a minimum of two months and had the option to take them for three months longer. The withdrawal in the written charters of the chance that the libellant might exercise the option was no consideration on the appellee's part for that possibility was not a right which the owner possessed. It may be said that there was a consideration arising out of implied agreements to rescind the oral charterparties and to substitute the written charters therefor. But we think that the written charters did not wipe out or rescind the oral agreements. They only embodied promises to carry them out to the extent of one voyage for which the appellee was already bound instead of for two voyages and pro tanto were wholly consistent with the oral charters. In view of the appellant's notices of protest and reservation of rights which accompanied the signature of the written charters it seems unreasonable to say that the execution of the charters signified an abandon-

ment of the option for two voyages granted by the oral agreements or effected more than an agreement to accept a charter for a single voyage and a promise to pay hire pro tanto for what was the minimum requirement of the earlier agreement.

* * * For the foregoing reasons, it seems apparent that the signed charters were not substitutions for the oral agreements and were not intended as rescissions thereof, and that consideration therefor was lacking. We add that the protest and reservation of rights by the appellant demonstrate that there was no complete integration of the agreement of the parties in the written charters. Restatement, Contracts § 237.

It may be further contended that Section 33(2) of the New York Personal Property Law applied and consideration was therefore unnecessary to support the written charters. The statute reads as follows:

"2. An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, * * * shall not be invalid because of the absence of consideration, provided that the agreement changing, modifying or discharging such contract, obligation, lease, * * * shall be in writing and signed by the party against whom it is sought to enforce the change, modification or discharge."

This statute, in our opinion, does not affect the situation. Even though the written charters may have been valid irrespective of any consideration it does not follow that the oral contracts were superseded. The written charters were only agreements to carry out part of the appellee's obligations already entered into and so far as performed would have been in partial execution of the earlier contracts. Those contracts were at least not wholly rescinded. Appellant's notices accompanying the written charters contained statements to the contrary and plainly indicated a purpose to reserve all rights under the prior oral agreements. Unless there was a rescission or an agreement to rescind implicit in the signed charters, which we have already held was not the case, the New York statute would not invalidate the oral charters. The statute at most validates the written contracts but they were not received in substitution for the oral ones and effected at most a pro tanto rescission of the latter. We think the suits to recover for breach of the oral charters ought to stand and that the written charters should be treated as a proper attempt to mitigate damages. In a similar situation the Court of Appeals for the Sixth Circuit, consisting of Taft and Lurton, JJ., held that it was the duty of one whose contract was broken to mitigate damages by accepting an arrangement on less favorable terms, while retaining his rights to recover damages for the original breach. *Lawrence v. Porter*, 63 F. 62, 26 L.R.A. 167.

We hold that the oral charters were not superseded and that the libellant properly joined in the written charters as a means of mitigating damages. The portions of the earlier oral agreements which were not inconsistent with the later written charterparties were not rescinded. Restatement, Contracts § 408; Williston Contracts, 1936 Ed., 1826. Accordingly the decrees of the District Court are reversed with costs and the exceptions to the libels are overruled with leave to the appellee to join issue and proceed to trial if it be so advised.

L. HAND, Circuit Judge, dissented, thinking that the libellant's express reservation of rights under the oral contract did not prevent his execution of the charter tendered by the defendant from operating as an acceptance of that charter as a substitute for and a discharge of the oral agreement.

NOTE

In *SAVAGE ARMS CORP. v. U. S.*, 266 U.S. 217, 45 S.Ct. 30, 69 L.Ed. 253 (1924), after securing at its own request a modification of its partly performed contract with the government, the plaintiff wrote a letter expressly "reserving all its rights against the United States" to damages for loss of profits on the unperformed part of the original contract. The court said: "The rescission of the contract in so far as it was executory had been consummated by the government's acceptance of appellant's proposal. The attempted reservation came too late. Either it was a mere afterthought, or there was a concealment of purpose, on the part of the appellant during the negotiations, amounting to bad faith. Whether the agreement was made reluctantly, or appellant got the worst of the bargain, are matters unnecessary to be considered. It is enough that, without fraud or coercion, it did agree."

SECTION 6.—ACCORD EXECUTORY—ACCORD AND SATISFACTION

INTRODUCTORY NOTE

The student will be justifiably puzzled by the cases dealing with an executory accord unless he knows something of the history of the law of this subject. In the previous chapter on Consideration it has already been stated that some centuries ago the "bilateral" contract was not recognized by the courts of common law; a mere promise was not regarded as a sufficient reason for enforcing a return promise given in exchange for it. An "executory accord" is in most cases a bilateral agreement for the settlement of a claim made by one party

for compensation for the breach of an alleged duty owed to him by another. The alleged obligor promises some performance other than that for which he was originally bound (or is asserted to have been); and the claimant (obligee) promises to accept that performance in satisfaction of his claim. Such an agreement as this was very early called an "accord." It did not itself satisfy and discharge the original claim; and it was not even an enforceable contract, for the reason that it was merely an exchange of promises.¹

Two rules of law were thus laid down by the courts: (1) An accord is not operative as satisfaction; only its complete performance by the obligor will so operate. (2) Upon an accord no remedy lies.

When rules of law have been put into words by those whose authority is generally accepted, they are likely to be repeated and to be applied long after the reason for their original statement has ceased to exist. In the present instance we have a striking example of a stated rule that has been repeated down to the present time and may even yet be occasionally applied, even though its statement and application are not only without their original reason, they are directly contrary to more general rules that are universally accepted and contrary to the interests and practices of the community. For more than three centuries bilateral contracts have been recognized as valid and enforceable; and men with a sense of business honor perform them without any necessity of an appeal to the courts. That the law applicable to these contracts was for a very long time not applied to an executory accord is explainable only by the tyranny of words supported by confusion in the mental process of legal analysis.

Rule numbered (2) above has been abandoned by the American Law Institute, and a rule in direct conflict with it is found in Restatement, Contracts, § 417. The student must expect to find many repetitions of the old rule, however; and he must become able to make such a clear analysis of a factual situation that a court can not fail to understand it and reach the proper decision. Furthermore, he must not

¹ In *Y.B. 15 Edw. IV, 8 pl. 5*, Pigot, J., said: "There is a difference between an arbitrament and an accord; in the case of an accord an actual payment or other recompense is necessary, or it will not be valid; if there is a dispute between you and me as to certain trespasses, whereupon there is an accord between us that I pay certain money in settlement, and I tender the money to you and you refuse to receive it, the accord is void, but if you receive the money it operates as satisfaction. Also for non-payment of the money you would have no action. In arbitraments

it is otherwise, for upon an award that I pay you certain money you would have an action."

After bilateral contracts became enforceable at common law, attempts were made to cause a bilateral accord to operate as satisfaction. See *Reniger & Fogasse's Case*, 1 Plow. 1 (1550); *Termes de la Ley*, tit. Concord; *Case v. Barber*, T. Raym. 450 (1681); *Allen v. Harris*, 1 Ld. Raym. 122 (1701). These attempts failed, except where the new contract is clearly substituted for the prior claim.

accept the worded rule of the Restatement or the assertions made in these Notes unless he can affirm them to his own satisfaction by his analytical and comparative study of the actual decisions made by the courts in recent times. He should feel no safer in swallowing these generalizations than in accepting those made by equally able men in an earlier period.

Rule numbered (1) above has also suffered some modification. Usually an accord, however valid it may be as an executory contract, is not in itself a satisfaction and discharge of the prior claim in relation to which it is made. This is because in its own terms it is usually provided only that *the newly promised performance* will so operate. In making their "accord," however, the parties may provide otherwise. The claimant may accept the obligor's *promise* of a new performance as a substitute for and in immediate discharge of his original claim. Such an "accord" as this is a substituted contract. In one respect, it is an "executory" contract; for the obligor's new promise has not yet been performed. In another respect, however, it may be said to be "executed": the claimant makes no promise to receive the substituted performance as satisfaction of his claim (although he promises expressly or by implication not to bring suit for its enforcement); instead he accepts the obligor's new promise as instant satisfaction and his old claim is discharged. Such an "accord" as this is identical with what is called a "novation" except that there is ordinarily no substitution of a new obligor.

This note does not attempt to state the entire legal operation of an "accord." The student must proceed to determine this for himself. His attention should be called, however, to the difference between a bilateral and a unilateral agreement. A claimant may propose and promise to accept a specified performance as a satisfaction of his claim, creating a power of acceptance in the other party by rendering that performance without making any promise to render it. Until the specified performance is begun there is no contract, called an "accord" or otherwise; there is only an unaccepted offer. Likewise, one against whom a claim is made may offer a specified performance as a satisfaction, creating a power of acceptance in the claimant by receiving the performance without making any promise to receive it. Whether a particular transaction is one of this sort or of a different sort is to be determined by an analysis of the facts as reported and by a reasonable interpretation of the words and acts of the parties. This must be done by the one who studies any reported case; it may not be done for him correctly, or done for him at all, in the opinion by the court.

Like other "introductions" to a subject, this note should be critically reconsidered as the cases that follow it are studied and analyzed.

(A) EFFECT OF AN ACCORD UPON THE PRIOR DUTY

RICHARDS v. BARTLET.

In the King's Bench, 1584. 1 Leon. 19.

Dorothy Richards, executrix of A. her former husband, brought an action upon the case upon a promise against Humfrey Bartlet, and declared, that in consideration of two weights of corn delivered by the testator to the defendant, he did promise to pay to the plaintiff ten pounds, to which the defendant said, that after the assumpsit the plaintiff in consideration, that the said two weights were drowned by tempest, and in consideration that the defendant would pay to the plaintiff for every twenty shillings of the said ten pounds three shillings four pence, scil. in toto thirty three shillings four pence, did discharge the said defendant of the said promise, and averred further, that he hath been always ready to pay the said sum newly agreed, upon which there was a demurrer. And the opinion of the whole Court was clearly with the plaintiff, first because that here is not any consideration set forth in the bar, by reason whereof the plaintiff should discharge the defendant of this matter, for no profit but damage comes to the plaintiff by this new agreement, and the defendant is not put to any labour or charge by it, therefore here is not any agreement to bind the plaintiff, see 19 H. 6. Accord, 1. 9 E. 4. 13. 12 H. 7. 15. See also Onlies case, 19 Eliz. Dyer, then admitting, that the agreement had been sufficient, yet because it is not executed, it is not any bar: and afterwards judgment was given for the plaintiff.

REILLY v. BARRETT.

Court of Appeals of New York, 1917. 220 N.Y. 170, 115 N.E. 453.

Action by William F. Reilly against William M. Barrett, as president of the Adams Express Company. A judgment for the plaintiff was unanimously affirmed by the Appellate Division (168 App.Div. 925, 931, 152 N.Y.S. 1139), and defendant appeals by permission. Affirmed.

ANDREWS, J. This action was brought to recover damages for personal injuries caused by the alleged negligence of the defendant. As an affirmative defense a supplemental answer alleged:

"That on or about the 16th day of August, 1912, the defendant, in good faith, served his verified answer to the complaint herein denying generally the validity of the plaintiff's claim, and thereafter, and on or

about the 10th day of December, 1913, an agreement was made between the plaintiff and the defendant, through their respective attorneys, by which the defendant agreed to pay to the plaintiff in full settlement of the cause of action set forth in the complaint the sum of \$200, and the plaintiff, in consideration thereof, agreed to accept the said sum in full settlement of the action, and upon the payment thereof to discontinue the action without costs."

The answer then alleges tender of the sum of \$200 to the plaintiff and his refusal to accept the same, and the continued readiness of the defendant to pay over such sum to the plaintiff.

The sufficiency of this defense was challenged by the demurrer, and the sole question in this court is whether the decision of the Special Term, affirmed by the Appellate Division, sustaining such demurrer, is correct.

An agreement whereby one party undertakes to give or perform, and the other to accept in settlement of an existing or matured claim something other than what he believes himself entitled to, is an accord. The execution of such an agreement is a satisfaction.

An accord, when followed by satisfaction, is a bar to the assertion of the original claim. Until so followed it has no effect.

The fact that the original claim is based on contract or in tort is immaterial. Either may be barred by accord and satisfaction. So it is whether the claim is liquidated or unliquidated, except that in the former case certain principles as to consideration are enforced which are not applicable to the latter.

These rules apply to every such transaction. It may be called a compromise. But whatever the name given the original claim is not barred until the satisfaction is completed. *Kromer v. Heim*, 75 N.Y. 574, 31 Am.Rep. 491; *Brooklyn Bank v. De Grauw*, 23 Wend. 342, 35 Am.Dec. 569.

The satisfaction contemplated by the accord may involve the payment of money or the delivery of property. Or the creditor may agree to accept the debtor's promise itself in satisfaction rather than the performance of this promise. *Kromer v. Heim*, supra.

In any event the defendant who seeks to set up this defense as a bar to the original action must allege and prove both the accord and the satisfaction. If his claim be that his promise was accepted in satisfaction, that he must plead. The burden is upon him to show the existence of a bar. *Babcock v. Hawkins*, 23 Vt. 561. Because of his failure to include such a statement in his supplemental answer the demurrer thereto was rightly sustained.

The answer clearly shows an executory agreement by which the defendant agreed, within a reasonable time, to pay the plaintiff the sum

of \$200, and by which the plaintiff agreed to accept that sum when tendered in settlement of the action, and thereupon to discontinue such action without costs. There is no allegation that the defendant's promise was to be received in satisfaction, and no facts pleaded from which such an inference can be drawn. The answer is therefore defective in that it pleads only an accord.

The plaintiff relies upon *Bandman v. Finn*, 185 N.Y. 508, 78 N.E. 175, 12 L.R.A., N.S., 1134. But, as is clearly pointed out, that was the case of a creditor holding an unmatured and contingent obligation agreeing with his debtor for the surrender of the obligation. The authority of *Kromer v. Heim* is not weakened, and it has been cited as late as *Mance v. Hossington*, 205 N.Y. 33, 98 N.E. 203.

The judgment appealed from should be affirmed, with costs.

Judgment affirmed.

QUESTIONS:

1. Did the new agreement (the "accord") have "no effect" as (a) an executory contract; (b) a temporary suspension; (c) a discharge? See Restatement, Contracts, § 417.
2. Should the court, as a court of equity, have entered a decree for the defendant, conditional on payment of \$200 into court?
3. Is it material that the plaintiff's claim was for a tort instead of for breach of a previous contract?
4. Is an accord specifically enforceable in equity, whether made before breach or after breach of the former contract duty that is to be discharged by performance? See Restatement, Contracts, § 417 (d); *Very v. Levy*, post, *Beech v. Ford*, ante.

NOTE

New York Pers.Prop.Law, section 33-a, after defining "executory accord," provides: "(2) An executory accord, hereafter made, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim * * * which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent * * *."

"(3) If an executory accord is not performed according to its terms by one party, the other party shall be entitled either to assert his rights under the claim * * * which is the subject of the accord, or to assert his rights under the accord."

Section 33-b provides: "(1) An offer in writing, hereafter made, signed by the offeror or by his agent, to accept a performance therein designated in satisfaction or discharge in whole or in part of any claim * * * followed by tender of such performance by the offeree or by his agent

before revocation of the offer, shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that such tender was not accepted by the offeror or by his agent."

Does this statute make an oral executory accord unenforceable? Compare Section 33-b with Restatement, Contracts, § 45.

WHITE v. GRAY et al.

Supreme Judicial Court of Maine, 1878. 68 Me. 579.

WALTON, J. Plaintiff held a note against defendants for \$800. Defendants were insolvent and were endeavoring to compound with their creditors. In consideration of which, the plaintiff agreed that, if their efforts were successful, he would take in payment of his note a lot of land, and new notes for \$500, payable, one-half in one year, and one-half in two years. Defendants' efforts were successful, and they offered to settle with the plaintiff upon the terms stated in the agreement; but he refused, denying all liability under his agreement, and claiming the full amount due upon his note. No deed of the land was ever executed, nor were the notes mentioned in the agreement ever made or tendered to the plaintiff.

The question is whether these facts constitute a valid ground of defense to an action on the note. We think not.

It is settled law in this state that a defense based on an alleged accord and satisfaction can be sustained only when the accord has been completely executed. Neither an offer to perform nor an actual tender of performance is sufficient. Nothing short of actual performance—meaning thereby, performance accepted—will sustain such a defense. The debtor's remedy, if the creditor has wrongfully refused to accept performance, is a separate action upon the agreement. *Young v. Jones* 64 Me. 563, 18 Am.Rep. 279; *Bragg v. Pierce*, 53 Me. 65; *Cushing v. Wyman*, 44 Me. 121.

The agreement which, in the case first cited, failed as a ground of defense, was successful when made the ground of a separate action. *Mattocks v. Young*, 66 Me. 459.

The distinction between an agreement which is, per se, to satisfy and extinguish an existing debt, and an agreement, the performance of which is to have that effect, must not be overlooked. The former operates as an immediate satisfaction of the debt. The latter, only when performed. The agreement set up as a defense in this case is clearly of the latter kind.

Judgment for plaintiff.

QUESTIONS:

1. Was the supposed accord a bilateral agreement?
 2. What was the consideration for the defendant's promise?
 3. Was there a revocation before acceptance of the offer, or a repudiation that excused performance of a condition precedent?
 4. Is the decision, or the reasoning, in conflict with Restatement, Contracts, § 417?
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FRANCIS et al. v. DEMING et al.

Supreme Court of Errors of Connecticut, 1890. 59 Conn. 108, 21 A. 1006.

THAYER, J. To the plaintiffs' complaint, claiming the foreclosure of a judgment lien, the defendants filed a special answer alleging, in substance, that the plaintiffs, after the judgment was rendered and after the judgment lien was filed, agreed to discharge the same if the defendants should within one month from June 10, 1889, pay the plaintiffs a sum materially less than the amount of the judgment, give them a release of damages for the attachment made in the writ, and make return to the probate court that the defendant Henry A. Deming had given notice of the settlement of his administration account with the estate of one Emily Francis, deceased; and that said notice was given, said release signed, and on the 8th, 9th, and 10th days of July, 1889, said Henry A. Deming went to the office of the plaintiffs' attorney prepared to pay the money and deliver the release, but did not find the attorney, who was sick at home as the defendant then learned; and that afterwards, and after the present suit was brought, the money was actually tendered to the plaintiffs' attorney, who refused to receive it. To this answer the plaintiffs demurred. The court sustained the demurrer, and from that decision this appeal was taken.

It is not alleged or claimed that the defendants agreed to obtain the release, make the return, and pay the money within one month from June 10th, and that this agreement was accepted by the plaintiffs in discharge of the judgment. It was not an accord with mutual promises, therefore, but a mere promise by the plaintiffs to discharge the judgment if these things were done. Their performance was thus a condition precedent to the defendants' right to a discharge. *Goodrich v. Stanley*, 24 Conn. 613. The agreement, if the condition is fully performed, constitutes an accord and satisfaction of the judgment, and is a bar to the action. Unperformed, it is a mere accord, and does not bar the action. *Williams v. Stanton*, 1 Root, 426; *Scutt's Appeal*, 43 Conn. 109. This is admitted by the defendants, but it is claimed that, in law, what has been done by them constitutes performance. When money is to be paid by one party to another, and the contract fixes no

place for the payment, the rule is that the payment must be to the person at the place where he is, if he be within the same dominion. 1 Swift, Dig. 292; 2 Pars.Cont. 636. Parke, B., in *Startup v. Macdonald*, 6 Man. & G. 624, says: "In such a case the party bound must find the other at his peril, and within the time limited, if he be within the four seas." Here no place was fixed for the payment. It was the defendants' duty, therefore, to seek the plaintiffs or their duly-authorized agent or attorney, and make tender to them within the time limited. This they did not do. Calling at the office of the attorney, prepared to pay, does not meet the requirements of the law. Deming there learned that the attorney was at his house. He made no tender of the money and release at the office to the person in charge. He did not seek the attorney at his house and tender them to him. Nor did he seek the plaintiffs, who reside in an adjoining town, and tender performance to them. The allegations of the answer show no excuse for his failure to do so. No waiver of performance within the time limited is claimed. As the tender after the action was begun was of the money only, and did not include either interest or the costs which had accrued, it was not a legal tender, and would not entitle the defendants to a discharge.

But the defendants urge that this is a proceeding in equity, and that the rules of equity are not so stringent as those of law concerning the necessity of a tender within the time limited, and that, as the answer shows that they were on July 10th, and still are, ready and willing to perform, the demurrer should have been overruled. When a condition is subsequent, and is broken, equity will generally relieve the party in default if he shows sufficient excuse for non-performance within the time specified. In the present case the defendants had no right to a discharge of the judgment, except upon the performance of the condition within the time. The performance of the condition was the consideration for the plaintiffs' promise to discharge the judgment. In such a case, where the rights of the party in default are dependent upon a condition precedent which is neither fulfilled nor waived, as no right or title vests, equity can afford no relief. *Davis v. Gray*, 16 Wall. 203, 21 L.Ed 447; *Giddings v. Insurance Co.*, 102 U.S. 111, 26 L. Ed. 92; *Wells v. Smith*, 2 Edw.Ch. (N.Y.) 78; *Mills v. Hoag*, 7 Paige (N.Y.) 21, 31 Am.Dec. 271; *Seton v. Slade*, 2 White & T. Lead.Cas. (Har. & W.Amer.Ed.) 1143. This case presents no equities in the defendants' favor. The plaintiffs agreed, if the defendants performed within one month, to accept nearly \$300 less than was due them upon their judgment. The return of the probate notice the defendant Deming was legally bound to make. The release he has never tendered. Under these circumstances, showing no excuse for non-performance, neither law nor equity can afford him assistance.

There was no error in the judgment appealed from. The other judges concurred.

QUESTIONS:

1. Did the defendant ever make a promise to render the performances specified by the plaintiff?
 2. Had the defendant begun or tendered these performances to such an extent as to make applicable Restatement, Contracts, § 45, making the plaintiff's offer irrevocable and binding him by a unilateral contract conditional on completion by the defendant?
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WALTER H. GOODRICH & CO. v. FRIEDMAN et al.

Supreme Court of Errors of Connecticut, 1917. 92 Conn. 262, 102 A. 607.

Action by Walter H. Goodrich & Co., a corporation, against Louis Friedman and others. Judgment for plaintiff, and defendants appeal. Error.

Action to recover the value of certain goods and articles sold and delivered, brought to and tried by the city court of New Haven. Facts found and judgment rendered for the plaintiff and appeal by the defendants. Error.

The plaintiff is a corporation engaged in the business of selling oils, gasoline, and the like. The defendants, between the dates of July 15, 1915, and December 13, 1916, made purchases of oils, gasoline, and other products, and made payments for these articles as set forth in the bill of particulars and made part of the plaintiff's complaint. On or about November 6, 1916, the plaintiff demanded payment of the defendants, who then owed the plaintiff \$595.56, but the defendants were unable to pay in cash. The plaintiff requested the defendants to execute a note for the amount of the indebtedness then existing, and suggested a note payable in 60 days. The defendants refused to give a 60-day note, but offered to execute a note payable in 4 months, whereupon a note in the following form was executed and delivered to the plaintiff.

"\$595.56

November 6, 1916.

"Four months after date we promise to pay to the order of Walter H. Goodrich & Co. five hundred and ninety-six and ⁵⁶/₁₀₀ dollars at Union & N. H. Trust Co. Value received."

There was no agreement between the plaintiff and the defendants that this note was received in payment of the existing debt. The plaintiff indorsed the note and discounted it at the bank where it was made payable, where it was later protested for nonpayment. The

plaintiff still holds the note, and it is unpaid. The note was at all times the property of the plaintiff. This action was instituted on December 19, 1916, prior to the maturity of the note. The amount of the plaintiff's claim as it appears from its bill of particulars is \$755.05. Of this amount \$156.49 represents sales which were made subsequent to November 16, 1916, the date of the note. The defendants admitted the execution, delivery, and acceptance of the note by the plaintiff, but claimed that the plaintiff was precluded from obtaining a recovery for the sum of \$596.56, the amount of the note, before it became due. The trial court overruled this claim, and rendered judgment for the full amount of the plaintiff's bill.

There are several reasons of appeal. In substance, the error assigned is the conclusion of the trial court that the plaintiff's acceptance of the negotiable promissory note and the negotiation of the same did not preclude a recovery of the indebtedness evidenced by the note before its maturity.

RORABACK, J. (after stating the facts as above). This action was commenced about 2½ months before the maturity of the note. It is a general rule that the nonexistence of a cause of action at law when the suit is brought is a fatal defect, which cannot be cured by the accrual of a right of action while the suit is pending. In other words, an action at law can be supported only on the facts as they existed when the action was commenced. *Woodbridge v. Pratt & Whitney Co.*, 69 Conn. 304, 305, 37 A. 688; *Dickerman v. N. Y., N. H. & H. R. Co.*, 72 Conn. 271, 275, 44 A. 228.

The acceptance of the note in the present case was at least an agreement for delay, and the plaintiff could not commence an action on the original debt evidenced by the note until the note became due. 2 *Parsons on Notes and Bills*, 135. The reason for this rule is that the entering into a new agreement and undertaking subjected the defendants, debtors, to peculiar liabilities, or afforded the plaintiff, creditor, fresh and peculiar rights which constituted a good consideration for the extension of credit. *Chitty on Contracts*, 593. This note "implied an agreement to suspend the remedy on the original demand during the term of the note." *Brabazon v. Seymour*, 42 Conn. 551, 554. See, also, 1 C.J. p. 1148, and cases cited in note 43 at the bottom of page 1148.

It appears that when this action was commenced the note had been discounted and was in the control of the bank, a bona fide holder. The defendants at this time were liable to pay the note to a third party. To now hold that the defendants at this time were liable for the price of the goods for which the note was given would be a plain evasion of

the rule that a cause of action must be supported by the facts as they existed when the action was commenced.

There is error, and a new trial is ordered.

The other Judges concurred.

QUESTIONS:

1. Why did not the indorsement and discount of the note at the bank deprive the plaintiff of any further right, either on the note itself or for goods sold?
2. Why did the note operate even as a suspension of the right to payment for the goods?
3. After default on the note, would the present action be maintainable? Suppose the bank still holds the note.

NOTE

The giving of a renewal note by a debtor is held to operate as a discharge of a surety on his former debt, on the ground that it suspends the creditor's remedy against the debtor until the maturity of the renewal note. It is generally assumed that the creditor's suit before that time would fail. See the dicta in the opinions in *Ford v. Beech*, 11 Q.B. 852 (1848), ante p. 832, and *Robinson v. Godfrey*, 2 Mich. 408 (1852), ante p. 841.

GOOD v. CHEESMAN.

Court of King's Bench, 1831, 2 Barn. & Adol. 328, 109 Eng.Rep. 1165.

Assumpsit by the plaintiff as drawer against the defendant as acceptor of two bills of exchange. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the sittings in London after Trinity term 1830, it was proved, on behalf of the defendant, that after the bills became due, and before the commencement of this action, the plaintiff and three other creditors of the defendant met together, in consequence of a communication from him, and signed the following memorandum: "Whereas William Cheesman of Portsea, brewer, is indebted to us for goods sold and delivered, and being unable to make an immediate payment thereof, we have agreed to accept payment of the same by his covenanting and agreeing to pay to a trustee of our nomination one third of his annual income, and executing a warrant of attorney as a collateral security until payment thereof. As witness our hands this 31st of October 1829." It did not appear whether or not the defendant was present when this paper was signed, nor did he ever sign it; but it was in his possession at the time of the trial, and he had procured it to be stamped. At the time of the signature, the defendant had other creditors than the four above mentioned, and particularly

one Gloge, to whom he had given a warrant of attorney, on which judgment had been entered up; and it was agreed, at the meeting of the 31st of October, that if Gloge would come into the arrangement there made, an additional £20 per annum should be set apart by the defendant out of his income. The defendant, on the 16th of November, 1829, wrote to the plaintiff as follows: "If you should see Mr. Wool-dridge" (one of the creditors who signed) "today, I should be glad if you would endeavour to be at my house any noon that you may be down, as there is an objection to the arrangement by Mr. Gloge, the particulars of which I will explain when I see you. I am sorry to be so troublesome; but, of course, I am anxious the thing should be settled." Gloge never acceded to the agreement, nor was any trustee ever nominated or covenant entered into, or warrant of attorney executed, as therein mentioned. The bills of exchange continuing wholly unpaid, this action was commenced. The Lord Chief Justice left it to the jury, as the only question of fact in the case whether the agreement entered into by the four creditors was conditional only, depending on Gloge's assent, or absolute; in the latter case, he was of opinion that the defendant was entitled to a verdict. The jury found for the defendant, but leave was given to move to enter a verdict for the plaintiff. A rule nisi was obtained accordingly.

LORD TENTERDEN, C. J. Upon the whole, I am of opinion that the verdict in this case was right. On the evidence it must be taken that the defendant assented to the composition, and would have been willing to assign a third of his income to a trustee nominated by the creditors, and execute a warrant of attorney, as required by the agreement; but he could not do so unless the creditors would appoint a trustee to whom such assignment could be made, or warrant of attorney executed. That no such appointment took place was the fault of the creditors, not of the defendant. It certainly appears that this was not an accord and satisfaction properly and strictly so called, but it was a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; the defendant, at the same time, promising to make over a part of his income, and to execute a warrant of attorney, which would have given the trustee an immediate right for their benefit. Then is not this a case where each creditor is bound in consequence of the agreement of the rest? It appears to me that it is so, both on principle and on the authority of the cases in which it has been held that a creditor shall not bring an action, where others have been induced to join him in a composition with the debtor; each party giving the rest reason to believe that, in consequence of such engagement, his demand will not be enforced. This is, in fact, a new agreement, substituted for the original contract with the debtor; the consideration to each creditor being the engagement of the others not to press their individual claims.

LITLEDALE, J. This is not strictly an accord and satisfaction or a release, but it is a new agreement between the creditor and debtor, such as might very well be entered into on a valid consideration. It was not necessary in this particular case that there should be an actual assignment, or execution of a warrant of attorney; if it only rested with the plaintiff and the other creditors that the contract should be carried into effect, and the defendant was always ready to do his part, it is the same as if he had actually executed an assignment or warrant of attorney. This case, therefore, is different from *Heathcote v. Crookshanks* (2 T.R. 24). And it would be unjust that the plaintiff by this action should prejudice the other three creditors, each of whom signed the agreement, and has since neglected the recovery of his demand, under a persuasion that none of the parties to the memorandum would proceed against the defendant.

PARKE, J. I am of opinion that the verdict was right. By the agreement entered into among these parties, the defendant was to give, and the creditors to accept, certain securities for payment in the manner there stipulated; and upon the faith of that compromise the three creditors who signed with the plaintiff have postponed their demands. Then, cannot this transaction be pleaded in bar to the present suit? It is laid down in *Com.Dig.Accord* (B, 4), that an accord with mutual promises to perform is good, though the thing be not performed at the time of action; for the party has a remedy to compel the performance: but the remedy ought to be such that the party might have taken it upon the mutual promise at the time of the agreement. Here each creditor entered into a new agreement with the defendant, the consideration of which, to the creditor, was a forbearance by all the other creditors who were parties, to insist upon their claims. Assumpsit would have lain on either side to enforce performance of this agreement, if it had been shewn that the party suing had, as far as lay in him, fulfilled his own share of the contract. I think, therefore, that a mutual engagement like this, with an immediate remedy given for non-performance, although it did not amount to a satisfaction, was in the nature of it, and a sufficient answer to the action.

PATTESON, J. The question is, whether or not this agreement was binding on the plaintiff. I think it was. The agreement was entered into by him on a good consideration, namely, the undertaking of the other creditors who signed the paper at the same time with him, on the faith, which every one was induced to entertain, of a forbearance by all to the debtor.

Rule discharged.

QUESTIONS:

1. Was this a "composition with creditors"?
2. Was the agreement bilateral?
3. If the debtor had repudiated his promise to assign a third of his income to a trustee, could the creditors have got judgment on their original claims?
4. By the agreement, what was to operate as satisfaction, the composition agreement itself, the assignment to the trustee with warrant of attorney, or actual payment to the trustee?
5. Does this case sustain Restatement, Contracts, § 417(a)?
6. If it "did not amount to a satisfaction," how could it be "in the nature of it"?

NOTE

The executory composition agreement with several creditors may itself be made to operate as a substituted contract and novation; or the agreement may be that its performance shall operate as a satisfaction. See *In re Hatton*, L.R. 7 Ch.App. 723 (1872). In the latter case actual performance operates as a discharge even though it consists only in part payment of the debt, and meantime prior to the time set for the substituted performance it operates to suspend the creditor's original right: *Beck v. Witteman Bros.*, 185 App.Div. 643, 173 N.Y.S. 488 (1918).

In *Slater v. Jones*, L.R. 8 Ex. 186 (1873), action was brought against a debtor who pleaded that the creditors had passed a resolution under the Bankruptcy Act of 1869 agreeing to accept a composition of six shillings in the pound as a full settlement, the time for payment of which sum had not yet arrived. This was held to be a good plea. Kelly, C. B. said: "Could the legislature have intended that a creditor who has assented to, or is bound by the resolution, should the next day commence an action against the debtor for his whole debt? Such a construction seems to me to be repugnant to common sense." After approving the decision of *In re Hatton*, L.R. 7 Ch.App. 726 (1872), holding that after default by the debtor in performance of the composition the creditor can maintain suit on the original claim in full, he continued: "Then it is contended that the case of *Ford v. Beech*, 11 Q.B. 852 (1848), interposes an insurmountable difficulty in the defendant's way; for if the composition resolution is a good bar now, the right of action for the debt would be gone forever; and according to the decisions I have just referred to, it is clear that the right is not gone, but exists if the debtor makes default. *Ford v. Beech*, however, has no application here. For all that is necessary to decide is that although, *rebus sic stantibus*, the plaintiffs have no cause of action, in another state of circumstances a cause of action may accrue to them."

Martin, B., said: "The principle [of *Ford v. Beech*] has itself been the subject of much comment in recent cases, and it has been suggested by the late Mr. Justice Willes that many of the difficulties caused by a rigid application of it are removed by construing covenants not to sue as releases with conditions subsequent."

Bramwell, B., made a similar attempt to distinguish *Ford v. Beech*.

In *Newington v. Levy*, L.R. 5 C.P. 607, 611 (1870), Willes, J., said: "We see no difficulty in upholding a release with a condition subsequent, in accordance with the suggestion of Maule, J., in *Gibbons v. Vouillon*, 8 C.B. 487 (1849). * * * We can see no substantial distinction between the case of a payment avoided by subsequent events and a release so avoided. This is not a case of temporary suspension, like *Ford v. Beech*; but a case in which the release will be forever operative unless itself subsequently avoided. The distinction is fine, but it is supported by analogy, and it gives effect to the clear intention of the parties." He thereupon held that a plea of an unexecuted composition was a good plea for the time being, but was afterwards avoided by the nonpayment of the composition. This was affirmed in the Exchequer Chamber, L.R. 6 C.P. 180 (1870).

Some distinctions are too fine to be visible to the naked eye. These cases show efforts of the common law judges to by-pass *Ford v. Beech*.

HADLEY FALLS NAT. BANK v. MAY.

Supreme Court of New York, 1883. 29 Hun, 404.

Appeal from a judgment in favor of the defendant, entered upon a verdict directed by the court, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

DANIELS, J. The defendant was clearly liable upon the notes made by him which were set out in the complaint, unless the compromise agreement delivered to him in May, 1875, in itself constituted a legal defense. This agreement, as the evidence at the trial tended to establish it, was in the following form:

"Know all men by these presents, that we, the undersigned creditors of Reuben May, do, for and in consideration of the sum of one dollar to us each in hand paid, covenant with the said Reuben May and with each other to receive and accept the sum of twenty-five per centum on the dollar, owing to us and set opposite to our names, in satisfaction of our demands.

"In witness whereof we have hereunto set our hands and seals, this
—day of May, 1875.

"[L. S.]

John Hancock National Bank,
"By R. S. Moore, President.
"Hadley Falls National Bank,
"By Ch. W. Ranlet, P.
"B. H. Arthur.

"In presence of Abram Kling."

The action upon the notes was commenced in December, 1880, and it was shown upon the trial that payment of the stipulated sum of

twenty-five per cent. on the dollar had been demanded and refused. It was under these circumstances that the court at the trial held that no action could be maintained upon the notes themselves. This ruling seems to have been made on the authority of *Breck v. Cole*, 6 N.Y. Super.Ct. 80, but that case was not authority for it. The action there determined was upon a note made by the debtor himself, in addition to those which the creditors by their composition agreement had stipulated to receive in full satisfaction of their debts, and it was held that this additional note of the debtor had been unlawfully exacted by the creditor and delivered to him by the debtor; that it was a fraud upon the other creditors, and therefore no action could be maintained upon it.

This principle is very well settled and entered into the decision of the case of *Lawrence v. Clark*, 36 N.Y. 128. But it was not involved in the determination of the present case, and failed to justify the disposition which was made of it at the circuit. The case of *Good v. Cheesman*, 2 Barn. & Adol. 328, relied upon as sustaining the ruling which was made, was also clearly distinguishable in its facts, for there the creditors agreed to accept payment of their debts by the debtor, "covenanting and agreeing to pay to a trustee of our nomination one-third of his annual income, and executing a warrant of attorney as collateral security until payment thereof." The debtor was always ready to perform, but the creditors failed to appoint the trustee to whom payment could be made, and the warrant of attorney delivered. And it was because the creditors had accepted this covenant, which the debtor had been at all times ready to perform and they had deprived him of the power of doing so by their omission to select the trustee, that the defense depending upon the composition agreement was sustained. The case of *Norman v. Thompson*, 4 Exch. 755, is equally as inapplicable to the present controversy, for there had been no default in the performance of the agreement. But the debtor, on the contrary, showed by his plea the sufficiency of which was in controversy that he had been at all times ready and willing to perform.

By the agreement which was entered into on the part of the plaintiff in this action the only covenant or stipulation which was made, was that it would accept the sum of twenty-five per centum on the dollar in satisfaction of its demands. It was therefore not an agreement to accept or receive the promise of the debtor to pay that amount in satisfaction, but the actual payment of that percentage by the debtor was requisite to perform the agreement and satisfy the debts. The terms of the agreement can be satisfied by no other rational construction; and where that is the effect which must be given to them, then the debtor cannot rely upon the agreement for his protection after he himself has failed to perform it by refusing to make the stipulated payment. The case of *Penniman v. Elliott*, 27 Barb. 315, is a direct author-

ity supporting this legal proposition. Its correctness was conceded in *Hall v. Merrill*, 18 N.Y.Super.Ct. 266, and it has repeatedly been applied in the same manner in the determination of the effect of similar compromises or compositions made under the bankrupt law.

In *re Hatton*, L.R. 7 Ch.App.Cases, 726, the creditors had agreed to accept five shillings in the pound in two installments in satisfaction of their debts. The debtor paid the first but failed to pay the second installment, and on account of that default the creditors were held entitled to enforce the original liability as that had been incurred by the debtor. And a similar view was sustained in *Goldney v. Lording*, L.R. 8 Q.B. 182, and *Newell v. Van Praagh*, L.R. 9 Com.Pleas, 96.

The principle applicable to this class of cases is that if the promise be "for a new consideration, performable at a future day certain, then the original right of action is suspended until that day comes. If the promise is then duly performed this right is destroyed, but if the promise is not then duly performed this right revives and the promisee has his election to sue on the original cause of action or on the new promise, unless by the terms or the legal effect of the new contract the new promise is itself a satisfaction and an extinction of the old one." 2 Pars. on Con. (6th Ed.) 683. And where the time of performance has not been specified the debtor is required to perform it within a reasonable time, and if he fails to do so the consequence will be the same under this general principle of the law. The same distinction was approved in *Kromer v. Heim*, 75 N.Y. 574, 31 Am.Rep. 491, and *Chemical Bank v. Kohnner*, 85 N.Y. 189, and *Baxter v. Bell*, 86 N.Y. 195, in no respect whatever either questions or impairs its effect.

By the failure of the debtor to pay the stipulated twenty-five per cent mentioned in the agreement delivered to him he deprived himself of all the benefit which it was designed he might secure by the performance of its terms. From the time of that failure the proposal ceased to be binding upon the plaintiff, and it afterwards had the right to resort to the notes held by it and enforce them as legal obligations against him. The judgment and order should therefore be reversed and a new trial directed, with costs to the plaintiff to abide the event.

MACOMBER, J., concurred.

Present—DAVIS, P. J., DANIELS and MACOMBER, JJ.

Judgment and order reversed and a new trial directed, with costs to plaintiff to abide event.

QUESTIONS:

1. Would the printed document have been a binding contract in the absence of a seal?

2. Did the document operate to suspend the right of action on the notes?
 3. Could the creditors have maintained suit against the debtor for his refusal to pay the 25 per cent.?
 4. Was this case determined by the law merchant, the common law, equity, or the law of New York?
 5. If the composition agreement had been assented to as a substituted contract, upon its breach by the debtor could the creditor get judgment for the full amount of the notes?
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(B) THE ACCORD AS AN ENFORCEABLE CONTRACT

LYNN et al. v. BRUCE.

Court of Common Pleas, 1794. 2 H.Bl. 317, 126 Eng.Reprint, 571.

This was an action of assumpsit. The first count of the declaration was on a forbearance to sue on a bond given by the defendant to the plaintiffs for £200. The second was as follows: "And whereas also afterwards, &c. in consideration that the said Robert and Thomas (the plaintiffs) at the special instance and request of the said Charles (the defendant) had then and there consented and agreed to accept and receive of and from the said Charles, a certain composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon a certain other sum of one hundred and five pounds five shillings and two pence, then due and owing from the said Charles to the said Robert and Thomas, upon and by virtue of a certain other writing obligatory, bearing date, &c. made and executed by the said Charles to the said Robert and Thomas, whereby he became held and firmly bound to them, in the sum of two hundred pounds, in full satisfaction and discharge of the said last mentioned writing obligatory, and all monies due thereon, he the said Charles undertook and then and there faithfully promised the said Robert and Thomas to pay them the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, upon request; and the said Robert and Thomas in fact say, that the said composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon the said last mentioned sum of one hundred and five pounds five shillings and two pence, amounted to a large sum of money, to wit, the sum of seventy-three pounds thirteen shillings and sixpence, to wit, at Westminster aforesaid, whereof the

said Charles afterwards, to wit, on the same day and year last aforesaid, at Westminster aforesaid, had notice; and although the said Charles hath paid to the said Robert and Thomas a certain sum of money, to wit, the sum of seventy pounds and six shillings, part of the said last mentioned sum of seventy-three pounds thirteen shillings and six pence, the amount of the said last mentioned composition, yet the said Charles not regarding, &c. hath not yet paid the sum of three pounds seven shillings and six pence, being the residue of the said sum of seventy-three pounds thirteen shillings and six pence, the composition last aforesaid, or any part thereof, &c."

A verdict having been found for the plaintiffs on the whole declaration, a motion was made in arrest of judgment on the ground of the insufficiency of the second count, and after argument the opinion of the Court was thus delivered by

Lord Chief Justice EYRE. This is a motion made in arrest of judgment, on an objection to the second count of the declaration. The substance of that count is, that in consideration that the plaintiff at the defendant's request, had consented and agreed to accept and receive from the defendant a composition of fourteen shillings in the pound, and so in proportion for a lesser sum than a pound, upon £105. 5s. 2d. due from the defendant to the plaintiff on a bond dated the 30th March, 1792, for £200., in full satisfaction and discharge of the bond and all money due thereon, the defendant promised to pay the said composition. It is then averred, that the composition amounted to £73. 13s. 6d., and that the defendant had paid the plaintiff £70. 6s., part thereof. The breach is, that he did not pay £3. 7s. 6d. the residue. This will be found to be a very clear case, when the nature of the objection is understood. The consideration of the promise is, as stated in this count, an agreement to accept a composition in satisfaction of a debt. If this is an agreement which is binding, and can be enforced, it is a good consideration. If it is not binding, and cannot be enforced, it is not a good consideration. It was settled in the case of *Allen v. Harris*, 1 Lord Raym. 122, upon consideration of all the cases, that upon an accord, which this is, no remedy lies; it was said, that the books are so numerous that an accord ought to be executed, that it was impossible to overturn all the authorities; the expression is, "overthrow all the books." It was added, that if it had been a new point, it might have been worthy of consideration. But we think it was rightly settled upon sound principles. "*Interest reipublicæ ut sit finis litium*;" accord executed is satisfaction; accord executory is only substituting one cause of action in the room of another, which might go on to any extent. The cases in which the question has been raised, whether an accord executory could be enforced, and in which it has been so often determined that it could not, have been cases in which it has been pleaded in bar of the original action. But the reason given in three

of the cases in 1 Roll.Abr. title Accord, pl. 11, 12, 13, is, because the plaintiff hath not any remedy for the whole, or where part has been performed for that which is not performed; which goes directly to the gist of this action, as it is stated in the count objected to. This is an action brought to recover damages, for that part of the accord which has not been performed. But an accord must be so completely executed in all its parts, before it can produce legal obligation of legal effect, that in *Peytoe's Case*, 5 Co. 79 b, it was holden, that where part of the accord had been executed, tender of the residue would not be sufficient to make it a bar to the action, but that there must be an acceptance in satisfaction. There are two cases in *Cro. Eliz.* 304, 305, to the same effect. It was argued according to the cases in *Roll.Abr.* that an accord executory in any part, is no bar, because no remedy lies for it for the plaintiff. Perhaps it would be a better way of putting the argument to say that no remedy lies for it for the plaintiff, because it is no bar. But put either way, it concludes in support of the objection to the second count in this declaration, and consequently the judgment must be arrested.

Rule absolute to arrest the judgment.

QUESTIONS:

1. Was this a composition with creditors?
2. If the defendant had paid the 14 shillings in the pound in full, would there have been satisfaction and discharge?
3. Would the plaintiff's "forbearance to sue on a bond" for £200 be a sufficient consideration for the defendant's promise to pay 14 shillings in the pound?
4. How much does the defendant now legally owe?
5. If the court should give judgment for the requested £3 7s. 6d., would this judgment bar a later action for the unpaid balance?
6. Is it true that "*interest reipublicæ*" requires the nonenforcement of an accord?

HUNT v. BROWN.

Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 253, 15 N.E. 587.

HOLMES, J. The plaintiff made three notes to Russell, the defendant's intestate. Afterwards, according to the plaintiff's evidence in the present case, Russell promised that if the plaintiff would assent to a compromise by the executors of the plaintiff's father's will of a claim in their hands against third persons, by which compromise the plaintiff's share of his father's estate would be diminished, Russell would accept in full settlement of the balance due upon the notes whatever percentage the executors should take in settlement of their

claim. The executors then settled the claim for 62 per cent of the amount, with the plaintiff's assent; then Russell died and suit was brought by his administrator, the present defendant, upon the notes, against the present plaintiff. The latter pleaded a general denial, and payment, and afterwards made an offer of judgment for the full amount of the notes, interest, and costs, which was accepted, and the sum was paid. The present suit is upon Russell's alleged agreement. The defendant asked a ruling that the agreement was without consideration, and also that the judgment in the former case was a bar. Both rulings were refused and he excepts.

1. It is very plain that the jury were warranted in finding that the plaintiff's assent to the compromise was dealt with by the parties as a consideration,—that is, as the conventional inducement of Russell's promise, and not merely as a condition precedent,—and that, if it was so dealt with, it was sufficient. Evidence, or even an admission, that the compromise was for the plaintiff's advantage, would not alter the case. In determining whether or not an act was dealt with by the parties to an oral agreement as consideration, the fact that its consequences were seen to be advantageous to the actor may be important; but on the question of sufficiency alone it is enough that the immediate effect of the act is an abandonment of an actual or supposed right, whatever the balance of advantages may be in the long run. It is hard to imagine any change of position, not made in pursuance of a previous duty, which may not be sufficient as a consideration, or which is not a detriment in a legal sense.

2. If Russell had received the 62 per cent as agreed, and the suit had been brought for the residue, the question would arise whether the acceptance of less than the sum due, upon a collateral consideration, could be distinguished from an acceptance of less, before the notes fell due, or, like that, constituted an accord and satisfaction (*Bowker v. Childs*, 3 Allen, 434, 436); and if it was technically a satisfaction, whether, like a payment (*Fuller v. Shattuck*, 13 Gray, 70), it must not have been pleaded in the suit upon the notes, if it was to be relied on at all; or whether there remained any contract unexecuted by the party satisfied, which he would break if he afterwards brought suit. But Russell did not accept 62 per cent, so that the only question is whether his agreement in any other way extinguished the notes in whole or in part; since in that case the judgment might be a bar.

The agreement was not itself a satisfaction. It was not a new contract substituted for the notes, and entitling the plaintiff to demand their surrender. Neither could it operate as a release of 38 per cent of the notes, when the percentage was fixed by the compromise referred to. Language sometimes has been used which suggests that an agreement for a sufficient consideration might take effect by way of release, although not under seal. *Goodnow v. Smith*, 18 Pick. 414,

416, 29 Am.Dec. 600; *Petty v. Allen*, 134 Mass. 265, 267; *Taylor v. Manners*, L.R. 1 Ch. 48. But the common law knows no such release. *Shaw v. Pratt*, 22 Pick. 305, 308. The consideration of the notes being executed, the agreement could operate only by way of accord and satisfaction. See *Cumber v. Wane*, 1 Smith, Lead.Cas. 633 (8th Amer.Ed.) and notes; *Bragg v. Danielson*, 141 Mass. 195, 196, 4 N.E. 622; *May v. King*, 12 Mod. 537, 538. The suggestion which we are considering, if stated in technical form, would have to be that Russell accepted the plaintiff's assent to the compromise which he desired in satisfaction of 38 per cent of the notes. But this is plainly a distortion of the evidence, according to which the assent was accepted, not as partial satisfaction of a debt, but as the consideration for a promise.

If, however, the jury might have been warranted in finding that the agreement and what was done under it had released or satisfied 38 per cent, they were warranted at least equally in finding that it was purely executory, in purport as well as in form, viz., to accept a percentage in satisfaction when it was paid. The court could not rule as matter of law that the opposite construction was the true one, or assume the opposite construction as a foundation for its rulings.

But it may be said that the contract must have been found to embrace the element that Russell would not sue for more than 62 per cent, and it may be argued that, if not technically a release, it ought to have been available in defense pro tanto, by way of estoppel or otherwise, in order to avoid circuity of action, upon the same principle that a covenant not to use is allowed to inure as a release. The answer is that, whether available in this way or not, whether or not such a defense would escape the objection that in substance it was accord without satisfaction, the plaintiff was not bound to use the agreement in defense. For if, as we have tried to show, and as the suggestion under consideration assumes, Russell's agreement did not extinguish the whole or any part of the notes, but left them in full force, it also necessarily retained its independent character as a collateral contract. See, further, *Costello v. Cady*, 102 Mass. 140; *Blake v. Blake*, 110 Mass. 202. A breach of it was a substantive cause of action, upon which the present plaintiff might bring his own suit in his own way, and he was no more bound to plead it than he would have been bound to plead a set-off, fraud, or a breach of warranty. *Smith v. Palmer*, 6 Cush. 513, 521; *Cobb v. Curtiss*, 8 Johns. (N.Y.) 470. See *Burnett v. Smith*, 4 Gray, 50, 52; *Davis v. Hedges*, L.R. 6 Q.B. 687.

When a defendant had the choice of setting up a matter in defense, or of suing upon it in another action, if he chooses not to set it up in defense, of course, the judgment in the action against him is no bar to a subsequent suit by him. *Smith v. Palmer*, *ubi supra*; *Glass Co. v. Morey*, 108 Mass. 570, 573; *Davis v. Hedges*, *ubi supra*. Russell's agreement was not pleaded in the former action. Even if it had been

executed, it would not have been admissible under a plea of payment. *Ulsch v. Muller*, 143 Mass. 379, 9 N.E. 736; *Grinnell v. Spink*, 128 Mass. 25. The present plaintiff not having set up the agreement, and having no other defense, very properly saved himself costs, and his antagonist delay, by submitting at once to the inevitable, and offering judgment. See *Rigge v. Burbidge*, 15 Mees. & W. 598.

Exceptions overruled.

QUESTIONS:

1. Was the accord unilateral or bilateral?
2. Why did not the judgment on the notes bar the present action?
3. Is it material whether the agreement was made before or after maturity of the notes?

NOTE

See Restatement, Contracts, § 417, especially Clause (d).

Where a creditor makes a new agreement with a third person for the future discharge of his claim by a substituted performance by this third person (like that in *Ford v. Beech*, ante), this new agreement is said not to be an "accord" and is certainly enforceable. *Strutt v. Farlar*, 16 M. & W. 249 (1847); *Henderson v. Stobart*, 5 Exch. 99 (1850).

An agreement between a creditor and his debtor providing for a future discharge by a substituted performance by the debtor may be made either before or after breach of the original obligation by the debtor. It should be enforceable in either case. See, after breach: *Crowther v. Farrer*, 15 Q.B. 677 (1850); *Farmers' State Bank v. Singletary*, 22 Ga.App. 653, 97 S.E. 90 (1918). Before breach: *Schweider v. Lang*, 29 Minn. 254, 13 N.W. 33, 43 Am.Rep. 202 (1882); *Smyth v. Holmes*, 10 Jurist, 862 (1846), where Parke, B., said: "Such an agreement before breach of the original agreement is binding. * * * An action will lie on mutual promises; and this is such an action, and not an action on an accord."

VERY v. LEVY.

Supreme Court of the United States, 1851. 13 How., 345, 14 L.Ed. 173.

Mr. Justice CURTIS. This is a suit in equity to foreclose a mortgage, commenced in the Circuit Court of the United States for the District of Arkansas. The bill alleges that on the 3d of March, 1841, the respondent, Levy, executed his writing obligatory, for the sum of four thousand dollars, bearing interest at the rate of seven per cent per annum, payable to Darwin Lindsley in six years after its date, and secured the same by a mortgage on certain premises situated in the city of Little Rock; that by assignment from Lindsley the complainant became the owner of this bond and mortgage on the 25th of March, 1841, and the bill prays for an account and foreclosure.

The answer of Levy admits the execution of a bond and mortgage, and their assignment to the complainant, and avers that on the 3d of March, 1843, he agreed with the complainant, through one John S. Davis, his agent, to deliver goods such as jewelry, etc., in which the respondent dealt, at Little Rock, upon reasonable prices, in satisfaction of this bond and mortgage, within twelve months from the 3d of March, 1843; that in pursuance of that agreement he did actually deliver on that day a part of the goods, agreed to be of the value of \$1-898.25, and afterwards, on the same day, the complainant, through his agent, Davis, signed and delivered to the respondent a memorandum in writing as follows:

"Little Rock, March 3d, '43. I hereby agree to take in goods, such as jewelry, etc., the balance due me on a note assigned by D. Lindsley to me, as also a mortgage assigned by said Lindsley; said goods to be delivered to me, or any agent at Little Rock, Arkansas, at reasonable prices at said Little Rock; said goods to be called for within twelve months from this time. Martin Very, by J. S. Davis, Attorney in Fact."

That in further pursuance of this agreement, the respondent kept in his hands, and ready for delivery, and withdrawn from his trade, a sufficient amount of goods, such as are referred to in the memorandum, during the whole year which elapsed after the making of the agreement, and was constantly ready and willing to deliver the same at Little Rock, but the complainant was not there, and did not authorize any one to receive them; that the respondent has ever since been ready and willing to perform his agreement, and offers to bring the goods into court, or place them in the hands of a receiver. The court below appointed a receiver, ascertained the amount of goods necessary to satisfy the unpaid residue of the bond, ordered the receiver, upon demand, to deliver the same to the complainant, in full satisfaction of the bond and mortgage, decreed the mortgage satisfied, and ordered the complainant to pay the costs. From this decree the complainant appealed.

An agreement by a creditor, to receive specific articles in satisfaction of a money debt, is binding on his conscience; and if he asks the aid of a court of equity to enforce the payment, he can receive that aid only to compel satisfaction in the mode in which he has agreed to accept it. A court of equity will even go further; and in a proper case will enforce the execution of such an agreement. At law, a mere accord is not a defence; and before breach of a sealed instrument, there is a technical rule, which prevents such an instrument from being discharged, except by matter of as high a nature as the deed itself. *Alden v. Blague*, Cro. Jac. 99; *Kaye v. Waghorne*, 1 Taunt. 428; *Bayley v. Homan*, 3 Bin. N.C. 915. But no such difficulties exist in equity. On the broad principle that what has been agreed to be done, shall be con-

sidered as done, the court will treat the creditor as if he had acted conscientiously, and accepted in satisfaction what he had agreed to accept, and what it was his own fault only that he had not received. Indeed, even a court of law in a case free from the technical difficulties above noticed, will do the same thing. *Bradly v. Gregory*, 2 Camp. 383.

In order, however, to bring a case within these principles, three things are necessary. An agreement, not inequitable in its terms and effect; a valuable consideration for such agreement; readiness to perform and the absence of laches on the part of the debtor. * * *

That the agreement itself imports a consideration, deemed by the law valuable, there can be no doubt. An agreement to give a less sum for a greater, if the time of payment be anticipated, is binding; the reason being, as expressed in *Pinnel's case* (5 Co. R. 117), that peradventure parcel of the sum, before the day, would be more beneficial than the whole sum on the day. *Coke's Lit.* 212, b; *Com.Dig.Accord*, B. 2; *Brooks v. White*, 2 Metc. (Mass.) 283, 37 Am.Dec. 95. And when the time of payment is not anticipated, the law deems the delivery of specific articles a good satisfaction of a money debt, because it will intend them to be more valuable than the money to the creditor who has consented to the arrangement. *Bac.Ab.Accord*, A; *Pinnel's case*, 5 Co.R. 117; *Booth v. Smith*, 3 Wend. (N.Y.) 66; *Kellogg v. Richards*, 14 Wend. (N.Y.) 116; *Steinman v. Magnus*, 11 East, 390; *Lewis v. Jones*, 4 B. & C. 513.

In this case, both these rules apply; for the time of payment was to be anticipated, and specific articles delivered. * * *

The decree of the Circuit Court is affirmed. with costs.

QUESTIONS:

1. Does this case support *Restatement, Contracts*, § 417(d)?
2. Was the new agreement a substituted contract?
3. If the creditor, instead of suing to foreclose the mortgage, had merely brought an action at law on the bond, could the defendant have obtained a decree in equity enjoining the suit on the bond and specifically enforcing the new agreement?
4. Should the defendant in *Reilly v. Barrett*, ante, p. 878, have made use of this case?

NOTE

The findings and decree of the Circuit Court were as follows:

The case being heard on bill, amendment, answers, replications, exhibits and testimony, the court held Very bound by the agreement, and found that Levy had always had sufficient goods on hand ready to be delivered;

and directed the master to ascertain the balance due on the bond, and the value of the goods delivered to the receiver.

The master reported the balance due on the 3d March, 1844, to be \$2,-002.59, and the value of the goods, \$5,776.99. No exception was taken to the report, and it was confirmed.

The court then ordered the complainant to select out of the goods, to the amount of \$2,002.59, and on his failure, after notice to his solicitor, that the master should do so. The complainant failed to select; the master set apart the requisite amount, the residue were redelivered to Levy, and the court decreed that Very should receive the goods so set apart by the master, and that the bond and mortgage were satisfied; denied the relief prayed, and dismissed the bill; all costs to be paid by the complainant.

In accord, see *Chicora Fertilizer Co. of Charleston, S. C. v. Dunan*, 91 Md. 144, 46 A. 347, 50 L.R.A. 401 (1900); *Moers v. Moers*, 229 N.Y. 294, 128 N.E. 202 (1920); *Buften v. Crane*, 101 Vt. 276, 143 A. 382 (1928), following *Very v. Levy*; *Cook v. Richardson*, 178 Mass. 125, 59 N.E. 675 (1901); *Union Central Life Ins. Co. v. Imsland*, 91 F.2d 365 (1937 C.C.A.), following *Very v. Levy*, and quoting *Restatement Contracts*, § 417.

BOSHART v. GARDNER, 190 Ark. 104, 77 S.W. 2d 642 (1935). The plaintiff held the defendant's overdue note for \$1,500, secured by mortgage on land. He wrote to the defendant thus: "In order to get this settled up I will take fifty per cent of the face of the mortgage if you can get a Federal loan and pay it up. Please let me know what you wish to do." The defendant replied, thanking the plaintiff for his "kind offer," and saying, "I intend trying for a Federal loan at once. * * * I will advise you." The defendant at once made application to the Federal agency for a sufficient loan and spent "a substantial sum of money in prosecuting the application." About seven weeks after receiving the defendant's reply letter, the plaintiff brought this action to foreclose the mortgage. About six months later, the Federal agency approved the defendant's application for a loan, the delay being due in no respect to the defendant. The court said that because of the defendant's expenditures in reliance "it would be inequitable to permit appellant to repudiate his offer of settlement when appellee is now ready for consummation.

The chancellor was also in error in treating appellant's offer and appellees' acceptance thereof as a consummated novation. The offer and acceptance should be treated as executory and continuing for such reasonable length of time as may afford appellees a reasonable opportunity of procuring a loan and paying the debt.

If appellees will pay into the registry of this court within sixty days from this date 50 per cent. of the mortgage debt and interest as de-

creed by the chancellor, plus \$19.12 taxes, the decree will be affirmed; otherwise the cause must be reversed and remanded, with directions to enter a decree in favor of appellant for the full amount of his debt, interest and taxes paid."

(C) WHAT CONSTITUTES ACCORD AND SATISFACTION

PINNEL'S CASE.

In the Common Pleas, 1602. 5 Coke, 117a.

Pinnel brought an action of debt on a bond against Cole, of £16 for payment of £8. 10s. the 11th day of Nov. 1600. The defendant pleaded, that he at the instance of the plaintiff, before the said day, scil. 1 Octob. anno 44. apud W. solvit. querenti £5 2s. 2d. quas quidem £5 2s. 2d. the plaintiff accepted in full satisfaction of the £8 10s. And it was resolved by the whole Court, that payment of a lesser sum on the day in satisfaction of a greater, cannot be any satisfaction for the whole, because it appears to the Judges that by no possibility, a lesser sum can be a satisfaction to the plaintiff for a greater sum; but the gift of a horse, hawk, or robe, &c. in satisfaction is good. For it shall be intended that a horse, hawk, or robe, &c. might be more beneficial to the plaintiff than the money, in respect of some circumstance, or otherwise the plaintiff would not have accepted of it in satisfaction. But when the whole sum is due, by no intendment the acceptance of parcel can be a satisfaction to the plaintiff: but in the case at Bar it was resolved, that the payment and acceptance of parcel before the day in satisfaction of the whole, would be a good satisfaction in regard of circumstance of time; for peradventure parcel of it before the day would be more beneficial to him than the whole at the day, and the value of the satisfaction is not material: so if I am bound in £20 to pay £10 at Westminster and you request me to pay you £5 at the day at York, and you will accept it in full satisfaction of the whole £10 it is a good satisfaction for the whole: for the expences to pay it at York, is sufficient satisfaction: but in this case the plaintiff had judgment for the insufficient pleading; for he did not plead that he had paid the £5 2s. 2d. in full satisfaction (as by the law he ought) but pleaded the payment of part generally; and that the plaintiff accepted it in full satisfaction. And always the manner of the tender and of the payment shall be directed by him who made the tender or payment, and not by him who accepts it. And for this cause judgment was given for the plaintiff.

See reader 26 H. 6 Barre 37. in debt on a bond of £10 the defendant pleaded, that one F. was bound by the said deed with him, and each in the whole, and that the plaintiff had made an acquittance to F. bearing date before the obligation, and delivered after, by which acquittance he did acknowledge himself to be paid 20 s. in full satisfaction of the £10. And it was adjudged a good bar; for if a man acknowledges himself to be satisfied by deed, it is a good bar, without anything received. Vide 12 R. 2 Barre 243. 26 H. 6 Barre 37. and 10 H. 7, &c.

QUESTIONS:

1. Is Coke's reason for the decision pure nonsense?
2. Was this case a sufficient basis for *Foakes v. Beer*?
3. Must the application of a payment always be directed by the debtor?
See Restatement, Contracts, §§ 387-394.

NOTE

Study again with this case *Foakes v. Beer*, ante, chapter 2. That case was previously considered only with respect to the sufficiency of the consideration for Julia Beer's promise; but, since *Foakes* had already performed the accord in full, it also involves the problem of what can operate as satisfaction of a duty.

Part payment by giving a promissory note secured by a chattel mortgage operates as satisfaction if so agreed. *Jaffray v. Davis*, 124 N.Y. 164, 26 N.E. 351, 11 L.R.A. 710 (1891).

WILLIAMS v. CASSIDY, — Iowa —, 23 N.W.2d 423 (1946).

The plaintiff made a written contract in 1928 to purchase land of the defendant for the sum of \$1,600, payable at the rate of \$20 per month. The plaintiff was given possession. Payments amounting to \$670 were made prior to November, 1931; no payments were made between then and March 1, 1933, but the plaintiff remained in possession. On the latter date a conversation occurred in which the defendant said that he did not want to take the land back, and the plaintiff asserted that he had promised too much for the land and could not pay it. They then made a new written contract, in which the defendant promised to convey on receipt of \$500 in addition to the payments made previously, this amount to be paid at the rate of \$5 per month. This amount was fully paid by November, 1944; and the defendant executed a "receipt in full" on the second contract and handed it to the plaintiff.

The plaintiff sued for a decree for specific performance to compel conveyance in accordance with the second contract. The defendant

asserted that contract to be invalid for lack of sufficient consideration and asked for strict foreclosure in accordance with the terms of the contract made in 1928. The land decreased in value during the Depression, but in 1944 was worth more than in 1928.

The court granted the decree asked by the plaintiff. It said that enforcement of the first contract would be "harsh and unreasonable" and that by reason of economic conditions in 1933 "there may have been impelling reasons on both sides for the supplemental contract" that was then made. The court recognized as the existing law that part payment of a liquidated debt does not operate as satisfaction of the whole debt, even though mutually so agreed. It held that rule to be inapplicable, its reasons being stated as follows:

"The contract of Oct. 1, 1928, was an executory contract on Mar. 1, 1933. It had been partly performed by both parties but had not been completely performed by either party. * * * In such situation, it was the legal right of the parties to rescind it or abandon it by mutual agreement. Under this record they must be held to have mutually agreed to abandon and rescind that contract. Having done so, the new contract, dated Mar. 1, 1933, stands independent of the 1928 contract so far as consideration is concerned, and, having been fully performed on the part of appellee, the trial court was right in ordering performance on the part of appellant. * * * [The court admitted that authorities are not in accord.] However, the decisions of this court are uniformly consistent with the conclusion we reach herein which is that the contract dated Oct. 1, 1928, was executory when the contract of Mar. 1, 1933, was agreed upon; the 1933 contract constituted a mutual agreement to rescind the 1928 contract and to establish a new basis for the sale of the property; the 1928 contract having thus been rescinded by mutual agreement, the consideration stated in the 1933 contract was adequate to support the promise made by appellant therein." * * *

PIERCE, BUTLER & CO. v. JONES & SON.

Supreme Court of South Carolina, 1876. 8 S.C. 273, 28 Am.Rep. 288.

MOSES, C. J. This was an action on two several promissory notes drawn by the respondents in favor of the appellants—one for \$4,000, dated 17th March, 1873, payable 1st March following; the other for \$5,820.03, dated 16th March, 1874, payable fifteen days after date. The last was the aggregate of open accounts and small drafts due before 14th February, 1874, and is, alike with the first, subject to the operation of the alleged agreement to be hereafter referred to.

On the 14th February, 1874, the said J. J. Pierce, Butler & Co., with other creditors of the said Thomas Jones & Son, executed a written

agreement in the following words: "We, the creditors of T. Jones & Son, hereby agree to compromise with the said T. Jones & Son for twenty-five cents on the dollar on the principal and interest of the several amounts due us, and will give them a clear receipt of all indebtedness to us and our assigns, provided that all persons who may hold any claim, account, note or other evidence of indebtedness shall assent to this settlement and arrangement." It appeared that each of the said creditors had received the sum for which, by the agreement, they had stipulated "to give a clear receipt of all indebtedness."

The report of the Referee states that all the other creditors had acted in good faith in regard to its stipulation, and this must be held to include all the creditors of the respondents, for the agreement was on the condition that all persons who might hold any claim, &c., should assent to it; and if any other creditor had refused to enter into the compromise it was to the interest of the appellants to show it, for in that event the non-compliance with the proviso on which they were to be bound might have operated to discharge them from its effect.

The agreement was set up by the respondents as a discharge of all the balance due upon the notes held by the appellants, by their acceptance of the payment of the one-fourth due thereon. The Circuit Judge sustained the defense on the ground submitted and dismissed the complaint.

The appeal seeks to reverse his judgment, and charges error of law therein.

It is contended, on behalf of the appellants, that a promissory note, at maturity, is not satisfied by the acceptance of a part of the amount due in discharge of the remaining balance, and that this principle must apply to exclude the defense relied on by the parties who now submit the said agreement as a bar to the recovery of the remaining portion of the notes.

The English and American cases (and in the last may be included those in the Courts of this State), it may be said, generally concur in the doctrine announced in Pinnel's case (5 Rep., 60, p. 117), "that payment of a lesser sum on the day in satisfaction of a greater cannot be any satisfaction of the whole, because it appears to the Judges that by no possibility a lesser sum can be a satisfaction to the plaintiff for a greater sum." While many eminent Judges have not hesitated to notice and descant on the seeming inconsistency of the rule which permits the acceptance of anything,—“a horse, a hawk, a robe,”—no matter how inconsiderable the worth, to operate as a discharge of a debt largely exceeding in amount the value of the article so received, and still withholds a like effect to a payment in money unless for the whole sum due, they have felt bound to conform to the decisions which have confirmed it, extending as they do through a long succession of years.

An agreement to accept a lesser sum in discharge of a greater is not allowed its proposed purpose for the want of a sufficient consideration to support it. It is therefore permitted to have full effect whenever such payment is made and accepted under such circumstances and at such time as a good, valid consideration for the promise and assumption of the creditor. While, therefore, the principle contended for is fully sustained by the authorities cited, and precludes the agreement from operating in a technical sense as accord and satisfaction, or a release, it fails in its application to the case here, because there was a sufficient consideration to sustain it as a valid and binding contract.

* * *

The appellants in the case before us secured through the agreement an advantage of which they possibly may have been deprived by the application by the debtors of their assets among their creditors in different proportions, giving to them a less share than to others, or, in fact, they might have made a preference to one creditor to the exclusion of all the rest, provided it was not undue and fraudulent. The appellants secured by the agreement at least twenty-five per cent of their debt, when, if they had not entered into it, they stood the chance of losing the whole. There is another view to be taken of the defense which must bar the recovery. The agreement, we must assume, by the proviso, which it contains, was assented to by all the creditors of the firm with whom it was made. Each, in consideration of the receipt of twenty-five per cent of his demand, consented to accept it as a compromise, by which he released all the balance of his debt. It was founded on the principle of equality—all were to share alike. If the appellants recovered in their action it would be a fraud on the other creditors who were induced to accept the proportion fixed by the agreement on the express stipulation that it was to be entered into by all the creditors, and binding so far as to prevent either from obtaining from the assets of the debtors more than the prescribed proportion. Each creditor for his act “had the undertaking of the rest as a consideration for his own undertaking.”

The principle which governed the decision in *Aiken v. Price*, *Dud. 52*, applies in full force here.

The motion is dismissed.

WRIGHT, A. J., and WILLARD, A. J., concurred.

QUESTION:

What is the difference between this case and *Hadley Falls Nat. Bank v. May*, ante?

See *Restatement, Contracts*, § 417(b).

FULLER v. KEMP.

Court of Appeals of New York, 1893. 138 N.Y. 231, 33 N.E. 1034, 20 L.R.A. 785.

Action by Fraser C. Fuller against Edward Kemp, Jr., for balance due for professional services as a physician. From a judgment of the general term (16 N.Y.S. 158) affirming a judgment in plaintiff's favor, defendant appeals. Reversed.

MAYNARD, J. The plaintiff has brought suit to recover a balance claimed to be due for his services as a physician, and the defendant relies solely upon the defense of an accord and satisfaction. The parties have agreed upon a statement of facts embracing the entire issue raised by the pleadings, and we are required to determine whether, upon the facts stipulated, the defendant has, as matter of law, established his defense. The plaintiff's demand was unliquidated, but he alleged that his services were worth \$670, and rendered a bill for that amount, without specifying any items. The defendant acknowledged the receipt of the bill by letter, and expressed surprise at its magnitude, and his belief that there must be some mistake about it, and requested plaintiff to look into it and send a corrected bill, as he was anxious to settle the matter at once. The plaintiff then sent an itemized bill, showing 126 visits in 49 days, for each of which a charge of \$5 was made, and 4 consultations, at the rate of \$10 each, making a total of \$670, as originally claimed. The defendant then wrote the plaintiff, inclosing a check for \$400, which he stated was in full satisfaction of the plaintiff's claim for professional services against him to that date; and also saying that the deductions he had made were in the instance where five, four, and three visits per day had been charged at full rates; and that he trusted the plaintiff would view the matter in the same spirit which he did, which was to fix a figure which would be entirely just to both parties; and that he had arrived at this conclusion after careful and earnest thought. The plaintiff received the letter and check, indorsed the latter and collected the money upon it, which he retained, and again sent his bill to the defendant, charging \$670 for his services, and crediting upon it \$400 received by check. The defendant thereupon again wrote the plaintiff, calling his attention to the express condition upon which he had forwarded the check, and that it was sent as payment in full satisfaction of the plaintiff's claim for professional services to date; that he did not recognize the plaintiff's right to retain the amount so offered, and repudiate the condition of the offer; and requesting the plaintiff either to keep the money upon the condition named, or return it to him by first mail. To this letter the plaintiff made no reply, but kept the amount of the check, and after the expiration of nearly a year brought this action for the recovery of \$270, the balance of his account after ap-

plying the \$400 received, in which he has recovered the sum of \$170, which it was stipulated upon the trial should be the amount of the judgment if he was entitled to recover at all.

Upon these conceded facts we think it must be held that there was in law an accord and satisfaction of the plaintiff's claim, and that no recovery could be lawfully predicated upon it. It is unquestionably true, as the respondent's counsel contends, and as the general term, in its opinion, very clearly states, that, in order to establish a defense of this character, there must be present in the transaction upon which it rests all the elements of a complete agreement,—a lawful subject-matter, a sufficient consideration, and the *aggregatio mentium*, or mutual assent, of the parties. The original contract, which the law implied, was an agreement on the part of the defendant to pay the plaintiff what his services were really worth. From the very nature of the case a further agreement must be reached by the parties, fixing the value of the services, or else resort must be had to a judicial determination for that purpose. The plaintiff accordingly sent his bill, in which he expressed his own views as to the amount of compensation which he ought to have. Had the defendant retained it without objection, it would in time have become an account stated, which is a species of implied contract, and the law would have presumed a promise on his part to pay the sum charged in the bill. But the defendant, while not disputing the rendition of the services, objected to the amount of the plaintiff's charges, and declined to pay the bill rendered, but sent a check for \$400, stating that it was to be in full satisfaction of the plaintiff's claim, and in substance expressing the hope that the plaintiff would, upon reflection, agree with him that it was the reasonable value of his services.

The plaintiff received and used the check, and, had he remained silent, it would have been conclusively presumed that he assented to the defendant's proposition, and had agreed to receive, and had received, the sum tendered in discharge of his debt. But the tenor of the defendant's letter was such as to invite a reply, and, while the plaintiff kept the check, he sent another bill for the same amount, upon which he credited the amount of the check as a part payment, leaving a balance, which he still claimed to be due. The just inference to be drawn from this communication was that he declined to accept the check in full payment, but had appropriated it as a partial payment of his claim, and the defendant undoubtedly so understood it. Had he then remained silent it might have been presumed that he assented to the use which the plaintiff had made of the check, and in time would have become bound to pay the balance, as upon an account stated; but the defendant at once notified the plaintiff that he had sent the check upon condition that it should be received in full payment of his bill, and that he could not assent to any other application of the

money, and that the plaintiff must either keep it upon that condition, or immediately return it. It is of no significance in this case that the remittance was by check. Both parties treated it as money, and upon the receipt of this letter the plaintiff had but a single alternative presented for his action,—the prompt restoration of the money to his debtor, or the complete extinguishment of the debt by its retention. The tender and the condition could not be dissevered. The one could not be taken, and the other rejected. The acceptance of the money involved the acceptance of the condition, and the law will not permit any other inference to be drawn from the transaction. Under such circumstances the assent of the creditor to the terms proposed by the debtor will be implied, and no words of protest can affect the legal quality of his act.

Where the demand is liquidated, and the liability of the debtor is not in good faith disputed, a different rule has been applied. In such cases the acceptance of a less sum than is the creditor's due will not, of itself, discharge the debt, even if a receipt in full is given. The element of a consideration is lacking, and the obligation of the debtor to pay the entire debt is not satisfied. There are many authorities which enforce this proposition, but they have no relevancy to a case like the present, where the debt was unliquidated, and there was a bona fide disagreement in regard to the extent of the debtor's liability. The law favors the adjustment of such controversies without judicial intervention, and will not permit the creditor to accept and retain money which has been tendered by way of compromise, and then successfully litigate with his debtor for the recovery of a greater sum. There have been some cases in our own courts where this principle has been applied, but in none that we have examined has the question arisen in the exact form here presented. *Palmerton v. Huxford*, 4 Denio, 166; *Looby v. Village of West Troy*, 24 Hun, 78; *Hills v. Sommer*, 53 Hun, 392, 6 N.Y.S. 469. In other states there are many decisions directly in point, where the facts were not distinguishable from those appearing in this record. *McDaniels v. Lapham*, 21 Vt. 222; *Preston v. Grant*, 34 Vt. 201; *Towslee v. Healey*, 39 Vt. 522; *Boston Rubber Co. v. Peerless Wringer Co.*, 58 Vt. 553, 5 A. 407; *Bull v. Bull*, 43 Conn. 455; *Potter v. Douglass*, 44 Conn. 541; *Reed v. Boardman*, 20 Pick. 441; *Donohue v. Woodbury*, 6 Cush. (Mass.) 148, 52 Am.Dec. 777; *Hilliard v. Noyes*, 58 N. H. 312; *Brick v. Plymouth Co.*, 63 Iowa 462, 19 N.W. 304; *Hinkle v. Railroad Co.*, 31 Minn. 434, 18 N.W. 275. * * *

To make out the defense, the proof must be clear and unequivocal that the observance of the condition was insisted upon, and must not admit of the inference that the debtor intended that his creditor might keep the money tendered in case he did not assent to the condition upon which it was offered. The defendant here has brought his case clearly within the rule, and is entitled to have the judgments of the

general and special terms reversed, and the complaint dismissed, upon the stipulated facts, without costs to either party in any court, pursuant to the stipulation in the record. All concur.

Judgment accordingly.

QUESTIONS:

1. Was Fuller's cashing the check a tort?
2. Was there an acceptance of Kemp's offer by silence?
3. L. Hand, J., said in *Matlack Coal & Iron Corporation v. New York Quebracho Extract Co.* (C.C.A.) 30 F.2d 275, that it is doubtful whether *Fuller v. Kemp* "is still law in New York." Was he mistaken?

See Restatement, Contracts, § 420.

WHITTAKER CHAIN TREAD CO. v. STANDARD AUTO
SUPPLY CO.

Supreme Judicial Court of Massachusetts, 1913.

216 Mass. 204, 103 N.E. 695, 51 L.R.A., N.S., 315, Ann.Cas.1915A, 949.

Action by the Whittaker Chain Tread Company against the Standard Auto Supply Company. On report. Judgment for plaintiff.

LORING, J. The plaintiff sold and delivered to the defendant goods to the amount of \$80.03. The defendant undertook to return a part of the goods sold, of the value of \$50.02. The plaintiff disputed its right to do so and refused to receive the goods from the teamster through whom the defendant undertook to make the return. While matters were in this condition the defendant sent the plaintiff a check for \$30.01, which was admittedly due and which the defendant stated was in full settlement of the account. The plaintiff cashed the check and on the following day notified the defendant that it had done so, and demanded payment of \$50.02, the balance claimed by it to be due after crediting the amount of the check as a payment on account. The judge found that the defendant had no right to return the goods which it attempted to return, and that the plaintiff was entitled to recover the \$50.02 due from them unless it was barred by cashing the check.

Cases in which debtors have undertaken to force a settlement upon their creditors by sending a check in full discharge of a disputed account have given rise to more than one question upon which there is a conflict in the authorities.

In *Day v. McLea*, 22 Q.B.D. 610, it was decided by the Court of Appeal in England that a creditor who cashes a check sent in full set-

tlement is not barred from contending that he did not agree to take it on the terms on which it was sent if at the time he accepts it he says that he takes it on account. The ground of that decision was that to make out the defense of accord and satisfaction the debtor must prove an agreement by the creditor to take the sum paid in settlement of the account, and that if the creditor in taking the check notifies the debtor that he accepts it on account and that he refuses to accept it in full settlement, the debtor as matter of law has not proved an agreement on the part of the creditor to accept the check in satisfaction of the claim, but that that question must be decided by the jury. This doctrine is upheld in 17 Harvard Law Review, at page 469, and in the case of Goldsmith v. Lichtenberg, 139 Mich. 163, 102 N.W. 627. See also in this connection Krauser v. McCurdy, 174 Pa. 174, 34 A. 518; Kistler v. Indianapolis & St. Louis R. R., 88 Ind. 460.

But the true rule is to the contrary. The true rule is put with accuracy in *Nassoioy v. Tomlinson*, 148 N.Y. 326, 331, 42 N.E. 715, 716, 51 Am.St.Rep. 695, in these words: "The plaintiff could only accept the money as it was offered, which was in satisfaction of his demand. He could not accept the benefit and reject the condition, for if he accepted at all it was 'cum onere.' When he indorsed and collected the check referred to in the letter asking him to sign the inclosed receipt in full, it was the same, in legal effect, as if he had signed and returned the receipt, because acceptance of the check was a conclusive election to be bound by the condition upon which the check was offered." And to that effect is the weight of authority. [Cases were here cited.]

Indeed the decision in *Day v. McLea*, ubi supra, was explained by the Court of Appeal in the recent case of *Hirachand v. Temple*, [1911] 2 K.B. 330, and made to rest not on the lack of agreement, but on the lack of consideration.

But in cases (like the case at bar) where there is a dispute as to the amount due under a contract and payment of an amount which he (the debtor) admits to be due (that is to say, as to which there is no dispute) is made by the debtor in discharge of the whole contract, further and other questions arise.

The question whether the creditor who under these circumstances accepts such a payment, protesting that he takes it on account, is or is not barred, is a question upon which again the authorities are in conflict. It was held in the following cases that a creditor in such a case is barred: *Nassoioy v. Tomlinson*, 148 N.Y. 326, 42 N.E. 715 [and other cases]. But in the following cases it was held that he was not barred: *Demeules v. Jewel Tea Co.*, 103 Minn. 150, 114 N.W. 733 [and other cases].

The decision in most of these cases was made to turn upon the question whether payment of the amount admitted to be due without dispute did or did not constitute a valid consideration for the discharge of the balance of the debt about which there was a dispute. If that were the only question involved in the case at bar it would be necessary to consider whether *Tuttle v. Tuttle*, 12 Metc. 551, 46 Am.Dec. 701, is in conflict with the well-settled law of the commonwealth that a promise to pay one for doing that which he was under a prior legal duty to the promisee to do is not binding for want of a valid consideration. The cases are collected in *Parrot v. Mexican Central Ry.*, 207 Mass. 184, 194, 93 N.E. 590, 34 L.R.A.,N.S., 261.

Tuttle v. Tuttle, *ubi supra*, was a case in which the holder of a note made an express agreement to forego a claim which he had made to interest on the note in consideration of payment of the balance of the principal then unpaid. It was a question whether he was entitled to interest, but there was no question of his right to the principal. It was held that this agreement was a bar to any claim for interest on the note. There was no discussion in the opinion as to the lack or validity of a consideration. But the point was involved in the decision.

In the case at bar there was no express agreement by the creditor to forego the balance of his claim on receiving payment of the amount admitted without dispute to be due. The only way in which such an agreement can be made out in the case at bar is on the ground that the plaintiff had to take the check sent him on the condition on which it was sent, and that by cashing the check he elected to accept the condition and so took the part admittedly due in full discharge of the whole debt. But while the doctrine of election is sound where a check is sent in full discharge of a claim no part of which is admitted to be due, it does not obtain where a debtor undertakes to make payment of what he admits to be due conditioned on its being accepted in discharge of what is in dispute. Such a condition, under those circumstances, is one which the debtor has no right to impose, and for that reason is void. In such a case the creditor is not put to an election to refuse the payment or to take it on the condition on which it is offered. He can take the payment admittedly due free of the void condition which the debtor has sought to impose. Take an example: Suppose the defendant had agreed to deliver to the plaintiff a stipulated quantity of iron for a stipulated price during each month of the year, and after six months the market price of iron was double that stipulated for in the contract. Suppose further that the defendant on the seventh month sent the stipulated amount of iron but on condition that the plaintiff should pay double the stipulated price. That is to say, can there be any doubt of the plaintiff's right to retain the iron without paying the double price? That is to say, can there be any doubt that the condition which required the plaintiff to pay double the contract

price for the instalment sent was void and that the plaintiff under those circumstances is not put to an election but can keep the iron under the contract? There can be no doubt on that question in our opinion; and in our opinion the principle of law governing that case governs the case at bar, where the debtor undertook without right to impose upon a payment of what admittedly was due a void condition that it be received in full discharge of what was in dispute.

It follows that in accepting the check in the case at bar as a payment on account, the plaintiff was within its rights and that it has not agreed to accept it in full settlement of the balance of the account. By the terms of the report judgment is to be entered for the plaintiff in the sum of \$50.02, with interest from the 20th day of October, 1911; and it is

So ordered.

QUESTIONS:

1. Was the contract "divisible"?
 2. Did the creditor "accept" an offer?
 3. Can the decision be reconciled with that made in *Fuller v. Kemp*?
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LEAVITT et al. v. MORROW.

Supreme Court of Ohio, 1856. 6 Ohio St. 71, 67 Am.Dec. 334.

To a declaration in assumpsit, containing only the common counts, the defendant filed the following special plea in bar: * * * "And for further plea, the said defendants say, that, after the making of said supposed promises in the declaration mentioned, and after the decease of said Wilson, viz: on the 2d day of June, 1852, Jane Wilson, the widow of said Hans Wilson deceased, and a devisee and legatee under his last will and testament, at the special instance and request of the said plaintiff, and as an accord and satisfaction of his supposed claim against the estate of said Wilson deceased, at said county, caused and procured to be conveyed by William Kelly and Maria his wife, a part of the south half of Section 11, Township 7, and Range 2, in Jefferson county, to one Benjamin McFarland, a trustee selected by the said David Morrow, to have and to hold the same in trust for the use of the said David Morrow and Rebecca his wife, during their joint lives and the life of the survivor, and at the death of the survivor of the said David and Rebecca, to convey the estate to the heirs at law of said David Morrow, being the persons who would have taken the same by descent, in the case that said David Morrow had died seized and intestate. And the said David Morrow then and there accepted the

conveyance in trust, in full accord, satisfaction, and discharge, of his said supposed claim against the estate of the said Hans Wilson, deceased; and this they are ready to verify. Wherefore they pray judgment," etc. * * *

A demurrer to this plea was overruled, and on issue joined the verdict and judgment were for the plaintiff. The defendant brings writ of error, the lower court having held that settlement by a third person does not operate as a discharge.

BARTLEY, C. J. The main question presented for determination in this case is whether an accord and satisfaction, accepted in discharge of a debt, but coming from a stranger or person having no pecuniary interest in the subject-matter, is a legal defense to an action against the debtor, or his legal representatives. The charge of the District Court to the jury, was in the negative of this proposition; and if the court erred in this, the judgment must be reversed.

It requires powers of discrimination looking far beyond the justice of the case, to see the reason of the rule, that accord and satisfaction, although moving from a stranger, yet accepted by the creditor, and set up in the plea of the defendant, as a discharge of the debt, does not constitute a legal defense to the action. It is said in some of the early adjudications touching this subject, that the reason of the rule is, that the person from whom the accord and satisfaction comes is not privy to the contract giving rise to the debt. This reason might give just cause to the creditor to refuse to receive the satisfaction from a stranger, or third person, not known in the transaction of the parties, even as agent of the debtor. But where the creditor has actually received and accepted the contribution in satisfaction of the debt, to allow him to maintain an action on the same debt afterward, would seem to shock the ordinary sense of justice of every man. It is urged, in support of the rule, that one man can not make another his debtor without his consent; that one man can not make a gift or donation to another, unless the latter consent to receive it; and that it may be possible that a debtor may, on account of cross claims, matters of set-off, or in view of other circumstances, be unwilling that a stranger should step in, and, by voluntary contribution, satisfy the claim of his creditor.

All this may be very true, and not affect the controversy in this case. And it is said, that exceptions may exist to all general rules—indeed, that exceptions sometimes prove the rule. It may be laid down as incontestable, as a general thing, that, where one man is indebted to another, and a third person steps in and pays the debt, in the absence of all circumstances tending to show the contrary, the rational inference would be, that the act done, being for the debtor's benefit, was done with his consent, or, if without his knowledge at the time,

that it would, as a matter of course, be ratified by him afterward. If in such a case, the creditor should subsequently bring suit against the debtor, and the debtor should appear in the action, and plead the satisfaction in discharge of his liability, I can not conceive upon what just and rational ground the creditor could be allowed to reply, that his debt was not discharged, because the satisfaction which he had accepted in discharge of it was without the consent of the defendant. The very fact of the satisfaction being set up in the action, by the defendant, in discharge of the debt, would, of itself, seem sufficient to conclude the plaintiff from denying that it had received the defendant's consent, or ratification.

It is claimed, however, on behalf of the defendant in error, that the question, in this case, depends upon a rule of law which was decided many years ago, and which has been recognized and acquiesced in, by the sages of the law, for nearly two hundred years; that the common law settles the question—which has been fined and refined by an infinite number of grave and learned men, through a succession of ages, until, by long experience, it has grown to such perfection, that, in the language of Lord Coke, “no man of his own private reason, ought to be wiser than the law.” It is true, that the doctrine, that an accord and satisfaction, moving from one who was a stranger, and in no sort privy to the condition of the obligation, could not be pleaded in bar by the obligor, which was reported by Croke to have been laid down in *Grymes v. Blofield*, Cro. Eliz. 541, and which appears to have been affirmed in *Edgecomb v. Rodd* and others, 5 East's Rep. 294, and recognized as law in some of the other English decisions, as well as in some of the elementary books, and abridgments, has been followed in a number of the reported cases in this county. In the case of *Clow v. Borst et al.*, 6 Johns. (N.Y.) 38, and the case of *Stark's Adm'r v. Thompson's Ex'r*, 3 T.B.Mon. (Ky.) 303, the rule appears to have been adhered to; and in the case of *Daniels v. Hallenback*, 19 Wend. (N.Y.) 410, it was recognized with some qualification.

But mere precedent, alone, is not sufficient to settle and establish forever a legal principle. Infallibility is to be conceded to no human tribunal. A legal principle, to be well settled, must be founded on sound reason, and tend to the purpose of justice. The maxim communis error facit jus, has a limited application. Otherwise, it could never be said, that law is the perfection of reason, and that it is the reason and justice of the law which give to it its vitality. When we consider the thousands of cases to be pointed out in the English and American books of reports, which have been overruled, doubted, or limited in their application, we can appreciate the remark of Chancellor Kent in his Commentaries, vol. 1, page 477, that “Even a series of decisions are not always evidence of what the law is.” Precedents are to be regarded as the great store-house of experience; not always

to be followed, but to be looked to as beacon lights in the progress of judicial investigation, which although, at times, they may be liable to conduct us to the paths of error, yet may be important aids in lighting our footsteps in the road to truth. * * *

From an examination of the whole subject, it appears that the case of *Grymes v. Blofield*, as reported by Croke, in which the doctrine originated that a plea of accord and satisfaction, moving from a stranger, was not a good plea in bar, is, to say the least of it, of doubtful authority; and, in the cases in which it has been followed, both in England and in this country, it appears to have been adopted with little or no inquiry into the reason or justice of its application. The rule laid down is purely technical; and the reason assigned, that the stranger is not privy to the condition of the obligation, loses all its reality when we consider that the satisfaction must have been accepted by the plaintiff, and assented to, or ratified by the defendant. It would seem therefore, that a rule which, in its tendency, is calculated to foster bad faith and defeat the purposes of justice, ought not to be adhered to, simply on account of its antiquity.

We are unanimous in the opinion that there was error in the instructions of the District Court to the jury.

Judgment reversed, and cause remanded for further proceedings.

QUESTIONS:

1. Was Jane Wilson an assignee of the plaintiff's rights?
2. Was ratification by the legal representative of H. Wilson necessary to a discharge? Has he ratified?
3. Does Jane Wilson have now any right of reimbursement?
4. A precedent seems not to be conclusive. What is?
5. Is this decision a "precedent"?
6. Is a legal "principle" eternal?

NOTE

In spite of the early decision in *Grymes v. Blofield*, Cro.Eliz. 541 (1594), a payment by a third person operates as an accord and satisfaction, if so offered by the third person and accepted by the creditor. It will so operate even though the debt due is liquidated and the sum paid is less than the sum due. Restatement, Contracts, § 421, states that the debtor has power to nullify his discharge by making a disclaimer.

If the debtor gives in payment of his debt the note of a third person, the creditor may take this note either as an absolute satisfaction or only as a conditional one. In the latter case, if the note is not paid when due the creditor can maintain suit against his original debtor. *Cheltenham Stone & Gravel Co. v. Gates Iron Works*, 124 Ill. 623, 16 N.E. 923 (1888).

BARNETT v. ROSEN, 235 Mass. 244, 126 N.E. 386 (1920). The plaintiff had separate judgment debts due from Mr. and Mrs. Rosen. By mutual agreement between the plaintiff and Mrs. Rosen, she paid and he received \$35 in full satisfaction of both judgments, both writs of execution held by the plaintiff being marked as satisfied. This amount was less than the amount of Mrs. Rosen's own debt. In a suit against Mrs. Rosen to collect the balance of the judgment against her, the court held that it had been effectively discharged. The payment of \$35 operated as full satisfaction of both judgments, even though it would not have operated as a discharge of the judgment against Mrs. Rosen had it been paid and accepted in satisfaction of that judgment alone. In paying any amount, however small, on her husband's debt, she did something that her legal duty did not require of her.

NOTE ON SATISFACTION OF FORMAL OBLIGATIONS

The American Law Institute makes no distinction between formal contracts and informal ones with respect to the modes of discharge, rightly assuming that the ancient technical rules should now be regarded as obsolete. See Restatement, Contracts, §§ 407, 417, 418.

The early rule of the common law was that a "specialty"—a debt of record or an obligation created by a sealed instrument—could be varied or discharged only by a document of like formality and dignity. A plea of accord and satisfaction was not good in an action on a sealed bond debt. *Noyes v. Hopgood*, Cr.Jac. 649 (1622). The first step in breaking down this rule was to distinguish between the primary obligation created by a sealed instrument and the secondary duty to make compensation for its breach, the strict rule not being applicable to the latter. *Blake's Case*, 6 Co. 43b (1605); *Alden v. Blague*, Cro.Jac. 99 (1605). The rule was not applicable in the courts of equity; and in any modern court having both equity and common law jurisdiction it should never be applied. *Steeds v. Steeds*, 22 Q.B.D. 537 (1889). Nor should it be applied in any court where the statute requires it to give effect to "equitable defenses." If there is any other court to which these statements are not applicable, it should declare that even a purely common law court has power to recognize a change in the law and to disregard the ancient rule.

SECTION 7.—DISCHARGE BY IMPOSSIBILITY OR FRUSTRATION

INTRODUCTORY NOTE

A promisor who is sued for breach of contract may set up, among various other kinds of defenses, the three following:

(1) he may assert that supervening events have made his own performance impossible;

(2) he may assert that performance of the agreed equivalent has become impossible;

(3) he may assert that the purpose for which he made the contract has been "frustrated."

The first of these is that he himself can not perform, for reasons that should excuse him. The second is that the plaintiff can not perform, with the result that there is a "failure of consideration," actual or prospective. The third is an assertion that supervening events have made it impossible for him to attain the end and aim for which he assented to the bargain; it is so worded that it includes practically all cases within the second, but it also includes cases in which the "frustration" of purpose exists even though the other party can render the exact performance that he promised.

The problem in the present Section is to determine when these asserted defenses are legally effective, and what are the facts and events that constitute such "impossibility" or "frustration" as to discharge a contractor from his legal duty.

In all three of these defenses some kind of "Impossibility" is asserted; but it will be obvious that very different considerations are involved. With respect to all three, there has been a progressive development of the law in recent times, lessening the risks to be carried by a promisor. It is probable that this has been based upon a similar development in the practice and understanding of contractors.

When a promisor is held to be discharged from duty by supervening impossibility of his performance, due to destruction of property or otherwise, although his risk under the contract is thereby lessened, the subdivision of risks is not unfair. He still bears the risk of loss of property values and the risk of not getting the agreed exchange (the price and the expected profit thereof).

The other party also bears a risk—the risk of not getting the profit that performance of the bargain would have brought him; he can maintain no action for loss of this profit, however certain it may be that the profit would have been ~~made~~. On the other hand, he does

not bear the risk of having to pay something for nothing. He does not have to pay the price for the house, the goods, or the service that he will not get; and if he has paid part or all of it in advance he has a right to its restitution.

Thus are the risks of loss and disappointment divided between the parties; and the subdivision does not give dissatisfaction in the community. The rule is a workable one, based in part or in whole on existing mores; or, if of pure judicial origin, it is accepted into the developing mores by usage and consent.

The subdivision of risks is similar when a promisor is held to be discharged by supervening death or illness, the act of law or government, or other events that frustrate purposes for which the contract was made.

(A) IMPOSSIBILITY OF PERFORMANCE OF THE PROMISE FOR BREACH
OF WHICH SUIT IS BROUGHT

KING v. BRAINE.

Michaelmas Term, 1597. Owen, 60.

A man sells sheep, and warrants that they are sound, and that they shall be sound for the space of a year, upon which warrant an action of the case was brought, and it was moved that the action did not lye, because the warranty is impossible to be performed by the party, because it is onely the act of God to make them sound for a year. But Clench and Fenner on the contrary; for it is not impossible, no more than if I warrant that such a ship shall return safe to Bruges, and it is the usuall course between merchants to warrant the safe return of their ships.

NOTE

When a performance that is promised in specific terms is later found to be impossible, under what circumstances is it reasonable to interpret the promise as one to indemnify the promisee in case the specifically described performance becomes impossible? Suppose the following cases: (1) A physician promises to effect a cure, but the disease turns out to be incurable by any method as yet discovered. *McQuaid v. Michou*, 85 N.H. 299, 157 A. 881 (1932).

(2) An agent promises to find a purchaser for Blackacre at \$10,000, within six months. Land values rapidly fall; and no one can be found who will pay so much. *Hokanson v. Western Empire Land Co.*, 132 Minn. 74, 155 N.W. 1043 (1916).

(3) A party promises to sell specific goods, forgetting the fact that he has already sold them to a third person. The latter will not rescind the sale or sell back the goods. *Stern v. Ace Wrecking Co.*, 38 A.2d 626 (1944, Mun.Ct.D.C.).

(4) A shipowner promises to have his ship "Kingswood" at Sydney by May 1, ready to take on freight. On April 29, in the entrance to Sydney Harbor, the boilers explode for unknown reasons. *Joseph Constantine S. S. Co. v. Imperial Smelting Corp.*, [1942] A.C. 154, [1941] 2 All Eng. 165.

See Restatement, Contracts, §§ 2, 455, 456.

Like other terms, "Impossibility" is loosely used in different senses, such as physical impossibility (objective), personal inability (subjective), legal prohibition, economic unprofitableness of a high degree, difficulty and hardship, danger to life or health. The legal effect of events causing "impossibility" of performance of such varying kinds as these can not be expected to be uniform. The use of the term in stating a rule of law should be avoided unless it is accompanied by a carefully drawn definition. As used in Restatement, Contracts, the term impossibility "means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved." Section 454.

MOORE & BAKER v. MORECOMB.

In the Common Pleas, 1601. Cro.Eliz. 864.

Debt upon an obligation, conditioned to deliver to the plaintiff before such a feast such a ship, and all the tackling thereto, or in default thereof to pay at the same feast such a sum as John Norris and J. S. shall value them to be worth. The defendant pleaded, that before the said feast the said J. Norris and J. S. did not make any valuation of them. It was thereupon demurred: and resolved by all the Court for the plaintiff; for although he hath election to do the one or the other, yet the condition being for his benefit, he ought to provide that the value should be assessed, otherwise he is to deliver the goods themselves; for if one be obliged to make such an assurance of such land as the counsel of the obligee before such a day shall advise, or to pay there and then £100 if the counsel devise not any assurance, he ought to pay the £100 for it being to his advantage when it is performed, he ought to provide that he performs the one.—And Walmesley said, If one be obliged to pay £20 before the first day of May, or to marry A. S. before the first day of August next ensuing, if he doth not pay the £20 before the first day of May, and A. S. dies before the first day of August, so as the condition is become impossible by the act of God in this part, yet the obligation is forfeited, because he hath undertaken to perform the one of them; and it was his folly that he

did not perform it when it was in his power and election to have done it. Wherefore, &c.—And afterwards it was adjudged for the plaintiff.

NOTE

If a party contracts to do either one of two things at his option and one of them becomes impossible, he must do the other. In *State v. Worthington*, 7 Ohio 171 (1835), the defendant promised to pay \$2,000 either in land or in money. Conveyance of the land became impossible. "It would be indeed startling to the good sense of an honest man if one who contracted to do one of two things need do neither if unable to do both?" See *Restatement, Contracts*, § 469.

Observe, however, that if a party promises a specified performance, with a provision for the payment of a sum of money as a penalty or liquidated damages in case of failure to perform, the contract is not an "alternative contract." The other party bargains for the performance, not for the sum of money.

PARADINE v. JANE.

In the King's Bench, 1647. *Aleyn*, 26.

In debt the plaintiff declares upon a lease for years rendering rent at the four usual feasts; and for rent behind for three years, ending at the Feast of the Annunciation, 21 Car. brings his action; the defendant pleads, that a certain German prince, by name Prince Rupert, an alien born, enemy to the King and kingdom, had invaded the realm with an hostile army of men; and with the same force did enter upon the defendant's possession, and him expelled, and held out of possession from the 19 of July 18 Car. till the Feast of the Annunciation, 21 Car. whereby he could not take the profits; whereupon the plaintiff demurred, and the plea was resolved insufficient. * * *

3. It was resolved, that the matter of the plea was insufficient; for though the whole army had been alien enemies, yet he ought to pay his rent. And this difference was taken, that where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him. As in the case of waste, if a house be destroyed by tempest, or by enemies, the lessee is excused. *Dyer*, 33. a. *Inst.* 53, d. 283. a. 12 H. 4. 6. so of an escape. *Co.* 4. 84. b. 33 H. 6. 1. So in 9 E. 3.16. a supersedeas was awarded to the justices, that they should not proceed in a cessavit upon a cesser during the war, but when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning, or thrown down by enemies, yet he ought to repair

it. Dyer 33. a; 40 E. III. 6. h. Now the rent is a duty created by the parties upon the reservation, and had there been a covenant to pay it, there had been no question but the lessee must have made it good, notwithstanding the interruption by enemies, for the law would not protect him beyond his own agreement, no more than in the case of reparations; this reservation then being a covenant in law, and whereupon an action of covenant hath been maintained (as Roll said) it is all one as if there had been an actual covenant. Another reason was added, that as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses, and not lay the whole burthen of them upon his lessor; and Dyer 56.6. was cited for this purpose, that though the land be surrounded, or gained by the sea, or made barren by wildfire, yet the lessor shall have his whole rent: and judgment was given for the plaintiff.

QUESTIONS:

1. Was the performance promised by the defendant rendered impossible, in any sense, by Prince Rupert?
2. Was there any condition precedent to the duty to pay rent that became impossible?
3. Should the defendant's duty be held to be discharged on the ground that the object of the leasing contract is frustrated? See Restatement, Contracts, § 288.
4. Would the passage of a prohibition law discharge a tenant's duty to pay rent under a lease restricting the use of the premises to saloon purposes?
5. Is a tenant, who has covenanted to repair and rebuild a dwelling in case of any injury or destruction, discharged by the fact that the dwelling is destroyed by a bomb dropped from an enemy airship? See *Redmond v. Dainton*, [1920] 2 K.B. 256.

TAYLOR v. CALDWELL.

In the Queen's Bench, 1863. 3 Best & S. 826.

BLACKBURN, J. In this case the plaintiffs and defendants had, on May 27th, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., June 17th, July 15th, August 5th, and August 19th, for the purpose of giving a series of four grand concerts, and day and night fêtes, at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

The parties inaccurately call this a "letting," and the money to be paid, a "rent"; but the whole agreement is such as to show that the

defendants were to retain the possession of the Hall and Gardens so that there was to be no demise of them, and that the contract was merely to give the plaintiffs the use of them on those days. Nothing, however, in our opinion, depends on this. The agreement then proceeds to set out various stipulations between the parties as to what each was to supply for these concerts and entertainments, and as to the manner in which they should be carried on. The effect of the whole is to show that the existence of the Music Hall in the Surrey Gardens in a state fit for a concert was essential for the fulfilment of the contract,—such entertainments as the parties contemplated in their agreement could not be given without it.

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll. Abr. 450, Condition (G), and in the note (2) to *Walton v. Waterhouse* (2 Wms.Saund. 421a, 6th Ed.) and is recognized as the general rule by all the judges in the much discussed case of *Hall v. Wright* (E. B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied; and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfill the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.

* * *

There is a class of contracts in which a person binds himself to do something which requires to be performed by him in person; and such promises, e. g. promises to marry, or promises to serve for a certain time, are never in practice qualified by an express exception of the death of the party; and therefore in such cases the contract is in terms broken if the promisor dies before fulfilment. Yet it was very early determined that, if the performance is personal, the executors are not liable; *Hyde v. The Dean of Windsor* (Cro.Eliz. 552, 553). See 2 Wms.Exors. 1560 (5th Ed.), where a very apt illustration is given. "Thus," says the learned author, "if an author undertakes to compose a work, and dies before completing it, his executors are discharged from this contract; for the undertaking is merely personal in its nature, and, by the intervention of the contractor's death, has become impossible to be performed." For this he cites a dictum of Lord Lyndhurst in *Marshall v. Broadhurst* (1 Tyr. 348, 349) and a case mentioned by Patteson, J., in *Wentworth v. Cock* (10 A. & E. 42, 45-46). In *Hall v. Wright* (E. B. & E. 746, 749), Crompton, J., in his judgment, puts another case. "Where a contract depends upon personal skill, and the act of God renders it impossible, as, for instance, in the case of a painter employed to paint a picture who is struck blind, it may be that the performance might be excused."

It seems that in those cases the only ground on which the parties or their executors can be excused from the consequences of the breach of the contract, is, that from the nature of the contract there is an implied condition of the continued existence of the life of the contractor, and perhaps in the case of the painter, of his eyesight. In the instances just given, the person, the continued existence of whose life is necessary to the fulfilment of the contract, is himself the contractor, but that does not seem in itself to be necessary to the application of the principle, as is illustrated by the following example. In the ordinary form of an apprentice deed, the apprentice binds himself in unqualified terms to "serve until the full end and term of seven years to be fully complete and ended," during which term it is covenanted that the apprentice his master "faithfully shall serve," and the father of the apprentice in equally unqualified terms binds himself for the performance by the apprentice of all and every covenant on his part. (See the form, 2 Chitty on Pleading, 370 [7th Ed.] by Greening.) It is undeniable that if the apprentice dies within the seven years, the covenant of the father that he shall perform his covenant to serve for

seven years is not fulfilled, yet surely it cannot be that an action would lie against the father. Yet the only reason why it would not is that he is excused because of the apprentice's death.

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. For example, where a contract of sale is made amounting to a bargain and sale, transferring presently the property in specific chattels, which are to be delivered by the vendor at a future day; there, if the chattels, without the fault of the vendor, perish in the interval, the purchaser must pay the price, and the vendor is excused from performing his contract to deliver, which has thus become impossible.

That this is the rule of the English law is established by the case of *Rugg v. Minett* (11 East, 210), where the article that perished before delivery was turpentine, and it was decided that the vendor was bound to refund the price of all those lots in which the property had not passed; but was entitled to retain without deduction the price of those lots in which the property had passed, though they were not delivered, and though in the conditions of sale, which are set out in the report, there was no express qualification of the promise to deliver on payment. It seems in that case rather to have been taken for granted than decided that the destruction of the thing sold before delivery excused the vendor from fulfilling his contract to deliver on payment.

This also is the rule of the civil law, and it is worth noticing that Pothier, in his celebrated *Traité du Contrat de Vente* (see part 4, § 307, etc.; and part 2, ch. 1, sec. 1, art. 4, § 1), treats this as merely an example of the more general rule that every obligation *de certo corpore* is extinguished when the thing ceases to exist. See Blackburn on the Contract of Sale, p. 173. * * *

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of *Coggs v. Bernard* (1 Smith's L.C. 171 [5th Ed.] 2 L.Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the civil law that it might perhaps be thought that this principle was there derived direct from the civilians, and was not generally applicable in English law except in the case of bailments; but the case of *Williams v. Lloyd* (W. Jones, 179), above cited, shows that the same law had been already adopted by the English law as early as the Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends

on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given, that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the Gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

Rule absolute.

QUESTIONS:

1. If the continued existence of the hall was a condition of the defendant's duty to deliver possession, is it found to be so by a process of "interpretation" of the terms of agreement or is it a purely "constructive" condition?
2. Why should not the defendant be bound to indemnify the plaintiff for his wasted expenditures and his profits that were prevented?
3. Why should not the plaintiff have to pay the agreed rental, as the tenant had to in the case of *Paradine v. Jane*?

See Restatement, Contracts, §§ 281, 460.

SUPERINTENDENT & TRUSTEES OF PUBLIC SCHOOLS OF CITY OF TRENTON v. BENNETT et al.

Supreme Court of New Jersey, 1859. 27 N.J.L. 513, 72 Am.Dec. 373.

WHELPLEY, J. This case presents the naked question whether, where a builder has agreed, by a contract under seal, with the owner of a lot of land, "to build, erect, and complete a building upon the lot for a certain entire price, but payable in arbitrary installments, fixed without regard to the value of the work done, and the house before its completion falls down, solely by reason of a latent defect in the soil, and not on account of faulty construction, the loss falls upon the builder or the owner of the land."

The case comes before the court, upon a certificate from the Mercer circuit, for the advisory opinion of this court.

The covenant of Evernham and Hill was to build, erect, and complete the school-house upon the lot in question for the sum of \$2610; the whole price was to be paid for the whole building; the division of that sum into installments, payable at certain stages of the work, was not intended to sever the entirety of the contract, and make the payment of the installments payments for such parts of the work as might be done when they were payable: this division was made, not to apportion the price to the different parts of the work, but to suit the wants of the contractor, and aid him in the completion of the work; the consideration of the covenant to complete the building was the whole price, and not the mere balance that might remain after the payment of the installments: it cannot be pretended that the contractor, after payment of the part of the installments, might refuse to go on and complete the building, and yet retain that part of the price he had received. *Haslack v. Mayers*, 26 N.J.L., 284.

No rule of law is more firmly established by a long train of decisions than this, that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract; therefore, if a lessee covenant to repair a house, though it be burned by lightning, or thrown down by enemies, yet he is bound to repair it. *Paradine v. Jane*, Aleyn, 26; *Walton v. Waterhouse*, 2 W.Saund. 422a, note 2; *Brecknock Co. v. Pritchard*, 6 Term R. 750. This case was an action upon a covenant to build a bridge, and keep it in repair: the defendant pleaded that the bridge was carried away by the act of God, by a great and extraordinary flood, although well built and in good repair. The plea was held bad on demurrer.

To the same effect are *Bullock v. Dommit*, 6 Term R. 650; *Phillips v. Stevens*, 16 Mass. 238; *Dyer*, 33a. And there is no relief in equity. *Gates v. Green*, 4 Paige (N.Y.) 355, 27 Am.Dec. 68; *Holtzapffell v. Baker*, 18 Ves. 115. Chancellor Walworth, in *Gates v. Green*, in denying relief in equity against a covenant to pay rent after the destruction of the demised premises, admits the rule to be against natural law, and not to be found in the law of other countries where the civil law prevails; yet says it is firmly established, notwithstanding the struggles of some of the early English chancellors against it.

In *Beebe v. Johnson*, 19 Wend. (N.Y.) 500, 32 Am.Dec. 518, it was held by Nelson, C. J., delivering the opinion of the court, that the defendant was not excused from performing his covenant to perfect, in England, a patent granted in this country, so as to insure to the plaintiff the exclusive right of vending the patented article in the Canadas, because the power of granting such an exclusive privilege appertained

not to the mother country, but to the provinces, and was never granted, except to subjects of Great Britain and residents of the provinces; and the plaintiff and defendant were both American citizens.

The court said, if the covenant be within the range of possibility, however absurd or improbable the idea of execution may be, it will be upheld, as where one covenants it shall rain tomorrow, or that the pope shall be at Westminster on a certain day. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by any means be accomplished; for if it be only improbable, or out of the power of the obligor, it is not deemed in law impossible. 3 Comyn, Dig. 93. If a party enter into an absolute contract, without any qualification of exception, and receives from the party with whom he contracts the consideration of such engagement, he must abide by the contract, and either do the act or pay the damages; his liability arises from his own direct and positive undertaking.

In *Lord v. Wheeler*, 1 Gray (Mass.) 282, where a workman had agreed to repair a building for an entire sum, and after the owner had moved in, it was burned up before the repairs were completed, it was held that where one person agrees to expend labor upon a specific subject, the property of another, as to shoe his horse, or slate his dwelling-house, if the horse dies, or the dwelling-house is destroyed by fire, before the work is done, the performance of the contract becomes impossible, and with the principal perishes the incident. The case was clearly distinguished from the ordinary contract of one to erect a building upon the lands of another, performing the labor and supplying the materials therefor; where, if before the building is completed or accepted, it is destroyed by fire or other casualty, the loss falls upon the builder, he must rebuild. The thing may be done, and he has contracted to do it. *Adams v. Nichols*, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; *Brumby v. Smith*, 3 Ala. 123; 2 Pars.Cont. 184; 1 Chit. Cont. 568.

No matter how harsh and apparently unjust in its operation the rule may occasionally be, it cannot be denied that it has its foundations in good sense and inflexible honesty. He that agrees to do an act should do it, unless absolutely impossible. He should provide against contingencies in his contract. Where one of two innocent persons must sustain a loss, the law casts it upon him who has agreed to sustain it, or rather the law leaves it where the agreement of the parties has put it; the law will not insert, for the benefit of one of the parties, by construction, an exception which the parties have not, either by design or neglect, inserted in their engagement. If a party, for a sufficient consideration, agrees to erect and complete a building upon a particular spot, and find all the materials, and do all the labor, he must erect and complete it, because he has agreed so to do. No matter what the expense, he must provide such a substruction as will sustain

the building upon that spot, until it is complete and delivered to the owner. If he agrees to erect a house upon a spot where it cannot be done without driving piles, he must drive them, because he has agreed to do everything necessary to erect and complete the building. If the difficulties are apparent on the surface, he must overcome them. If they are not, but become apparent by excavation or the sinking of the building, the rule is the same. He must overcome them, and erect the building, simply because he has agreed to do so—to do everything necessary for that purpose.

The cases make no distinction between accidents that could be foreseen when the contract was entered into, and those that could not have been foreseen. Between accidents by the fault of the contractor, and those where he is without fault, they all rest upon the simple principle—such is the agreement, clear and unqualified, and it must be performed, no matter what the cost, if performance be not absolutely impossible. • • •

Neither the destruction of the incomplete building by a sudden tornado, nor its falling by reason of a latent softness of the soil which rendered the foundation insecure, necessarily prevented the performance of the contract to build, erect, and complete the building for the specified price; it can still be done, for aught that was opened to the jury as a defense, and overruled by the court.

The whole defense was properly overruled, because it did not show the performance of the covenant impossible, or any lawful excuse for non-performance of the contract.

I am also of opinion that the damage occasioned by the destruction of the building by the gale of wind must be borne by the defendants, for the reasons before given, and that the circuit court be advised accordingly.

QUESTIONS:

1. Is there a reason for distinguishing between a contract to erect a building and a contract to paint an existing building, with respect to the effect of destruction without fault?
2. When should the risk of injury to a building under construction caused by subsurface defects in the land be borne by the owner?
3. Which party bears the risk of destruction of the partly constructed building by lightning?
4. Which one bears the risk of loss caused by the inadequacy of plans and specifications drawn by the owner's architect? See Restatement, Contracts, § 456.
5. Was performance made "impossible" in this case, by the defect in the soil or otherwise?

NOTE

Cases are very numerous in which it has been held that a contractor is not excused from the duty of performance by the fact that he encounters increased and unexpected difficulty and expense. See *Dermott v. Jones*, 69 U.S. (2 Wall.) 1, 17 L.Ed. 762 (1864); *Stees v. Leonard*, 20 Minn. 494, Gil. 448 (1874), quicksand; Restatement, Contracts, § 467. Among such difficulties are landslides, bad weather, rock encountered in excavating, broken machinery, financial difficulties, labor shortage.

Contractors now very generally put in an express provision making their duties to perform (or to perform on time) conditional on the absence of fires, strikes, accidents, and other causes beyond their control. Such terms as *force majeure* and *vis major* are often found in overseas bills of lading. These provisions are useful, even though the application of the provision in a specific case may be doubtful. The question arises, how big a fire and how long a strike. Such a provision would no doubt justify delay in such a case as *School Trustees v. Bennett*, ante; it can not be said that it would justify entire nonperformance. Even in the absence of such a provision, the occurrence of an event that makes performance impossible, or even commercially impracticable, may be held to operate as a discharge.

In *ROSSVILLE ALCOHOL & CHEM. CORP. v. STEEL CONST. CO.*, 104 Ind.App. 515, 8 N.E.2d 1016 (1937), the plaintiff Construction Company contracted with the defendant to "furnish, fabricate, and erect" two steel tanks in the defendant's building and to make such material alterations in the building as the size and weight of the tanks made necessary. The defendant promised to pay the price after the tanks were "erected, tested, and accepted." After all the materials had been brought to the premises and the tanks were in process of construction, an explosion and a fire, for which neither party was responsible, destroyed the partly constructed tanks and all the materials, and so badly injured the building that construction of the tanks became impossible without making extensive repairs to the building.

QUESTIONS:

1. Was it the duty of either party to repair the building?
2. If the defendant repairs the building, must the plaintiff construct the tanks?
3. Does the plaintiff have a right to payment of part of the contract price; or to the reasonable value of work done and materials destroyed?
4. Were the duties of both parties conditional on continued existence of the building, because they so agreed "by implication" or because they would have so agreed if they had thought of it, or because "justice" so requires?

MIDDLESEX WATER CO. v. KNAPPMANN WHITING CO., 64 N.J.L. 240, 45 A. 692 (1899). The Water Company promised a factory owner to maintain a stated water pressure at the factory for protection against fire. A break occurred in a water main, the cause not appearing. While repairs were going on and the water turned off, the factory burned. The owner was held to have a right to damages for his loss. Water companies ordinarily make no such contract or else put in a provision against liability.

YERRINGTON v. GREENE et al.

Supreme Court of Rhode Island, 1863. 7 R.I. 589, 84 Am.Dec. 578.

Assumpsit against the defendants, as administrators on the estate of William W. Keach, for the recovery of damages for the breach of a contract by which the said Keach agreed to employ the plaintiff, at a salary, for three years, in his business.

At the trial of the case, under the general issue, at the March term of this court, 1863, before the chief justice, with a jury, it was proved by letters interchanged between the plaintiff, who then resided in Boston, and the intestate, who was a manufacturing jeweller, in Providence, that on the 19th day of March, 1860, the former agreed to serve the intestate, and the latter agreed to employ the plaintiff, as a clerk and salesman, having charge of the intestate's office, or place of sale, in New York, and as agent in his business in making occasional trips for him to Philadelphia for the term of three years from the first day of April, 1860, or as soon thereafter as the plaintiff could obtain a release from his employment in Boston, at a salary of twelve hundred dollars, for the first year, of thirteen hundred dollars, for the second year, and of fifteen hundred dollars, for the third year; that on the sixteenth day of April, 1860, the plaintiff entered into the service of the intestate, under this contract, and continued to serve him under it until the first day of April, 1861, when the said Keach died; that the defendants, as administrators of said Keach, continued to employ the plaintiff, at the stipulated salary, until the sixteenth day of June, 1861, when, having discontinued the office in New York, and removed what goods were there to Providence, where Keach had another place of sale, they declined longer to employ the plaintiff, or to pay him his salary, though from that time to the date of the writ, he had been ready and willing to serve in said business, and had tendered his services in it to them, and had been unable to procure other employment; that the defendants, as administrators of Keach, wound up his business by selling the goods removed from New York, with other goods of his, at Providence, and had been allowed by the court of probate, for their services as administrators, the sum of three thousand dollars. Upon

this state of facts, the chief justice instructed the jury, that the death of Keach terminated this contract of service, and that no recovery of damages could be had of the defendants, as his administrators, for their refusal to employ the plaintiff under it afterwards; whereupon, the jury having returned a verdict for the defendants, the plaintiff, having duly excepted thereto, now moved for a new trial, on the ground of error in law in said instruction.

AMES, C. J. It is, in general, true, that death does not absolve a man from his contracts; but that they must be performed by his personal representatives, or their non-performance compensated, out of his estate. An exception to this rule, equally well established, at both the civil and common law, is, that in contracts in which performance depends upon the continued existence of a certain person or thing, a condition is implied, that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. The implication arises in spite of the unqualified character of the promissory words, because, from the nature of the contract, it is apparent that the parties contracted upon the basis of the continued existence of the particular person or chattel. The books afford many illustrations of this reasonable mode of construing contracts, *de certo corpore*, as the civil law designation of them is, in furtherance of the presumed and probable intent of the parties. The most obvious cases are, the death of a party to a contract of marriage before the time fixed by it for the marriage; the death of an author or artist before the time contracted for the finishing and delivery of the book, picture, statue, or other work of art; the death of a certain slave promised to be delivered, or of a horse promised to be redelivered, before the day set for the delivery or redelivery; and the death of a master or apprentice before the expiration of the term of service limited in the indenture. The bodily disability from supervening illness, as of an artist, from blindness, to paint the picture contracted for, or of a scholar to receive the instruction his father had stipulated should be received and paid for, has been held, for the like reason, to excuse each from the performance of his contract. *Hall v. Wright*, 1 El., Bl. & El. 746; *Stewart v. Loring*, 5 Allen (Mass.) 306, 81 Am.Dec. 747. The cases in support of these and other illustrations of the exception to the general rule are set down in the defendants' brief, and it is unnecessary to repeat them.

Both at the civil and the common law, it is necessary, that the party who would avail himself of this excuse for non-performance of the contract, should be without fault in the matter upon which he relies as an excuse. The latest and most instructive case, upon this subject, so far as the discussion of the principle of decision is concerned, is that of *Taylor v. Caldwell*, decided by the Queen's Bench, in May last 8 Law T.Rep. 356. In that case it was held, that the parties were

discharged from a contract to let a music hall for four specified days for a series of concerts, by the accidental destruction of the hall by fire before the first day arrived. The full and lucid exposition by Mr. Justice Blackburn, who delivered the opinion of the court, of the prior cases and of the principle upon which they have been decided, leaves nothing further to be desired upon this subject.

Does the case at bar fall within the general rule, or within the exception we have been considering? This must depend upon the nature of the contract, whether one, requiring the continuing existence of the employer, Keach, for performance on his part, or one which could, according to its spirit and meaning, be performed by the defendants, his administrators. The contract was, to employ the plaintiff as clerk and agent of the intestate, in his business, in New York and Philadelphia; and it seems to us undoubted, that the continued existence of both parties to the contract for the whole stipulated term, was the basis upon which the contract proceeded, and if called to their attention at the time of the contract, must have been contemplated as such by them. The death of the plaintiff within the three years would certainly have been a legal excuse from the further performance of his contract; since it was an employment of confidence and skill, the duties of which, in the spirit of the contract, could be fulfilled by him alone. If this be the law in application to a covenant for ordinary service (Shep. Touch. 180), how much more in application to a contract for service of such confidence and skill as that of a clerk and agent for sale. On the other hand, this employment could continue no longer than the business in which the employer was engaged, and the plaintiff retained. The intestate, when living, could, by the contract, have required the services of the plaintiff in no other business than that in which he had engaged him, and with no other person than himself. It would seem, then necessarily to follow, that when the death of the employer put a stop to this business, and left no legal right over it in the administrators, except to close it up with the least loss to the estate of their decedent, they were, by the contract, bound no longer to employ the plaintiff, any more than he to serve them. The act of God had taken away the master and principal,—the law had revoked his agency, and stopped the business to which alone his contract bound him,—and if he would serve the administrators in winding up the estate, it must be under a new contract with them, and under renewed powers granted by them. Any other result than that this contract of service was upon the implied condition that the employer, as well as the employed, was to continue to live during the stipulated term of employment, would involve us in the strange conclusion, that the administrators might go on with the business of their intestate, in which the plaintiff must continue with powers unrevoked by the death of his principal, or, that he, with new powers from them, was bound by the contract to serve

them as new masters, and in a different service, and that they were bound to grant him such powers, and employ him for the stipulated time in such service. The novelty of such a claim, and the contradiction of well-settled principles necessary to maintain it, justify the ruling of the judge who tried the cause; and this motion must be dismissed with costs, and judgment entered upon the verdict.

NOTE

In the case of a contract for strictly personal service the death, insanity, or incapacitating illness of the employee prevents his nonperformance from operating as a breach. *Spalding v. Rosa*, 71 N.Y. 40, 27 Am.Rep. 7 (1877), service as singer.

The death of the employer or master has the same effect where the service is to be strictly personal to him. *Kenny v. Doherty*, 230 N.Y. 44, 129 N.E. 201 (1920); *Lacy v. Getman*, 119 N.Y. 109, 23 N.E. 452 (1890). It is otherwise if the service is not to be under the employer's personal supervision.

It has been held that the involuntary dissolution of a corporation by the state prevents its further nonperformance from operating as a breach. *People v. Globe Mut. Life Ins. Co.*, 91 N.Y. 174 (1883); *Assets Realization Co. v. Roth*, 226 N.Y. 370, 123 N.E. 743 (1919).

See Restatement, Contracts, § 460.

C. G. DAVIS & CO. v. BISHOP.

Supreme Court of Arkansas, 1919. 139 Ark. 273, 213 S.W. 744.

Action by C. G. Davis & Co. against G. W. Bishop. From the judgment for defendant, plaintiff appeals. Affirmed.

HART, J. C. G. Davis & Co. sue G. W. Bishop to recover damages which they allege they sustained by reason of the breach of a contract by Bishop to sell and deliver to them a certain number of bales of cotton.

At the conclusion of the evidence, the court directed the jury to return a verdict in favor of the defendant, and from the judgment rendered the plaintiffs have duly prosecuted an appeal to this court.

The only issue raised by the appeal is whether or not the trial court erred in directing a verdict for the defendant under the evidence adduced by the plaintiffs. Hence it will only be necessary to abstract the testimony of the plaintiffs.

C. G. Davis & Co. is a firm of cotton buyers at Texarkana, Tex., and has been engaged in that business for several years. G. W. Bishop owned a large cotton plantation in Miller county, Ark., and usually planted about 1,000 acres in cotton. About the 1st of August, 1917,

C. G. Davis, the senior member of the firm, and G. W. Bishop had a conversation about the advisability of the latter's selling at that time a part of the cotton which was being grown on his plantation during that year. They agreed that it would be a good thing for Bishop to do this. Bishop told Davis that he had 1,000 acres in cotton and usually made 500 or 600 bales. On the 1st day of August, 1917, they entered into a contract for the sale by Bishop to C. G. Davis & Co. of 300 bales of the cotton at 24½ cents a pound. The cotton was already growing on Bishop's farm in Miller county, Ark., and was to be delivered at Texarkana, Tex., during the months of October, November, and December of that year.

In contracts of that kind it was the custom for the planter to deliver the number of bales sold out of the first cotton picked by him. During the fall Bishop picked 219 bales of cotton on his farm and delivered the same to C. G. Davis & Co., who paid him the contract price therefor. Bishop failed to deliver to Davis & Co., any more cotton, and they brought this suit in order to recover damages which they allege they sustained on account of his failure to deliver to them any more cotton. It was shown by Bishop that he delivered to them all the cotton that he grew on his farm in Miller county, Ark., during that year.

The court did not err in directing a verdict for the defendant. It is true, as contended by counsel for the plaintiffs, that the general rule is that, when the contract is to do a thing which in itself is possible, the promisor will be liable for a breach thereof, notwithstanding it was beyond his power to perform it. The reason is that it was his own fault to run the risk of undertaking to perform an impossibility, when he might have provided against it by his contract. There are, however, well-known exceptions to this general rule, and one of them is that, where from the contract it is apparent that the parties contracted on the basis of the continued existence of a given thing, a condition is implied that, if the performance became impossible from the perishing of the thing, that shall excuse the performance.

In the instant case, according to the evidence adduced by the plaintiffs, the defendant agreed to sell to the plaintiffs 300 bales of cotton which were growing on his farm in Miller county, Ark. The contract was executed on the 1st day of August. The defendant had planted 1,000 acres in cotton, and that number of acres usually made 500 or 600 bales of cotton. The contract related to the crop to be grown by the defendant on the latter's farm in Miller county. Under these circumstances the performance of it, in the contemplation of both parties, depended upon the future growth and continued existence of the cotton.

The defendant delivered to the plaintiffs all the cotton that grew on the farm, and he was therefore excused from a further performance of the contract.

According to the plaintiffs' own testimony it was the intention of the defendant to sell him a part of the crop which was growing on his plantation in Miller county, and under the circumstances the designation of 300 bales was a mere statement of opinion as to the quantity, and cannot be regarded as a warranty that the defendant would raise that number of bales. Of course, if the defendant by the terms of the contract had warranted that he would raise 300 bales of cotton, he would be bound by the terms of his warranty, notwithstanding on account of weather conditions or other matters over which he had no control he failed to raise the designated number of bales. Here, we have already seen, it appears from the plaintiffs' testimony that it was the intention of the parties that the cotton should be grown on the defendant's own farm, and it is plain that the number of bales was specified in the contract for the purpose of limiting the quantity sold to that amount. * * *

It follows that the judgment must be affirmed.

NOTE

One who contracts to supply another with a specified quantity of goods is not discharged from duty by the fact that he is unable to procure or to manufacture the goods at the place or in the manner that he had anticipated. The promised performance has not become impossible, although it may be difficult or expensive. It is otherwise if the contract requires the delivery of specific goods then existing (finished or unfinished) or of goods to be grown on specific land or in a particular factory; in these cases destruction may cause the promised performance to be impossible and will operate as a discharge. Thus, the hirer of a horse who promised to return it in good condition was held to be discharged when the horse got meningitis and was shot by the S.P.C.A. *Gouled v. Holwitz*, 95 N.J.L. 277, 113 A. 323 (1921).

LOUISVILLE & N. R. CO. v. CROWE.

Court of Appeals of Kentucky, 1913. 156 Ky. 27, 160 S.W. 750, 49 L.R.A.,N.S., 848.

Action by M. B. Crowe against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

In consideration of the conveyance of land for its right of way, the Railroad promised the plaintiff to compensate him therefor by giving him an annual pass during his life between Scottsville, Ky. and Gallatin, Tenn. It issued the pass as agreed until the passage of the Hepburn Bill by Congress forbade the issuance of such passes in interstate commerce. The plaintiff sought a decree for specific performance if that could be had; and if not he asked \$500 as damages. The trial court refused to order the Railroad to perform spe-

cifically by issuing the annual pass, this having become illegal according to *L. & N. R. Co. v. Mottley*, 219 U.S. 467, 31 S.Ct. 265, 55 L.Ed. 297, 34 L.R.A.,N.S., 671; but it held that the plaintiff was entitled to "damages" in lieu of specific performance, rendering judgment for \$200. [Statement is rewritten.]

HANNAH, J. * * * The *Mottley Case*, above mentioned, is conclusive upon the question of plaintiff's right to have specific performance of the contract sued on; but in that case the Supreme Court said: "Whether, without enforcing the contract in suit, the defendants in error may, by some form of proceeding against the railroad company, recover or restore the rights they had when the railroad collision occurred, is a question not before us, and we express no opinion on it." This question has not heretofore been passed upon by this court. And we have been cited to no case involving the right of one party to a contract to recover damages for the thing taken and retained by the other party, where such other party has been prevented from performing his part of the contract by the enactment of a law, subsequent to the execution of the contract, making the continuance of said contract unlawful, where the contract in question was lawful when it was entered into. Nor have we been able to find any authority on this subject except the case of *Cowley v. Northern Pacific Ry. Co.* (1912) 68 Wash. 558, 123 P. 998, 41 L.R.A.,N.S., 559, which is almost identical with the one at bar, and which denies the right of recovery of damages on such contracts as this. However, we do not feel bound by that decision.

Appellant cites a number of authorities holding that, to the general rule that a party to a contract is not discharged by subsequent impossibility of performance, there is the exception that, where the performance becomes impossible by law, either by reason of a change in the law, or by some action by or under the authority of government, the promisor is excused. But these authorities merely hold that it is a general rule of law that where a contract is lawful when made, and a subsequent enactment renders performance of it unlawful, neither party shall be prejudiced, and the contract is at an end. They do not hold that one party can take the property of another under a promise to pay for it, and still hold it, and not pay for it, if, by reason of an enactment of law after the contract is made, such party is prohibited from making payment in the article he contracted to pay with. And if those cases did so hold, we would be inclined to disagree with them. The party obtaining the property in this way should be required to restore it, or to pay for it upon equitable terms.

Here, appellee in good faith conveyed and delivered up the possession of his land, in consideration of the promise of his vendee to pay for same in a particular thing, an annual pass. This was in effect a contract to pay appellee the purchase price of his land in annual in-

stalments, during the remainder of his life, instead of in one lump sum at the time of the execution of the deed; and, to pay said purchase price of his land in transportation over the said line of railroad, rather than in cash, or other medium of exchange. This consideration has not been fully paid. The medium of payment in said deed provided for and agreed upon is no longer of permissible use, by reason of the act of Congress above mentioned as construed by the Supreme Court of the United States in the Mottley Case; but, rather than do the appellee the injustice of declaring a forfeiture of the unfulfilled contract by a release and discharge of appellant from all liability thereunder, some other medium of payment should in good conscience be substituted for the medium which is no longer available; or appellee should recover or be restored to the rights he had when the said deed was executed by him.

In this case, it would not be equitable to restore to appellee the land taken and retained; nor could this now be done, the rights of the public having intervened. The equitable way to adjust the matter is to require appellant to pay to appellee a reasonable sum, based, not on the probable value of what he would have received thereunder for the remainder of his life, nor upon a breach of the contract, but for the right of way so taken and necessarily retained; taking into consideration, of course, what appellee has already received under the contract.

From the evidence in this case, we think the lower court did this, and the judgment is therefore affirmed.

NOTE

When a promised performance, lawful when the contract was made, becomes unlawful by the subsequent enactment of a statute, the promisor is discharged from the contractual duty. Restatement, Contracts, § 458. His nonperformance thereafter is not a breach of contract; nor is he liable in damages therefor measured by the value of the promised performance. The allowance to the plaintiff that is approved by the court in the above case should be described as Restitution, rather than as Damages. See Restatement, Contracts, § 468. It is measured by the value of the consideration received by the Railroad, in excess of such compensation as it may have already rendered. Had the consideration been in the form of money paid, the judgment would be for "money back."

If the performance promised is one that is to be rendered in a foreign jurisdiction, the promisor is discharged from duty if the performance is there made illegal by enactment of law or by administrative decree. Restatement, Contracts, § 461, Illustrations. Early cases held the contrary.

A promised performance may be made illegal by the outbreak of war, the performance being one that would require the crossing of the line of hostilities. *Ertel Bieber & Co. v. Rio Tinto Co.*, [1918] A.C. 260; Restatement, Contracts, § 596(b).

A contract for the use or delivery of a specific ship or for the production of goods in a specific factory may be made impossible by a governmental requisition of the subject matter. Such a requisition operates as a total discharge, except when it is obvious that it will be in effect for so short a time as not to frustrate the substantial purposes of the contracting parties. It operates as a discharge whether the requisition is by a domestic or a foreign government. *Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619, 41 S.Ct. 612, 65 L.Ed. 1123 (1921); *Mawhinney v. Millbrook Woolen Mills*, 231 N.Y. 290, 132 N.E. 93 (1921).

The delivery of coal, or of a motor truck, may be prevented by a Government "freezing order", with a resulting discharge, or suspension, of a contractor's duty. *Cinquegrano v. Clarke Motors*, 69 R.I. 28, 30 A.2d 859 (1943). The same effect might follow a "priority" regulation. The duty to render personal service may be discharged by being drafted into military service.

Performance of a contract for the sale of liquors may be made illegal by the passage of a prohibitory statute. The delivery of certain kinds of goods or the payment of certain prices, for them may be forbidden by a war-time statute, or by one for the control of distribution by rationing or for prevention of inflation. In such cases, the duty to render the promised performance is discharged. An illustrative case is *Denny, Mott, & Dickson v. Fraser & Co.*, post, subsec. (C). When Congress forbade the payment of "gold bonds" in gold, the debtor's duty to pay in that manner was discharged and the creditor had no right to damages for breach, even though he might prove that greenbacks had less purchasing power in the world.

WHITMAN v. ANGLUM.

Supreme Court of Errors of Connecticut, 1918. 92 Conn. 392, 103 A. 114.

Action by Benjamin Whitman against Jerry F. Anglum. Judgment for plaintiff, and defendant appeals. No error.

On the 5th day of March, 1914, the plaintiff and defendant entered into a contract in writing whereby the plaintiff agreed to purchase, and the defendant agreed to sell, at least 175 quarts of milk each day from April 1, 1914, to April 1, 1915. The contract contained the following: "The said Whitman is to come and get the milk at No. 1 Wawarme avenue, in the city of Hartford."

The premises of the defendant are known as No. 1 Wawarme avenue. On the 23d day of November 1914, by an order of the commissioner of domestic animals for the state, all the defendant's cattle and products of his farm were quarantined. The defendant was quarantined, and he was not allowed to go from the premises. Shortly after the quarantine order, all the cows on the farm were killed. The quarantine was intended as far as possible to prevent all persons and animals from going on or off the premises, as well as to prevent the

removal of products of all kinds that might carry infection of the "hoof and mouth disease" then prevalent among the defendant's cattle. From November 22, 1914, the defendant failed to furnish or offer to furnish milk until March 13, 1915. From a judgment in favor of the plaintiff, the defendant has appealed.

SHUMWAY, J. (after stating the facts as above). This was an absolute and unconditional undertaking by the defendant to sell and deliver milk daily of the specified quality and amount. The defendant's claim is that he was excused from the performance of the contract by reason of the quarantine, which made it illegal for him to leave his premises and carry away any products of his farm or any articles that might carry infection. The quarantine order did not make it illegal to deliver milk, nor make it illegal for the defendant to procure its delivery.

This much is conceded. But the defendant contends that the clause in the contract, to wit, "The said Whitman is to come and get the milk at No. 1 Wawarme avenue," is an essential part of the contract, and as delivery was to be made at the place named, therefore delivery under the terms of the contract was illegal. There is nothing in the record to show that the defendant could not perform his contract. While it may be true that the plaintiff could not enter the defendant's house or go upon other parts of the premises which were under quarantine, it does not follow that the contract could not be performed substantially if not literally. The contract was not to deliver milk produced on the premises. All that can be said is, the defendant was under a temporary disability to perform his contract. He is not, however, released from the obligations of his contract because it was difficult or impossible to perform them, so long as the performance was not illegal. *School District v. Dauchy*, 25 Conn. 530, 68 Am.Dec. 371; *Worthington v. Charter Oak Life Insurance Company*, 41 Conn. 401, 19 Am.Rep. 495.

There is no error. The other Judges concurred.

QUESTION:

From the court's statement of the case, would you infer that "the contract was not to deliver milk produced on the premises"?

VIRGINIA IRON, COAL & COKE CO. v. GRAHAM, 124 Va. 692, 98 S.E. 659 (1919). The plaintiff leased mining property of the defendant for 40 years and promised to pay a royalty of 50 cents for each ton of merchantable ore mined. The lease further provided:

"Not less than twenty thousand tons to be shipped each year. If less is shipped, royalty is to be paid on twenty thousand tons, and if more

than twenty thousand tons are shipped in one year, and less than that quantity in the next preceding or succeeding year, the surplus of the one year and the royalty paid thereon may be carried to the credit of the other year, either preceding or succeeding to make the required minimum."

After operating the mine for 20 years, no more merchantable ore could be found; and the lessee sued for a decree of cancellation. The lessor argued that the lease was "a contract of hazard, that the risk as to the quantity and quality of the ore was assumed by the lessee," there being no warranty by the lessor against exhaustion of the ore body, and that the lessee was bound to pay a minimum rental of \$10,000 per year.

The court granted the relief sought. It said:

"If one makes a contract to do a thing which is in itself possible, he will be liable for a breach of the contract, notwithstanding it is beyond his power to perform it. But where, from the nature of the contract itself it is apparent that the parties contracted on the basis of the continued existence of the substance to which the contract related, a condition is implied that if performance becomes impossible because that substance does not exist, this will and should excuse such performance.

* * * It appears clear that the main purpose of the contract was to mine iron ore, the existence of which in quantities great enough to justify the continuance of mining operations for 40 years was assumed as a fact by both parties, and by its express language the lessor was to receive 50 cents per long ton as compensation, "for each ton of good merchantable ore mined and shipped." The subject and substance of the contract is merchantable iron ore, to be mined and shipped, and the obligation is to pay therefor, or to pay such royalty on the minimum quantity which both parties assumed could be so produced. * * *

"It is manifest then that if the facts alleged in the bill can be proved, and the ore does not exist, the lessee should be relieved of its obligation to pay the royalty provided for in the lease, because the paramount consideration of the contract has failed, and performance thereof by the lessee has become impossible."

QUESTIONS:

1. Did any performance promised by either party become impossible?
2. What was the consideration for the lessee's promise to pay rental?
Has it "failed"?
3. Was the lessee's promise to pay rental *expressly* conditional?
4. Has the lessor's purpose been "frustrated"? The lessee's purpose?
5. Can the cancellation of the lease be justified on the ground of mutual mistake?

MINERAL PARK LAND CO. v. HOWARD et al.

Supreme Court of California, 1916.
172 Cal. 289, 156 P. 453, L.R.A.1916F, 1.

Action by the Mineral Park Land Company against P. A. and C. H. Howard. Judgment for plaintiff, and defendants appeal. Modified and affirmed.

SLOSS, J. The defendants appeal from a judgment in favor of plaintiff for \$3,650. The appeal is on the judgment roll alone.

The plaintiff was the owner of certain land in the ravine or wash known as the Arroyo Seco, in South Pasadena, Los Angeles county. The defendants had made a contract with the public authorities for the construction of a concrete bridge across the Arroyo Seco. In August, 1911, the parties to this action entered into a written agreement whereby the plaintiff granted to the defendants the right to haul gravel and earth from plaintiff's land, the defendants agreeing to take therefrom all of the gravel and earth necessary in the construction of the fill and cement work on the proposed bridge, the required amount being estimated at approximately 114,000 cubic yards. Defendants agreed to pay 5 cents per cubic yard for the first 80,000 yards, the next 10,000 yards were to be given free of charge, and the balance was to be paid for at the rate of 5 cents per cubic yard.

The complaint was in two counts. The first alleged that the defendants had taken 50,131 cubic yards of earth and gravel, thereby becoming indebted to plaintiff in the sum of \$2,506.55, of which only \$900 had been paid, leaving a balance of \$1,606.55 due. The findings support plaintiff's claim in this regard, and there is no question of the propriety of so much of the judgment as responds to the first count. The second count sought to recover damages for the defendants' failure to take from plaintiff's land any more than the 50,131 yards.

It alleged that the total amount of earth and gravel used by defendants was 101,000 cubic yards, of which they procured 50,869 cubic yards from some place other than plaintiff's premises. The amount due the plaintiff for this amount of earth and gravel would, under the terms of the contract, have been \$2,043.45. The count charged that plaintiff's land contained enough earth and gravel to enable the defendants to take therefrom the entire amount required, and that the 50,869 yards not taken had no value to the plaintiff. Accordingly the plaintiff sought, under this head, to recover damages in the sum of \$2,043.45.

The answer denied that the plaintiff's land contained any amount of earth and gravel in excess of the 50,131 cubic yards actually taken, and alleged that the defendants took from the said land all of the earth and gravel available for the work mentioned in the contract.

The court found that the plaintiff's land contained earth and gravel far in excess of 101,000 cubic yards of earth and gravel, but that only 50,131 cubic yards, the amount actually taken by the defendants, was above the water level. No greater quantity could have been taken "by ordinary means," or except by the use, at great expense, of a steam dredger, and the earth and gravel so taken could not have been used without first having been dried at great expense and delay. On the issue raised by the plea of defendants that they took all the earth and gravel that was available the court qualified its findings in this way: It found that the defendants did take all of the available earth and gravel from plaintiff's premises, in this, that they took and removed "all that could have been taken advantageously to defendants, or all that was practical to take and remove from a financial standpoint"; that any greater amount could have been taken only at a prohibitive cost, that is, at an expense of 10 or 12 times as much as the usual cost per yard. It is also declared that the word "available" is used in the findings to mean capable of being taken and used advantageously. It was not "advantageous or practical" to have taken more material from plaintiff's land, but it was not impossible. There is a finding that the parties were not under any mutual misunderstanding regarding the amount of available gravel, but that the contract was entered into without any calculation on the part of either of the parties with reference to the amount of available earth and gravel on the premises.

The single question is whether the facts thus found justified the defendants in their failure to take from the plaintiff's land all of the earth and gravel required. This question was answered in the negative by the court below. The case was apparently thought to be governed by the principle—established by a multitude of authorities—that where a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by difficulty of performance, or by the fact that he becomes unable to perform. 1 *Beach on Contracts*, § 217; *Klauber v. S. D. S. C. Co.*, 95 Cal. 353, 30 P. 555; *Wilmington Trans. Co. v. O'Neil*, 98 Cal. 1, 32 P. 705; *The Harriman*, 9 Wall. 172, 19 L.Ed. 629.

It is, however, equally well settled that, where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent. 1 *Beach, Contr.* § 217; 9 *Cyc.* 631. Thus, where the defendants had agreed to pasture not less than 3,000 cattle on plaintiff's land, paying therefor \$1 for each and every head so pastured, and it developed that the land did not furnish feed for more than 717 head, the number actually put on the land by defendant, it was held that plaintiff could not recover the stipulated sum for the difference between the cattle pastured and the minimum of 3,000 agreed to be pastured. *Williams v. Miller*, 68

Cal. 291, 9 P. 166. Similarly, in *Brick Co. v. Pond*, 38 Ohio St. 65, where the plaintiff had leased all the "good No. 1 fire clay on his land," subject to the condition that the lessees should mine or pay for not less than 2,000 tons of clay every year, paying therefor 25 cents per ton, the court held that the lessees were not bound to pay for 2,000 tons per year, unless there was No. 1 clay on the land in such quantities as would justify its being taken out. In *Ridgely v. Conewago Iron Co.* (C. C.) 53 F. 988, the holding was that a mining lease requiring the lessee to mine 4,000 tons of ore annually, and to pay therefor a fixed sum per ton, or, failing to take out such quantity, to pay therefor, imposed no obligation on the lessee to pay for such stipulated quantity after the ore in the demised premises had become exhausted. There are many other cases dealing with mining leases of this character, and the general course of decision is to the effect that the performance of the obligation to take out a given quantity or to pay royalty thereon, if it be not taken out, is excused if it appears that the land does not contain the stipulated quantity. *Brooks v. Cook*, 135 Ala. 219, 34 So. 960; *Muhlenberg v. Henning*, 116 Pa. 138, 9 A. 144; *McCahan v. Wharton*, 121 Pa. 424, 15 A. 615; *Boyer v. Fulmer*, 176 Pa. 282, 35 A. 235; *Bannan v. Graeff*, 186 Pa. 648, 40 A. 805; *Gribben v. Atkinson*, 64 Mich. 651, 31 N.W. 570; *Blake v. Lobb's Estate*, 110 Mich. 608, 68 N.W. 427; *Hewitt Iron M. Co. v. Dessau Co.*, 129 Mich. 590, 89 N.W. 365; *Diamond I. M. Co. v. Buckeye I. M. Co.*, 70 Minn. 500, 73 N.W. 507.

We think the findings of fact make a case falling within the rule of these decisions. The parties were contracting for the right to take earth and gravel to be used in the construction of the bridge. When they stipulated that all of the earth and gravel needed for this purpose should be taken from plaintiff's land, they contemplated and assumed that the land contained the requisite quantity, available for use. The defendants were not binding themselves to take what was not there. And, in determining whether the earth and gravel were "available," we must view the conditions in a practical and reasonable way. Although there was gravel on the land, it was so situated that the defendants could not take it by ordinary means, nor except at a prohibitive cost. To all fair intents then, it was impossible for defendants to take it.

"A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost." 1 Beach on Contr. § 216. We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions which would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them. But, where the difference in cost is so great as here, and has the effect, as found, of making per-

formance impracticable, the situation is not different from that of a total absence of earth, and gravel.

On the facts found, there should have been no recovery on the second count.

The judgment is modified by deducting therefrom the sum of \$2,043.45, and, as so modified, it stands affirmed.

NOTE

The duty of one who contracted to float logs down a stream was held discharged when the water was reduced to a trickle by a drought. *Clarks-ville Land Co. v. Harriman*, 68 N.H. 374, 44 A. 527 (1895). But the duty to furnish pasturage was held not discharged when a drought destroyed the grass, *Berg v. Erickson*, 234 F. 817 (1916, C.C.A.); and the duty to supply water for irrigation was held not discharged by drought, *Northern Irr. Co. v. Watkins*, 183 S.W. 431 (1916, Tex.C.A.).

NORTH GERMAN LLOYD v. GUARANTY TRUST CO.

Supreme Court of the United States, 1917.
244 U.S. 12, 37 S.Ct. 490, 61 L.Ed. 960.

Mr. Justice HOLMES delivered the opinion of the court:

This writ was granted to review two decrees that reversed decrees of the district court, dismissing libels against the steamship *Kromprinzessin Cecilie*. 238 F. 668, 151 C.C.A. 518; 228 F. 946, 965. The libels alleged breaches of contract by the steamship in turning back from her voyage from New York and failing to transport kegs of gold to their destinations, Plymouth and Cherbourg, on the eve of the outbreak of the present war. The question is whether the turning back was justified by the facts that we shall state.

The *Kromprinzessin Cecilie* was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1,892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 304, Americans; and 2 or 3 from Italy, Belgium, Holland, etc. She continued on her voyage until about 11:05 p. m. Greenwich time, July 31, when she turned back; being then in 46° 46' N. latitude and 30° 21' W. longitude from Greenwich, and distant from Plymouth about 1,070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia (July 28), that Germany had declined a proposal by Sir Edward

Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia; and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful, and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless to the master: "War has broken out with England, France, and Russia, Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 p. m. August 2, and 1 a. m. August 3, and would have delivered the gold destined for England, to be forwarded to London by 6 a.m., August 3. On August 1st, at 9:40 p. m., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered for the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3, Germany was at war with France, and at 11 p. m., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, e. g., *The Prinz Adalbert*, L.R. [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

With regard to the principles upon which the obligations of the vessel are to be determined it is plain that, although there was a bill of lading in which the only exception to the agreement relied upon as relevant was "arrest and restraint of princes, rulers, or people," other exceptions necessarily are to be implied; at least, unless the phrase "restraint of princes" be stretched beyond its literal intent. The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine v. Jane*, *Aleyn*, 26, 82 Eng. Reprint, 897, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money), some, at least, which, if they had been dealt with, it cannot be believed that the

contractee would have demanded or the contractor would have assumed. *Baily v. De Crespigny*, L.R. 4 Q.B. 180, 185. Familiar examples are contracts for personal service, excused by death, or contracts depending upon the existence of a particular thing. *Taylor v. Caldwell*, 3 Best & S. 826, 839. It has been held that a laborer was excused by the prevalence of cholera in the place where he had undertaken to work. *Lakeman v. Pollard* (1857) 43 Me. 463, 69 Am.Dec. 77. The same principles apply to contracts of shipment. If it had been certain that the vessel would have been seized as prize upon reaching England, there can be no doubt that it would have been warranted in turning back. See *Mitsui & Co. v. Watts, W. & Co.*, [1916] 2 K.B. 826, 845; *The Styria v. Morgan*, 186 U.S. 1, 22 S.Ct. 731, 46 L.Ed. 1027. The owner of a cargo upon a foreign ship cannot expect the foreign master to run greater risks than he would in respect to goods of his own nation. *The Teutonia*, L.R. 4 P.C. 171; *The San Roman*, L.R. 5 P.C. 301, 307. And when we add to the seizure of the vessel the possible detention of the German and some of the other passengers, the proposition is doubly clear. Cases deciding what is and what is not within the risk of an insurance policy throw little light upon the standard of conduct to be applied in a case like this. But we see no ground to doubt that Chief Justice Marshall and Chief Justice Kent would have concurred in the views that we express. *Oliver v. Maryland Ins. Co.*, 7 Cranch, 487, 493, 3 L.Ed. 414; *Craig v. United Ins. Co.*, 6 Johns. (N.Y.) 226, 250, 253, 5 Am.Dec. 222. See, also, *British & F. M. Ins. Co. v. Sanday*, [1916] A.C. 650.

What we have said so far we hardly suppose to be denied. But if it be true that the master was not bound to deliver the gold in England at the cost of capture, it must follow that he was entitled to take reasonable precautions to avoid that result, and the question narrows itself to whether the joint judgment of the master and the owners in favor of return was wrong. It was the opinion very generally acted upon by German shipowners. The order from the Imperial Marine Office, if not a binding command, at least shows that if the master had remained upon his course one day longer, and had received the message, it would have been his duty as a prudent man to turn back. But if he had waited till then, there would have been a question whether his coal would hold out. Moreover if he would have been required to turn back before delivering, it hardly could change his liability that he prophetically and rightly had anticipated the absolute requirement by twenty-four hours. We are wholly unable to accept the argument that although a shipowner may give up his voyage to avoid capture after war is declared, he never is at liberty to anticipate war. In this case the anticipation was correct, and the master is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by the margin of a few hours. In our opinion the event shows that he acted as a prudent man.

We agree with the counsel for the libellants that on July 27 neither party to the contract thought that it would not be performed. It was made in the usual form, and, as we gather, charged no unusual or additional sum because of an apprehension of war. It follows, in our opinion, that the document is to be construed in the same way that the same regular printed form would be construed if it had been issued when no apprehensions were felt. It embodied simply an ordinary bailment to a common carrier, subject to the implied exceptions which it would be extravagant to say were excluded because they were not written in. Business contracts must be construed with business sense, as they naturally would be understood by intelligent men of affairs. The case of *The Styria*, *supra*, although not strictly in point, tends in the direction of the principles that we adopt.

Decree reversed.

Mr. Justice PITNEY and Mr. Justice CLARKE dissent, upon grounds expressed in the opinions delivered by Circuit Judges Dodge and Bingham in the circuit court of appeals, 238 F. 668.

(B) IMPOSSIBILITY OF PERFORMANCE OF THE AGREED EQUIVALENT
(Discharge by "Failure of Consideration", Actual or Prospective)

INTRODUCTORY NOTE

As has been seen in a previous Chapter, a promisor's duty of immediate performance may be conditional on various facts and events, most frequently an antecedent or concurrent performance by the other party constituting all or a material part of the equivalent for which the promisor bargained. As long as such a condition of the promisor's duty has not been performed, or in some manner excused, he can not be charged with a breach of his contractual duty. On the other hand, his primary contractual duty has not been discharged by such a non-performance, as long as the time for rendering performance has not expired and it still remains possible. The legal "obligation," including *the primary contractual duty* of each party who has made a promise, is created when the bargain is consummated; *the duty to render performance immediately* awaits the happening of various conditions precedent thereto.

Just as soon as one (or more) of these conditions precedent becomes impossible of occurrence, not having been in some way excused, the contractual duty can never become a duty of immediate performance

and a breach can not occur. Therefore it is now proper to say that the promisor's contractual duty is discharged. When there is a time limit for the performance of a condition of the promisor's duty, the condition becomes impossible of performance when the time has expired. The fact that the other party has promised to render his performance within a stated time does not in itself make performance within that time a condition of the promisor's duty; either the agreement must provide that "time is of the essence" or the facts of the case must be such that delay beyond the specified time limit causes such material harm as to make it reasonable and just for the promisor to refuse to perform. But whether the express agreement sets a time limit or not, in every case there must come a time when tender of performance will be too late and the promisor will be discharged. Restatement, Contracts, § 395, reads: "A contractual duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty." See particularly the accompanying Comment and Illustrations.

Even before the time allowed for performance of a condition of a promisor's duty has expired, the course of events may show that the condition has become impossible of performance. Such prospective impossibility, if it can be shown, operates at once to discharge the duty of the promisor.

A promisor's contractual duty may be discharged by prospective impossibility of a return performance, even though it is a duty that is to be performed first and is not conditional on tender of the return performance. If the contract is one for the agreed exchange of performances, a promisor is discharged if he can show that he is not going to receive the agreed equivalent. His contractual duty, although to be performed first, is constructively conditional on the continuing possibility of the agreed equivalent and on the continuing willingness of the other party to perform it. An anticipatory repudiation by that other party operates as a discharge as soon as the power of retraction is gone. So also does prospective impossibility; and this includes not only that form of impossibility that is "objective" and applicable to all men alike, but also to the mere personal inability of the other party to render his return performance ("subjective" impossibility).

"Failure of Consideration"—that is, failure of the return performance for which a promisor bargained—discharges the promisor from legal duty. This is true even though the failure is not itself a breach of contract, as where performance has been excused by supervening impossibility or illegality. Destruction of the subject matter of a contract to sell may discharge the seller from duty to deliver; but the buyer is not bound to pay for a dead horse or a smashed automobile. One who has contracted to sell and deliver liquors is discharged from duty if a prohibition law is enacted making his performance illegal;

but the buyer's duty to pay the price is discharged, not because his promised performance has become illegal but because of failure of the return performance for which he bargained. *Brauer v. Hyman*, 98 N.J.L. 743, 121 A. 667 (1923).

A series of rules as to the effect of a repudiation by one party, or of his prospective inability to render his return performance, upon the duty of the other party, is found in Restatement, Contracts, §§ 280–287. These sections are in Chapter 10, which is entitled “Conditions; and Breach of Promise as an Excuse for Failure to Perform a Return Promise.” The rules so stated are not repeated in Chapter 13, entitled “Discharge of Contracts;” but reference back to them is made under section 398, which lays down the following very general rule: “A material change of position by one party to a bilateral contract, justified by the probable failure to receive an agreed exchange from the other party, discharges the contractual duty of the former.” This is accompanied by the following Comment: “In cases enumerated in sections 280–287 prospective breach or inability to perform justifies a material change of position. It is possible that the breach or inability may not occur, and unless there has been a change of position there is no discharge. It is the justified change of position that definitely establishes discharge of the duty.”

A few cases on discharge by prospective impossibility or “inability” are presented in this Section.

McCORMICK et al. v. TAPPENDORF et al.

Supreme Court of Washington, 1909. 51 Wash. 312, 99 P. 2.

Action by Charles R. McCormick and another, partners as Charles R. McCormick & Co., against Paul F. Tappendorf and another, partners as the Vancouver Lumber Company. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

HADLEY, C. J. This is an action to recover damages for an alleged breach of contract to deliver a quantity of railroad ties. The terms of the contract are set forth in the following copy of a part of the correspondence between the parties: “Portland, Oregon, January 23, 1906. Vancouver Lumber Company, Vancouver, Wash.—Gentlemen: We hereby confirm our order for 50,000 pieces of 7x8–8’ merchantable Oregon Pine ties. These ties not to run over 20 per cent. No. 2 merchantable. Any excess No. 2 to be \$2.00 per thousand feet less. Inspection and tally at loading point by inspector from Pacific Lumber Manufacturers’ Association, or an inspector to be mutually agreed upon. Price \$9.00 per thousand feet, less two per cent. Delivered to ship’s tackle along the Columbia river where vessel drawing 20 feet

can safely lie afloat. Terms cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland. Delivery of the entire lot to be not later than June 1, 1906. You agree to notify us thirty days before wanting vessel. Vessel to receive the ties not less than 60,000 feet per day. Yours truly, Charles R. McCormick & Co., Accepted: Vancouver Lumber Co., By W. Tenney, Manager."

The complaint alleged that the defendants refused to deliver the ties, and recovery for resulting damages was demanded. The defendants answered that they were prepared to carry out their contract, and for that purpose had the ties sawed and delivered at the Columbia river, that they were ready and willing to deliver the ties according to the contract, but the plaintiffs refused to pay for the same or to make provision for payment as provided by the contract. The cause came on for trial before a jury and resulted in a verdict for the plaintiffs in the sum of \$2,325.83. Judgment for that sum was entered against the defendants, and they have appealed.

The court in its instructions did not submit to the jury any questions of fact except the amount of damages to be recovered. The appellants excepted to the action of the court in taking from the jury all questions relative to the contract and the breach thereof. It is contended that failure on the respondents' part to make preparations to pay cash for the ties on delivery to the ship for loading would be such a breach of their contract as would excuse appellants from actually turning the ties over to them. It is also urged that there was such evidence tending to prove that the respondents made no preparations to pay cash as required the submission to the jury of the question of breach of the contract on the part of appellants. It will be noted that the terms of the contract called for delivery of the ties "to ship's tackle along the Columbia river," and the terms of payment are "cash on presentation of bill of lading, inspection certificate and invoice at the Bank of California, Portland."

It is the respondents' contention that the appellants were required to deliver the ties to the ship and receive a certificate of inspection and an invoice after which they were required to present these to the bank in Portland; that without this they cannot maintain that they are excused from liability. It is true that the appellants could have had no right of action for breach of the contract until they had actually made delivery and payment had been refused; but the respondents brought this action, claiming a breach by appellants for failure to deliver the ties. We think they are not entitled to recover, and that appellants are excused if the evidence shows that at the time the respondents were not in position to make payment as the contract required. One party need not perform a condition precedent if it appears that the other party cannot or will not perform. "One of two parties should not be

required to tender performance when the other has, by act or word, indicated that he will not or cannot accept it, or will not or cannot do that in return for which the performance was promised. Nor will the courts hold him any longer bound." 9 Cyc. 641.

There was evidence to the effect that, after a vessel was ready to take the ties in the Columbia river, the appellants ordered a tug to tow the ties out to the ship, and then telegraphed the specified bank in Portland to know if arrangements for payment for the ties had been made, and received a negative reply. Appellants then went in person to the Bank of California in Portland, and also to the United States National Bank of Portland, of which latter bank some mention had been made as the place of payment, by reason of the suspension of business by the Bank of California in San Francisco on account of the recent fire and earthquake. They were informed that no arrangements had been made for payment through either bank. It was testified that appellants then telegraphed respondents that the ties would not be delivered until arrangements for cash payment were made as required by the contract, that the respondents replied by telegram and proposed that the ties be loaded, and that the appellants accept a 10-days sight draft. All this is proper evidence for the jury, as it has a tendency to show that the respondents were not prepared to, and could not, pay cash upon delivery of the ties, and comply with their contract. It is for the jury to say what was the fact in that regard. If they should find from the evidence that respondents had not made preparation to comply with the terms of their contract in regard to payment, and that for that reason they could not do so, then appellants were excused for refusing to actually deliver possession of the ties to respondents. • • •

Judgment reversed.

QUESTIONS:

1. Does the defendant establish a good defense if he proves that the plaintiff is insolvent? See Restatement, Contracts, § 287.
2. Was tender of the price a condition precedent to the defendant's duty to ship the ties?
3. Was shipment of the ties a condition precedent to the plaintiff's duty to pay?
4. Did either party commit a breach of contract? See Restatement, Contracts, §§ 280, 323, 398.
5. At what point in this transaction was the defendant's change of position sufficiently material to operate as a complete discharge of his duty to deliver the ties?

CAPORALE v. RUBINE.

Court of Errors and Appeals of New Jersey, 1918. 92 N.J.L., 463, 105 A. 226.

Action by Louis Caporale against Samuel H. Rubine. Judgment for plaintiff, and defendant appeals. Reversed, and new trial ordered.

KALISCH, J. The legal question presented on this appeal is whether the plaintiff made out a case legally sufficient to warrant its submission, by the trial judge, to a jury for its decision.

The plaintiff below was permitted to recover a verdict for \$925 and costs against the defendant below, as damages, for an alleged breach of contract, and to enter judgment on the verdict from which judgment the defendant appeals.

The legal question as to the sufficiency of the proof is raised by a motion for a nonsuit, which was denied, and by a motion to direct a verdict for defendant, which was also refused.

The case shows that the present litigants entered into a written agreement, whereby the defendant agreed to convey to the plaintiff property in Woodcliffe on Hudson, at a purchase price of \$14,850, subject to a mortgage of \$10,000. The plaintiff agreed to convey to defendant, in exchange and payment for the property to be conveyed to him, certain lots in Woodcliffe, valued at \$10,000, subject to a mortgage of \$6,900, and to give defendant a purchase-money mortgage for \$1,750, on the property conveyed by the latter to the plaintiff. The plaintiff declared in the agreement that the property to be conveyed by him to the defendant was absolutely free and clear of all incumbrances, excepting a balance of \$6,900 due the Woodcliffe Land Improvement Company, represented by the mortgage above referred to. The title to the respective property was to be passed on before May 1, 1917, at Mr. Halpin's office.

The agreement was entered into on the 6th day of April, 1917. It appears that the plaintiff never had the legal title to the property which he contracted to convey to defendant, but that the legal title thereto was and remained in the Woodcliffe Land Improvement Company. This company in July, 1913, entered into an agreement with the plaintiff's wife to convey the property to her upon certain conditions to be performed by her and upon her compliance therewith, to make, execute, and deliver to her a deed in fee simple subject to the various restrictions, mentioned in the agreement, and which limit the use of the property by the owner in many material respects.

The plaintiff's wife died in February, 1916, and by her will she devised to her husband the equity in the property arising out of the agreement made by her with the land company. Therefore, when the plaintiff entered into the agreement with the defendant to convey the

property to him, the former had simply an equitable title thereto, and, as appears from the agreement made with the land company, the property was subject to servitudes.

It is, however, of no importance that the plaintiff, at the time when he entered into the contract, to convey the property to the defendant, was not invested with title to the property, provided he could establish that he was in a position to perform his undertaking in conformity with the agreement, in that he was able to procure the title or control it and have it conveyed to the purchaser and offers to do so. 39 Cyc. 1983.

It is obvious from the agreement between the parties that there was to be a concurrent performance by both, since the performance of the one was the consideration of the performance of the other. Neither was required to make a tender first.

The legal rule is well stated by Ewing, Chief Justice, in *Ackley v. Richman*, 10 N.J.L., at page 306, where he says: "The parties to a contract for the sale of land, unless there is something peculiar in its structure, expect and intend the performance on each part at the same time. The delivery of the deed and the payment of the money are to be simultaneous. Each supposes he is to perform upon a correspondent performance on the other part. Neither supposes he is bound to perform if the other neglects or refuses, and is to resort after performance to a remedy on the covenants. Neither supposes he is liable to an action by the other, when the other has not performed or offered to perform."

Counsel of respondent claims that the plaintiff was not legally obligated to be in a position to convey a good title at the time fixed in the contract, but only that he should be able to convey a good title at the time of performance; and, as it appeared that the defendant had divested himself of the title to the property which he had agreed to convey to the plaintiff, the plaintiff was relieved from carrying out his part of the agreement, and was therefore entitled to bring his action for damages.

The latter part of this contention is obviously unsound.

The defendant's act in conveying the title to his property to a third person had no other legal effect than to relieve the plaintiff from making a tender of a deed of his property to the defendant.

But the plaintiff was not relieved from establishing, in order to recover damages for a breach of contract, that he was able and ready to perform his part of the undertaking. *Ackley v. Richman*, *supra*; *Conover v. Tindall*, 20 N.J.L., 513, at pages 515 and 516; *Bigler v. Morgan*, 77 N.Y. 312; 39 Cyc. 1983; *Wells Fargo & Co. v. Page*, 48 Or. 74, 82 P. 856, 3 L.R.A., N.S., page 103.

The measure of the plaintiff's legal obligation in the present case was to establish by competent proof that he was able and ready to convey a title such as would comply with the requirements of the agreement. This he clearly failed to do.

It is manifest from the terms of the agreement made by the plaintiff's wife with the land company that the plaintiff could not have conveyed the title free from the restrictions imposed upon the property, and that the land company was under no legal duty to make any such conveyance until the year 1926. Furthermore, there was no evidence that the land company was ready and willing to make a conveyance of the title to the defendant at the present time; nor was there any proof that the land company could lawfully release the property from the restrictions imposed upon it; or that the company was able and ready to convey the title to defendant, "absolutely free and clear of encumbrances."

The defendant was therefore entitled to prevail on his motion for a nonsuit and on his motion for a direction of a verdict for defendant.

The judgment is reversed, and a new trial ordered.

QUESTIONS:

1. Did the plaintiff manifest such prospective inability to convey his land as to justify the defendant in conveying his property to a third person?
 2. At what point was the duty of the defendant discharged? See Restatement, Contracts, §§ 283, 284.
 3. Did the plaintiff commit a Breach of Contract? See Restatement, Contracts, § 323.
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KEPPELON v. W. M. RITTER FLOORING CORPORATION.

Court of Errors and Appeals of New Jersey, 1922. 97 N.J.L., 200, 116 A. 491.

Action by Louis Keppelon against the W. M. Ritter Flooring Corporation. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

TRENCHARD, J. • • • We come now to the question of the legal sufficiency of the "defense" which was stricken out. The complaint averred that the plaintiff was building an apartment house in East Orange; that the defendant contracted to furnish the labor and materials necessary to lay, scrape, and finish the floors for a stated price to be paid in stated installments as the work progressed; that when the time arrived for the defendant to begin performance, the plaintiff requested performance, but the defendant stated to the plaintiff that it, the defendant, refused, and thereafter would refuse, to per-

form the contract; and that the defendant has wholly repudiated and refused to perform the contract.

The defendant's answer in the "second separate defense" averred that since the execution of the contract the credit of the plaintiff had become impaired, so he was no longer a good credit risk, and that he had failed to meet other obligations between him and the defendant, and that by reason of the plaintiff's poor financial condition the defendant was warranted in not performing the terms of the contract. At the trial the plaintiff moved to strike out that "defense" on the ground that it disclosed no defense, and the motion was granted, with permission, however, to the defendant to amend the answer. This the defendant did by adding to the above stated "second separate defense" the averment that the plaintiff, when the time for the defendant to perform arrived, "was in fact insolvent." This defense also the trial judge struck out.

Now, excepting the question raised as to the power of the trial judge, which we have disposed of, the only question raised on this appeal are: First, did the trial judge err in striking out the original "second separate defense"; and, secondly, did he err in striking out that defense as amended? We think both questions must be answered in the negative.

The original "second separate defense" disclosed no defense to the cause of action stated in the complaint. The fact that the credit of a party to a building contract (to whom by the terms of the contract labor and materials are to be furnished) has become impaired, so that he is no longer a good credit risk, and that he has failed to meet other independent obligations, does not relieve the other party from performance, and is no defense to an action for the breach of such contract, for it does not appear therefrom that he cannot and will not perform his part when his time for performance comes.

It has been held that mere doubts of the solvency of a party to a contract, or mere belief that he will be unable to perform when the time for his performance comes, will not excuse performance by the other party. *Jewett Publishing Co. v. Butler*, 159 Mass. 517, 34 N.E. 1087; *Coonan v. Cape Girardeau*, 149 Mo.App. 609, 129 S.W. 745; *Gooch v. Coleman*, 22 N.M. 45, 159 P. 945. If contracts could be repudiated upon the mere allegation that the credit of the other party had become impaired, there would indeed be much consternation in the business world, for contracts are made in view of the fact that credit fluctuates, and it is common knowledge that contracts are frequently fully performed by those whose credit has become impaired.

It has also been held that the mere failure of a party to a contract to perform an independent contract will not excuse performance by the other party. *Ebling v. Ebling*, 176 Mich. 602, 142 N.W. 1066. To

adopt any other rule would result in the admission of so much extraneous matter as to make trials a hopeless procedure. It would involve in the trial of a single action evidence concerning every other contract between the same parties, to determine whether there was performance, or perchance cancellation, or rescission, or satisfaction, or a counterclaim, in order to determine whether there was, as a matter of fact, a breach of other obligations of the plaintiff.

It is also clear that the "second separate defense" as amended discloses no defense to the action. It sets forth the same matters contained in the original defense, and adds that, when the time for the defendant to perform arrived, the plaintiff was in fact insolvent, and avers that by reason thereof "the defendant was warranted in not performing the terms of the said contract."

But we think that the mere insolvency of a party to a building contract (to whom by the terms of the contract labor and materials are to be furnished) does not terminate the contract, in the absence of provisions to that effect therein, nor does it justify the other party in refusing altogether to perform, for it does not follow therefrom that the insolvent party could not and would not perform his part, even though insolvent. *Florence Mining Co. v. Brown*, 124 U.S. 385, 8 S. Ct. 531, 31 L.Ed. 424. It might well be that the insolvent party might find it advantageous and possible to carry out his part of the contract, since insolvency does not necessarily mean a total lack of assets. To hold that mere insolvency of a party puts an end to a contract, and excuses the solvent party from the obligation altogether, would be intolerable. If the mere fact of insolvency terminates a contract, every insolvent contractor would automatically be shorn of all property rights and beneficial interests in contracts. Of course this cannot be.

In the present case we are not concerned with the effect of an "adjudication" in bankruptcy as illustrated in *Central Trust Co. v. Chicago Auditorium Ass'n*, 240 U.S. 581, 36 S.Ct. 412, 58 L.Ed. 811, because the defendant expressly disclaimed any purpose to prove any adjudication of insolvency or bankruptcy in either the federal or state courts. We remark, however, that the *Central Trust Company Case* does not hold that bankruptcy terminates contracts, nor that the co-contractor of an insolvent debtor is justified in breaching the contract. * * *

The defendant, however, contends that it was relieved of its obligation to do the work and furnish the materials "upon credit" when the plaintiff had become insolvent, and that it could "only be obliged to proceed with its contract in case payment is assured it in cash by some satisfactory indemnity," and refers us to cases said to support that proposition.

But that question is not presented in the case at bar, and will not be considered. Neither the defendant's pleading as originally stated, nor

as amended, raises that question, because it does not assert that defendant's refusal to proceed was due either to plaintiff's failure to pay in advance or to plaintiff's refusal to give assurance of payment, the pleader merely attempting to justify defendant's failure to proceed because of plaintiff's alleged poor financial condition and insolvency when the time arrived for defendant to begin performance.

The judgment will be affirmed, with costs.

NOTE

The legal effect of insolvency of one party varies somewhat with the kind of performance that he has promised to render. He may be an employee who has promised to perform services, or a contractor who has promised to erect a building, or a buyer of goods to be shipped on credit, or the maker of a note given for money lent.

The problem may present itself to the other party in several ways:

1. Does his insolvency discharge me from my contractual duty?
2. Does it constitute a present breach by him for which I can at once maintain action?
3. If there are conditions on my part to be performed, precedent to his duty to perform his part, am I excused from performing them?
4. Does his insolvency now cause my duty to proceed to be conditional on tender of cash or of additional security?

The last three of these questions have been previously considered.

NEVINS v. WARD.

Supreme Judicial Court of Massachusetts, 1946. 320 Mass. 70, 67 N.E.2d 673.

QUA, J. This suit in equity is in substance the equivalent of an action at law arising out of a written contract, dated April 26, 1940, whereby the plaintiff agreed to build a house in Quincy for the defendant Ward, hereinafter called the defendant, at a price (as modified by subsequent agreement eliminating some of the work) of \$11,525.

* * *

The plaintiff began work on April 29 and continued until September 11, when he received a notice from the defendant's attorney asserting that the plaintiff had violated the contract and ordering him to quit the job. A crucial question in the case is whether this action of the defendant in notifying the plaintiff to stop work was a breach of the contract by the defendant, as the plaintiff contends, or a refusal to go on with it which was justified by the previous conduct of the plaintiff, as the defendant contends.

The facts upon which this issue must be decided are these: The contract provided for "Progress Payments" of eighty-five per cent of

the value, based on contract prices, of labor and material incorporated in the work up to the first and fifteenth of each month, and further provided that prior to the second and to subsequent payments the plaintiff should submit evidence satisfactory to the architect and owner that all payrolls, material bills, and indebtedness connected with the work performed under the preceding payment had been paid. In general, "Progress Payments" were made twice a month, but the plaintiff did not pay all payrolls, material bills, and indebtedness connected with the work performed under preceding payments. The defendant waived this requirement as payments came due until about September 1, but not "in respect of subsequent progress payments." By the time the payment became due for work done up to September 1 the accumulation of unpaid charges amounted to a substantial sum. On August 23, the defendant was summoned as trustee in the amount of \$2,000 in an action against the plaintiff by one Spencer for a sum due on other work. The defendant and her attorney began an investigation of the indebtedness of the plaintiff, who then owed in fact over \$1,500 with respect to the defendant's job. The defendant's attorney charged the plaintiff with owing from \$1,100 to \$1,300 in unpaid bills on the job. The plaintiff at first denied this and then admitted that he did owe \$1,100. The attorney asked what the plaintiff was going to do about it. The plaintiff said he did not know what he could do. At a later interview the plaintiff asked about further payments. He sent the defendant a bill for \$300 for "labor." The defendant's attorney told the plaintiff that until he "complied with the contract" he would get no further payments. On September 9 there was a long interview between the plaintiff and the defendant's attorney. The attorney asked the plaintiff what he had done with the last previous payment of \$1,700 made on August 17. The plaintiff produced some receipts for payments which, with a sum paid for labor, amounted to nearly \$500 less than the \$1,700. The plaintiff said it would cost \$3,735 to complete the job from August 15. He said he could get the needed material on credit, but would need money for his payroll; that he "would not hire men without knowing how he was going to pay them"; that if "the Wards" would pay for the labor he would complete the job, and if at the end of the forty-three day period no liens had been filed "the Wards could pay him the contract price plus \$300-\$400 for extras." The defendant's attorney replied that the defendant would not be interested in this, and on the following day sent the notice directing the plaintiff to cease work. Shortly thereafter the defendant employed another person to complete the job. In the week ending September 7 the plaintiff had employed only one man outside his own family and had been unable to pay him \$20 of the \$30 due him for that week.

The master's findings hereinbefore stated are adequate to show that even if the plaintiff had not by September 11 actually broken the contract so that the defendant then had a cause of action against him, yet the course taken by the defendant was justified and was not a breach of the contract on her part. The pertinent rule of law is set forth in Am.Law Inst.Restatement: Contracts, § 280(1) in these words: "Where there are promises for an agreed exchange, if one promisor manifests to the other that he cannot or will not substantially perform his promise, or that, though able to do so, he doubts whether he will substantially perform it, and the statement is not conditional on the existence of facts that would justify a failure to perform, and there are no such facts, the other party is justified in changing his position, and if he makes a material change of position he is discharged from the duty of performing his promise." This statement of the law is supported by our own cases [here cases were cited]. This principle must not be confused with the doctrine of recovery for anticipatory breach, rejected in this Commonwealth by *Daniels v. Newton*, 114 Mass. 530, 19 Am.Rep. 384.

This case is well within the rule just quoted from the Restatement. The plaintiff's promise to build the house and the defendant's promise to pay for it were clearly "an agreed exchange". The plaintiff's statements that he would need money for his payroll, that he would not hire men without knowing how he was going to pay for them, and that he would complete the job if "the Wards" would pay for the labor amounted to a manifestation that he could not or would not complete the house unless the defendant would advance him money in excess of that called for by the contract. This was a refusal to perform in a substantial respect. The master's report shows that the fair value of the labor and material then required to complete the contract was a quarter or more of the contract price. A great deal remained to be done. It was not a matter merely of delay. Apparently the plaintiff would never finish the house unless the defendant took the risk of making advances to him which she was not required to make. Faced with this dilemma, she changed her position by employing another man to finish the job.

Enough has been said to show that the plaintiff cannot recover upon the contract itself or upon quantum meruit based upon any theory that a wrongful repudiation by the defendant could be treated by the plaintiff as a rescission. * * *

The defendant included a counterclaim in her answer. The master finds that he is not convinced that when the defendant ordered the plaintiff to stop work on September 11, the plaintiff "had then violated any affirmative obligation for which he is liable in damages." Whether in view of the fact that, as we decide, the plaintiff's conduct justified the defendant in removing the plaintiff from the job, the

defendant did have a cause of action against the plaintiff for not finishing the house after a reasonable time for finishing it had elapsed we need not consider, since there are no findings of damage, and various findings tend to indicate that there was none. We think the decree should be modified by dismissing the counterclaim.

QUESTIONS:

1. Were the plaintiff's "manifestations of inability" operative as a breach, anticipatory or otherwise, for which the owner could have at once maintained an action?
2. Did those "manifestations" at once discharge the owner from further duty?
3. Was the owner justified in contracting with another builder and in ordering the plaintiff off the premises?
4. If costs were increased, could the owner now get judgment for damages against the plaintiff?

NOTE

The promise of an owner who has made a valid contract to execute a lease will not be enforced if he shows that the prospective lessee will not have the financial ability to pay the agreed rent or otherwise perform his agreed exchange. *Prout's Inc. v. McIntyre*, 94 N.H. 135, 48 A.2d 487 (1946).

A party to a contract facing an inevitable breach by the other party, a breach vitally affecting the agreed exchange, is not required to go forward with the work and thereby accumulate a bill of damages that stopping work would avoid. *Wm. Cramp & Sons Ship & Eng. Bldg. Co. v. U. S.*, 50 Ct.Cl. 179 (1915).

If performance on time as promised is not "of the essence," prospective inability of the other party to perform on time is no discharge. *Holt v. United Sec. L. Ins. Co.*, 76 N.J.L. 585, 72 A. 301 (1909).

(C) FRUSTRATION OF PURPOSE FOR WHICH CONTRACT WAS MADE

KRELL v. HENRY

In the King's Bench. [1903] 2 K.B. 740.

Royal coronation processions in London were arranged for June 26 and 27, 1902. The plaintiff, being possessed of a flat in Pall Mall, put up a notice that his windows were to be let for the purpose of

viewing the processions. Induced thereby, the defendant on June 20 entered into a written contract with the plaintiff for the use of the flat on the two days mentioned. The defendant paid £25 at once and promised to pay £50 more on June 24. The contract, made by the exchange of two letters, contained no mention of the coronation. The king fell ill; and on the morning of June 24 the processions were cancelled. The defendant thereupon refused to pay the £50; and the plaintiff sued for the money. The court gave judgment for the defendant, believing the reasoning found in the case of *Taylor v. Caldwell*, ante, to be applicable. The following are excerpts from the opinion.

VAUGHAN WILLIAMS, L. J. * * * I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of something which is the subject matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognized by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. * * * It [the contract] is a license to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both parties as the foundation of the contract. * * * It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price, say £10, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionally high; but the cab had no special qualifications for the purpose

which led to the selection of the cab for the occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, 'Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab,' and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative position of the rooms which is the basis of the contract as much for the lessor as for the hirer; and I think that if the king, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the license in this case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab—namely, to see the race—being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of the contract, and that the non-happening of it prevented the performance of the contract. And secondly, I think that the non-happening of the procession * * * was an event of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made * * *. The test seems to be whether the event which causes impossibility was or might have been anticipated and guarded against. * * * I am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to show that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. * * *

QUESTIONS:

1. What was the purpose of Krell, the plaintiff, in making the contract? The purpose of Henry, the defendant?
 2. What enabled Krell to charge £75 for the use of his rooms for two days?
 3. What enabled the cab driver to charge £10?
 4. Was the court's allocation of the risks of not attaining their respective purposes "reasonable"?
 5. Did any performance, promised by either party, become impossible?
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DENNY, MOTT & DICKSON LTD., Appellants v. FRASER & CO. LTD., Respondents, [1944] A.C. 265. In the House of Lords, affirming the decision of the Court of Session, Scotland, 1943 S.C. 293.

Fraser was a timber merchant and manufacturer. Denny was a timber importer. In 1929 they agreed that Denny would buy all his requirements of pine lumber from Fraser and that the latter would supply all such requirements so far as his stocks would permit, the prices being specified. Each party reserved the power to terminate "this agreement" by a written notice, a notice of 12 months in the case of Denny and one of 3 years on the part of Fraser. Fraser agreed to lease a certain lumber yard to Denny on stated terms and free of rent during the period of the trading. Denny was given an option to purchase the lumber yard for £4,000 in the event of the termination of the trading agreement by either party, or, if he preferred, to lease the yard for 5 years at an annual rental of £500, renewable at his option for further 5 year periods up to a total of 99 years from 1929.

At the outbreak of war in September, 1939, a government regulation so restrained transactions in timber as to make further performance of the trading agreement illegal.

In July, 1941, Denny gave 12 months' written notice of termination of the agreement, and at the same time gave notice that he elected to buy the lumber yard for £4,000.

In an action brought by Fraser to determine the rights of the parties, the trial judge held: (1) that the agreement was composite, comprising two distinct and severable parts, a "trading" and a "purchase" agreement; (2) that the former had been terminated by frustration; but (3) that the "purchase" agreement remained operative and that the option was validly exercised. The Court of Session held on appeal that the effect of the government order was to render the trading illegal for an indefinite period and that as concerned trading the contract was terminated by frustration. The Court further held that the agreement formed a single contract and that it had been ter-

minated as a whole by frustration, and that Denny's attempt to exercise his option to purchase was inoperative. [Statement of facts is condensed.]

LORD WRIGHT. My Lords, frustration of a contract, which, though as an expression criticized in the past, has now received legislative sanction in a recent Act—The Law Reform (Frustrated Contracts) Act, 1943—has been described by Professor Winfield, at p. 235, in the 11th edition of Pollock on Contracts which he has edited in the following terms: "After the formation of a contract, certain sets of circumstances arise which, owing to the fault of neither party, render fulfilment of the contract by one or both of the parties impossible in any sense or mode contemplated by them. These sets of circumstances have been more or less defined by the courts and are held by them to release both parties from any further obligation to fulfil the contract." The rule has sometimes been described as an exception to the general principle that parties must perform their obligations or pay damages for breach of contract. I should prefer to describe it as a substantive and particular rule which the common law has evolved. Where it applies there is no breach of contract. What happens is that the contract is held on its true construction not to apply at all from the time when the frustrating circumstances supervene. From that moment there is no longer any obligation as to future performance, though up to that moment obligations which have accrued remain in force. The rule finds its simplest and earliest exemplification where a contract for personal service is frustrated by the death of the contractor during the period of covenanted service. For breaches of contract before his death, his representatives may be held liable, but no one has ever heard of them being held liable in damages for the dead man's failure to perform his contract as from the date of his death. A rule of this character obviously admits of almost indefinite exemplifications, as numerous and diverse as are the possibilities of the performance of a contract being interrupted by a vital change of circumstances. The law, however, has examined a great variety of cases in which it has held or refused to hold that a contract is nullified as to its future by the impact of the frustrating event. The application of the general principle must depend on the circumstances of the particular case. No detailed absolute rules can be stated. A certain elasticity is essential. The topic has been repeatedly elucidated by numerous decisions of this House. Thus in 1919 in the *Bank Line, Ltd. v. Arthur Capel & Co.*, [1919] A.C. 435, 441, Lord Finlay L.C. felt able to say that the law of the subject was well settled. He referred to the general principle, not particular applications.

It is now I think well settled that where there is frustration a dissolution of a contract occurs automatically. It does not depend, as does rescission of a contract on the ground of repudiation or breach, on the

choice or election of either party. It depends on what actually has happened on its effect on the possibility of performing the contract. Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties. The decision is as Lord Sumner said in *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.* [1926] A.C. 497, 510, "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances." The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment. I find the theory of the basis of the rule in Lord Sumner's pregnant statement (*loc. cit.*) that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. Though it has been constantly said by high authority, including Lord Sumner, that the explanation of the rule is to be found in the theory that it depends on an implied condition of the contract, that is really no explanation. It only pushes back the problem a single stage. It leaves the question what is the reason for implying a term. Nor can I reconcile that theory with the view that the result does not depend on what the parties might, or would as hard bargainers, have agreed. The doctrine is invented by the court in order to supplement the defects of the actual contract. The parties did not anticipate fully and completely, if at all, or provide for what actually happened. It is not possible, to my mind, to say that, if they had thought of it, they would have said: "Well, if that happens all is over between us." On the contrary, they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensations. As to that the court cannot guess. What it can say is that the contract either binds or does not bind. It is a separate matter whether some ancillary relief should be given, as for a failure of consideration consequent on the frustration, as was held to be proper in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32. To my mind, the theory of the implied condition is not really consistent with the true theory of frustration. It has never been acted on by the court as a ground of decision, but is merely stated as a theoretical explanation. I only refer to the point here because it seems to me that the conclusions of both Lord Robertson and Lord Jamieson were affected to some extent by reflecting on what the parties as indi-

viduals might or would have decided if they had thought of the possible frustrating cause. I must admit that the view I have stated is somewhat heretical, but the general nature of the doctrine of frustration has given rise to many irreconcilable explanations. In the *Bank Line* case Lord Sumner made an interesting anthology of some of them. In *Hirji Mulji's* case about seven years later, his analysis is more exact and penetrating, but he again emphasizes that, when frustration occurs, it is automatic, and that its legal effect depends not on the intention of the parties or even on their knowledge as to the event, but on its occurrence in such circumstances as to show it to be inconsistent with the further prosecution of the adventure. I mention these two aspects of the principle here because they are important for the decision of the present case. The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by "informed and experienced minds." What the event was in the present case is not in controversy.

It is possible to distinguish for some purposes at least three separate matters dealt with by the contract. First, the provisions of the agreement which deal with the trading in timber, that is, the purchase and sale of it; secondly, the provisions which deal with the letting of the yard while the trading is going on; and, thirdly, the provisions which deal with the option to purchase the yard or take it on long lease which may come into effect when the trading operations cease. The stoppage of trading was in fact due to general orders of the Minister of Supply, acting under his powers under the Defense General Regulations, made after the outbreak of war. The judges in the courts below have held (Lord Jamieson not dissenting) that these orders had the effect of rendering illegal and impossible for an indefinite time the further conduct of the trading operations. If, therefore, the provisions as to trading stood by themselves, it could scarcely have been questioned that the trading adventure was frustrated. Some objections to this conclusion were overruled in the court below and were scarcely relied on before this House, but assuming that the trading adventure was frustrated, there remained to be considered the effect of that on the provisions for the letting of the yard "to enable the trading agreement to be carried out." It was not difficult to conclude that this letting was to be concurrent with the trading operations which it was intended to enable and would fall with them when they were frustrated, but it was different with the option to purchase provided for by cl. 8. That option was only to come into force when the trading operations were terminated and only when they were terminated by the election of one party. In the words of the clause: "In the event of the foregoing trading agree-

ment being terminated by either party as aforesaid" (that is, under cl. 5) "the second parties" (the appellants) "shall have the right as at the date of termination of said agreement to purchase the said ground and all buildings and erections thereon at a price of 4,000*l.*" There was also in cl. 9 an alternative option for the appellants to take "the said ground and buildings and railway sidings thereon at an annual rent of 500*l.*"; under cl. 9 the lease was in the first instance to be for five years, but renewable up to the total period or ninety-nine years from May 28, 1929.

The events relied on as constituting frustration were the Control of Timber Orders made under the Defense Regulations and necessitated by the state of war. The agreement had been in operation for about ten years at the date of the earliest of the orders, the Control of Timber (No. 4) Order, 1939, which came into force on September 16, 1939, and was replaced and continued thereafter by similar orders. It was beyond controversy and was indeed agreed that the effect of these orders was to prevent the current operation of the agreement so far as it related to the supply of timber by the appellants to the respondents. The appellants' stock of timber was exhausted about the end of September, 1939, and from that date it was impossible to supply further timber to the respondents. In addition, the orders would have made it illegal for the appellants, even if they had timber to supply, to supply it in accordance with the conditions of the agreement as to price and otherwise. It is true that the agreement was for an indefinite time, and that the war might end within a comparatively short period. The position must be determined as at the date when the parties came to know of the cause of the prevention and the probabilities of its length as they appeared at the date of the order, but subsequent events ascertained at or before the trial may assist in showing what the probabilities really were (as Lord Sumner said in *Bank Line, Ltd. v. Arthur Capel & Co.* In addition, there is to be remembered the principle stated by Lush J. in *Geipel v. Smith*, L.R. 7 Q.B. 404, (1872), that "a state of war must be presumed to be likely to continue so long, and so to disturb the commerce of merchants, so as to defeat and destroy the object of a commercial adventure." It is true that Lush J. was there referring to a single definite adventure, not to a continuous trading, but the real principle which applies in cases of commercial responsibility is that business men must not be left in indefinite suspense. If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to them, and to be free from commitments which are struck with sterility for an uncertain future period. Lord Shaw emphasized this principle in the *Bank Line* case, and so did Lord Sumner. This, I think, is the true basis of the rule. It does not depend simply on the considera-

tion that when the interruption ceases conditions of performance may be different, though that may also be worth dwelling on in certain cases, as in *Metropolitan Water Board v. Dick Kerr & Co. Ltd.* [1918] A.C. 119, where it was said that the interruption destroyed the identity of the performance contracted for. In the present case the suspense has already lasted for more than five years, and it may be many years still before the government controls are removed.

Lord Robertson and the judges in the Second Division, Lord Jamieson not dissenting on that point, have held that qua trading and the ancillary use and occupation of the yard for the purpose of trading the contract was frustrated, but there still remained the crucial question, what effect that frustration had on the option to purchase the yard which was the subject of cl. 8. The language of the clause was very precise and specific. It was to operate in the event of the trading agreement being terminated by either party by the notice specified in cl. 5. Lord Robertson was not unconscious that this raised a difficulty in the way of the appellants' claim that they were entitled to exercise the option to purchase, and had, in fact, duly exercised the option by their notice of July 17, 1941, but he decided in their favor on the ground that, notwithstanding the precise language of the clause conferring the option, what the parties would have agreed, if their minds had been directed to the point, would have been that the event of a frustration of the trading agreement would not have cancelled the option, but have opened the door to its exercise. He treated the "purchase agreement," as he called it, as a separate and self-subsistent agreement, standing on its own legs and remaining in force though the legs were cut from under the trading agreement, but the learned judge failed to observe that, even so, the right of exercising the option to purchase was expressly dependent on the single event of the trading agreement being terminated by notice. That being the condition precedent, the right could not arise if it was not fulfilled. The Lord Justice-Clerk, in his cogent judgment, rejected the appellants' contention. A notice to terminate must imply that there is something to terminate. According to the conditions expressed in cl. 8, the right to exercise the option to purchase never arose and cannot now arise if, as the fact is, the trading agreement was terminated by frustration.

The learned counsel for the appellants, faced with this difficulty, based his contentions before this House on a different ground. He argued that the whole agreement was one and indivisible, of which the trading agreement and the option to purchase formed integral parts, and that the impossibility of fulfilling the trading agreement did not destroy the contract as a whole because cl. 8 remained in effect. It was still capable of fulfilment, and remained open to the appellants, unless and until they thought fit to give notice of termination of the trading agreement, which they did by their letter of July 17, 1941, in

accordance with cl. 5. Thereupon they became entitled to exercise the option to purchase, and did exercise it by the letter. The result of this view would be that the appellants could postpone indefinitely giving notice of termination and thus keep alive for an indefinite time their right of election and so retain their hold upon the yard. This would be an unreasonable and inequitable position, but I do not think that the contention is sound. I do not question that the right to exercise the option, whatever it may be, is part of the consideration for the entire agreement. Nor do I doubt the possibility that there might be cases in which the contract provides for various matters to be performed in such a way that the impossibility of performing some of the stipulations might not frustrate the contract as a whole. Such a case may be illustrated by the decision of the Court of Appeals in *Leiston Gas Co. v. Leiston-cum-Sizewell Urban District Council*, [1916] 2 K.B. 428. The contract there was for the supply of gas and lighting, and for the repair and maintenance of the lighting system. In January, 1915, lighting regulations, by reason of the war, prohibited the lighting of the lamps. The case was heard before the law had been settled and elucidated, as it has since been, by the three decisions already referred to, *Metropolitan Water Board v. Dick Kerr & Co., Ltd.*, *Bank Line, Ltd. v. Arthur Capel & Co.*, *Hirji Mulji v. Cheong Yue Steamship Co., Ltd.*, and much that was said by the Court of Appeal in *Leiston's* case would not have been said at all, or would have been said differently, if the court had had the advantage of the views of this House. Scrutton J., however, does state the issue to be whether the failure to supply was "of such a lengthy and permanent character as substantially to alter the mode of performance" so as to terminate the contract. He decided that it was not, treating it as a question of fact and degree. I am not clear that the same decision would be given to-day. But questions of applying the doctrine may always be difficult to solve. So far as principle goes, the decision is important, in so far as it directs attention to the test, which is, what is the substantial contract and is that frustrated. Looking at this contract and to the frustrating event, I think it would be unreasonable not to regard the trading agreement as the substantial matter, so that when that is frustrated so is the contract as a whole. It would not be possible, in my opinion, to regard the whole contract as surviving when the trading agreement became frustrated. I need not consider another possible view, namely, that cl. 8 and 9 survived as a separate agreement, in the way that the arbitration clause in *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, 367, was, in the opinion of the Lord Chancellor, capable of surviving as an independent clause. That would not help the appellants here, because cl. 8, for whatever reason, is quite plain and specific, as I have already said, in the limited and grudging terms in which it grants the option to purchase. The option does not derive from the general character of the contract, but from the specific words of cl. 8. When the trading ceased the free use

of the yard would revert to its owners in the absence of a new and special grant. The stringent and limited character of the express condition of the option under cl. 8 must receive effect from the court. The condition was not, and in the events could not be, complied with by the appellant. The question whether Scots law would give any or what restitution to the appellants for alterations and improvements effected upon the yard during the period of their occupation is not before the House. I would dismiss the appeal.

[Other opinions are omitted.]

QUESTIONS:

1. Was the "frustration" in this case caused by "impossibility" of rendering a promised performance? Which party's performance?
2. Were the promises for purchase and sale of timber conditional on absence of governmental prohibition by reason of the fact that the parties so provided by "implication," or of the fact that the parties would have so provided if they had thought of it, or because the court declares them to be so conditional as a socially agreeable solution?
3. Does the option to buy terminate along with the trading provisions because "interpretation" of the contract so requires or on grounds of policy and justice apart from the intention of the parties?

NOTE

"In dealing with the concept of impossibility, or of frustration, just as in dealing with the more inclusive concept of conditions precedent to a duty of immediate performance, the courts have given increasing consideration to the extent of the risk that a promisor should be regarded as having undertaken. In the performance of a contract, losses and disappointments are encountered that the parties did not foresee or provide for. The court must then supply the gap and allocate the risks in accordance with reason—that is, in accordance with custom, business practice, common feeling, the mores of the community. Often, these are not so plain that he who runs may read; the court must be advised by evidence as well as argument.

"This process is often inaccurately described as 'interpretation' of the contract; it is less misleading to describe it as the 'construction' of the contract, meaning thereby the determination by the court of the legal operation of the contract along with that of the events that have occurred since its formation. The 'intention of the parties,' as objectively expressed, is indeed an important and frequently decisive element; but an intelligent judge is aware that his function goes far beyond the ascertainment of such intention.

"The risk of objective impossibility, physical or legal in character, is now seldom made to rest upon a promisor; and there is a tendency to include under that head the occurrence of unexpected circumstances in-

volving extraordinary difficulty or expense or the frustration of a purpose the supposed attainability of which gave value to the consideration for which the promisor bargained. Without question, disappointed bargainers are going to subject the courts to increasing pressure in the direction of this tendency. The matter is one of degree; and the lines of risk allocation must be determined by the courts as they write the *mores* into law in the litigated cases that arise. The risk of mere personal and subjective inability to perform a promise, for pecuniary or other economic reasons, must generally be borne by the promisor, except so far as bankruptcy laws modify this risk and afford limited relief by throwing it in part upon the promisee." Corbin, "Recent Developments in the Law of Contracts," 50 Harv.L.R. 449, 465 (1937), slightly revised.

A party who claims that his contractual duty has been discharged by an event that "frustrates" the purposes for which he made the contract is much more likely to have his claim sustained when the event is one that prevents performance by the other party than when it is an event that leaves the other party able and willing to perform. If the event makes impossible or commercially impracticable the performance of the other party, he is usually discharged from duty. If the first party is still compelled to keep his return promise, he will be compelled to give something for nothing. In such a case, we do not need to say that the first party is discharged by frustration of his purposes, although that is a reasonable form of statement. It has long been more common to say that he is discharged by "failure of consideration," or to say that his duty is conditional upon substantial performance of the agreed exchange.

Even though a contractor can and does receive the exact performance for which he bargained, some supervening event may very greatly reduce the *value* of that performance. Thus, one buys shares of stock—a war, an earthquake, and a Black Friday destroy their value; he hires a flat to see the king ride by—the king dies; he leases a building for use as a saloon—a prohibitory law is passed; he hires a high priced salesman for automobiles—the government turns the car factories into tank factories; a hotel man hires the use of a golf course for use of his guests—the hotel burns. Which party to the contract should carry the risk of loss from such events as these, or some part of that risk?

Consider, on the other hand, cases in which the shoe is on the other foot: One contracts to buy land at a fair price—a rich oil strike is made next door within a week, or within a year. One leases a store building for ten years—the location of a railway station near by trebles his sales and adjacent rents are doubled. Who gets the unexpected profits?

Suppose that an automobile manufacturer is required to devote his entire plant to the building of tanks, thus making useless to him supplies of ornamental gadgets that he had previously contracted to buy. His known purpose is thus frustrated by the government. Is he discharged from duty to the gadget manufacturer?

If A contracts to receive and pay for goods at a point within this country, the seller then knowing that A's sole purpose is to use the goods for export and distribution elsewhere, A's purpose may be wholly frustrated by a governmental embargo against export. It has been held that A is

not discharged. *Cooper v. Mundial Trading Co.*, 172 N.Y.S. 378 (1918). Such an embargo does not prevent either party's promised performance. It may or may not affect the market value of the goods. Query, in case the embargo almost wholly destroys the market value? Compare *Hackfield & Co. v. Castle*, 186 Cal. 53, 198 P. 1041 (1921). The plaintiff in Hawaii contracted to sell honey to the defendant and to ship it for the defendant via Tehuantepec to Hamburg. Before shipment the Tehuantepec route was closed and war made delivery at Hamburg impossible. The defendant's duty to take and pay for the honey was held discharged.

BAETJER et. al. v. NEW ENGLAND ALCOHOL CO.

Supreme Judicial Court of Massachusetts, 1946. 319 Mass. 592, 66 N.E.2d 798.

A contract for the sale of 2,500,000 gallons of molasses by the plaintiff to the defendant was made on April 3, 1942, the plaintiff being a producer of molasses in Puerto Rico and the defendant an alcohol manufacturer in Massachusetts. Delivery was to be made in the buyer's vessels at anchorage in a Puerto Rican harbor; but the buyer promised that he would accept delivery in the seller's own tanks on land of all molasses that was not taken on board ships by August 31 and would make payment therefor on that date. There was a "Force Majeure" provision protecting each party against liability for delay or for failure to perform because of war, strikes, storms and causes beyond control.

On April 3 the buyer received 440,000 gallons of molasses on its tanker, which sailed at once. This tanker was sunk by a submarine next day. War conditions prevented the buyer from sending any more ships for the molasses. On August 31, the seller had 2,060,000 gallons in his Puerto Rican tanks, tendered delivery and demanded payment. For refusal by the buyer, an action for damages was brought.

The following questions were involved in the case:

1. Was the buyer's duty to accept and pay for the molasses on August 31 discharged by the war and shipping conditions then existing, under the "Force Majeure" clause or otherwise?
2. Was the buyer's duty discharged by "Frustration of the Purpose" of the contract?

There was a government order forbidding imports from Puerto Rico except as permitted by the proper government official. The conditions were such that the buyer made no attempt to obtain any government permission. The buyer contracted for the molasses for use in its alcohol factory; but the written contract contained no word as to importation or use.

The court's opinion is in part as follows:

QUA, J. * * * The defendant's last contention is based upon the theory that performance of a contract may be excused if the parties contract on the assumption of the continued existence of something essential to performance and that thing fortuitously ceases to exist. * * *

It is contended that this principle covers the means of performance as well as the subject matter of the contract itself, and therefore that when it became impossible to obtain shipping the defendant was excused.

We think it unnecessary in this case to consider at length the scope of this principle or whether it can properly be applied to relieve from such a breach as a mere refusal to accept and pay for existing merchandise, acceptance of which according to the terms of the contract remains possible. It is plain that before the principle can be invoked it must appear that there was either a mutual agreement upon which the promises of the parties were dependent that a certain means of performance should continue to exist, or perhaps at the very least a mutual assumption of such continuance of existence as the basis on which the parties contracted. Under the latter alternative "The inquiry is merely this, whether the continuance of a special group of circumstances appears from the terms of the contract, interpreted in the setting of the occasion, to have been a tacit or implied presupposition in the minds of the contracting parties, conditioning their belief in a continued obligation." Cardozo, C. J., in *Canadian Industrial Alcohol Co., Ltd., v. Dunbar Molasses Co.*, 258 N.Y. 194, 198, 179 N.E. 383, 384, 80 A.L.R. 1173, quoted in *Williston on Contracts*, Rev. Ed., s. 1952, at pages 5472, 5473. The *Kronprinzessin Cecilie*, 244 U.S. 12, 24, 37 S.Ct. 490, 61 L.Ed. 960; *Am.Law Inst., Restatement, Contracts*, ss. 460, 461, 288.

At this point the defence fails. The case stated does not show either that the undertakings of the parties were expressly or impliedly conditioned in a contractual sense upon the continuance of shipping facilities or that they were entered into upon the mutual assumption of such continuance, conditioning the belief of the parties in a continuing obligation. In our opinion the case shows the contrary. When the contract was entered into on April 3, 1942, this country had been formally at war for approximately four months. The statutes of the United States had for some time contained general provisions for government requisition of vessels during a national emergency declared by the President. * * * On September 8, 1939, * * * the President had proclaimed a limited national emergency (4 Fed.Reg. 3851), and on May 27, 1941, * * * he had proclaimed an unlimited national emergency (6 Fed.Reg. 2617). It appears that in January, February, and March, 1942, attacks on vessels in the Caribbean and nearby Atlantic areas, although comparatively few at first, were doubling

each month, and insurance rates were rising rapidly. As early as the latter part of January the corporation from which the defendant had been accustomed to obtain its tankers had obligated itself to employ its ships only for Defence Supplies Corporation, although it agreed with the defendant "to coöperate in every way possible" to secure a tanker for the defendant. By Executive Order No. 9054 of February 7, 1942, 50 U.S.C.A. Appendix, § 1295 note, (7 Fed.Reg. 837), the War Shipping Administration was established and given final authority to control the use of all ocean merchant vessels under the flag or control of the United States except those under the control of the director of the Office of Defence Transportation. Foreign vessels could carry freight from Puerto Rico to continental United States only under Federal authority. Merchant Marine Act of 1920, U.S.C.(1940 ed.) Title 46, § 883, 46 U.S.C.A. § 883. See 7 Fed.Reg. 2581. In the light of these facts and other facts existing as of common knowledge in the first quarter of 1942 it is impossible to believe that these parties, engaged in commercial business involving sea transportation in the Caribbean, contracted upon an implied agreement or even a tacit "pre-supposition" that shipping communications would remain uninterrupted. On the contrary, as already stated, they expressly provided in their contract for interruption caused by war and agreed that such interruption should furnish a temporary excuse, though not, as we think, for the breach that occurred. When the defendant contracted to take the molasses in its vessels it doubtless hoped for and may have expected the best, but it also knew the worst and, except for the limited protection of the "Force Majeure" clause, took the risk. * * *

Even if we were to go beyond the alleged defence of impossibility of performance on the part of the defendant and were to consider the case with reference to the modern doctrine of so called "frustration," a doctrine little discussed as yet in this Commonwealth, the result would be the same. Whatever may be the extent and validity of that doctrine, and apart from any other reasons for not applying it in this case, a contracting party cannot be excused where the only "frustration" consists in the fact that known risks assumed by him have turned out to his disadvantage. * * *

Judgment for plaintiff.

LLOYD v. MURPHY.

Supreme Court of California, 1944. 25 Cal.2d 48, 153 P.2d 47.

Action by Caroline A. Lloyd and others against William J. Murphy for a declaration of rights under a lease and for rent. From an adverse judgment, defendant appeals.

Affirmed.

TRAYNOR, J. On August 4, 1941 plaintiffs leased to defendant for a five-year term beginning September 15, 1941, certain premises located at the corner of Almont Drive and Wilshire Boulevard in the city of Beverly Hills, Los Angeles County, "for the sole purpose of conducting thereon the business of displaying and selling new automobiles (including the servicing and repairing thereof and of selling the petroleum products of a major oil company) and for no other purpose whatsoever without the written consent of the lessor" except "to make an occasional sale of a used automobile." Defendant agreed not to sublease or assign without plaintiffs' written consent. On January 1, 1942 the federal government ordered that the sale of new automobiles be discontinued. It modified this order on January 8, 1942 to permit sales to those engaged in military activities, and on January 20, 1942, it established a system of priorities restricting sales to persons having preferential ratings of A-1-j or higher. On March 10, 1942, defendant explained the effect of these restrictions on his business to one of the plaintiffs authorized to act for the others, who orally waived the restrictions in the lease as to use and subleasing and offered to reduce the rent if defendant should be unable to operate profitably. Nevertheless defendant vacated the premises on March 15, 1942, giving oral notice of repudiation of the lease to plaintiffs, which was followed by a written notice on March 24, 1942. Plaintiffs affirmed in writing on March 26th their oral waiver and, failing to persuade defendant to perform his obligations, they rented the property to other tenants pursuant to their powers under the lease in order to mitigate damages. On May 11, 1942, plaintiffs brought this action praying for declaratory relief to determine their rights under the lease, and for judgment for unpaid rent. Following a trial on the merits, the court found that the leased premises were located on one of the main traffic arteries of Los Angeles County; that they were equipped with gasoline pumps and in general adapted for the maintenance of an automobile service station; that they contained a one-story storeroom adapted to many commercial purposes; that plaintiffs had waived the restrictions in the lease and granted defendant the right to use the premises for any legitimate purpose and to sublease to any responsible party; that defendant continues to carry on the business of selling and servicing automobiles at two other places. Defendant testified that at one of these locations he sold new automobiles exclusively and when asked if he were aware that many new automobile dealers were continuing in business replied: "Sure. It is just the location that I couldn't make a go, though, of automobiles." Although there was no finding to that effect defendant estimated in response to inquiry by his counsel, that 90 per cent of his gross volume of business was new car sales and 10 per cent gasoline sales. The trial court held that war conditions had not ter-

minated defendant's obligations under the lease and gave judgment for plaintiffs, declaring the lease as modified by plaintiffs' waiver to be in full force and effect, and ordered defendant to pay the unpaid rent with interest, less amounts received by plaintiffs from re-renting. Defendant brought this appeal, contending that the purpose for which the premises were leased was frustrated by the restrictions placed on the sale of new automobiles by the federal government, thereby terminating his duties under the lease.

Although commercial frustration was first recognized as an excuse for nonperformance of a contractual duty by the courts of England (*Krell v. Henry*, C.A., 1903, 2 K.B. 740; *Blakely v. Muller*, K.B., 19 T.L.R. 186; see *McElroy and Williams*, *The Coronation Cases*, 4 Mod.L.Rev. 241) its soundness has been questioned by those courts (see *Maritime National Fish, Ltd., v. Ocean Trawlers, Ltd.*, [1935] A.C. 524, 528–29; 52 L.Q.Rev. 324, arguing that *Krell v. Henry*, *supra*, was a misapplication of *Taylor v. Caldwell*, 1863, 3 B. & S. 826, the leading case on impossibility as an excuse for nonperformance), and they have refused to apply the doctrine to leases on the ground that an estate is conveyed to the lessee, which carries with it all risks. *Swift v. McBean*, 1942, 1 K.B. 275; *Whitehall Court v. Ettlinger*, [1919] L.J. [K.B.] N.S. 126; 137 A.L.R. 1199, 1224; see collection and discussion on English cases in *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883, 886, 887. Many courts, therefore, in the United States have held that the tenant bears all risks as owner of the estate (*Cusack Co. v. Pratt*, 78 Colo. 28, 239 P. 22, 44 A.L.R. 55; *Yellow Cab Co. v. Stafford-Smith Co.*, 320 Ill. 294, 150 N.E. 670, 43 A.L.R. 1173), but the modern cases have recognized that the defense may be available in a proper case, even in a lease. * * *

Although the doctrine of frustration is akin to the doctrine of impossibility of performance (see Civ.Code, § 1511; 6 Cal.Jur. 435–450; 4 Cal.Jur. Ten-year Supp. 187–192; *Taylor v. Caldwell*, *supra*) since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance (see *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 293, 156 P. 458, L.R.A.1916F, 1; *Christin v. Superior Court*, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153; 6 Williston, *op.cit. supra*, § 1935, p. 5419; Restatement, § 454, comment a., and Cal. Ann. p. 254). Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by a fortuitous event, which supervenes to cause an actual but not literal failure of consideration. *Krell v. Henry*, *supra*; *Blakely v. Muller*, *supra*; *Marks Realty Co. v. Hotel*

Hermitage Co., 170 App.Div. 484, 156 N.Y.S. 179; 6 Williston, op.cit. supra, §§ 1935, 1954, pp. 5477, 5480; Restatement, Contracts, § 288.

The question in cases involving frustration is whether the equities of the case considered in the light of sound public policy, require placing the risk of a disruption or complete destruction of the contract equilibrium on defendant or plaintiff under the circumstances of a given case (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*, H.L. 1942, 167 L.T.R. 101, 112, 113; see Smith, *Some Practical Aspects of the Doctrine of Impossibility*, 32 Ill.L.Rev. 672, 675; Patterson, *Constructive Conditions in Contracts*, 42 Columb.L. Rev. 903, 949; 27 Cal.L.Rev. 461), and the answer depends on whether an unanticipated circumstance, the risk of which should not be fairly thrown on the promisor, has made performance vitally different from what was reasonably to be expected (6 Williston, op. cit. supra, § 1963, p. 5511; Restatement, Contracts, § 454). The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.

The doctrine of frustration has been limited to cases of extreme hardship so that businessmen, who must make their arrangements in advance, can rely with certainty on their contracts. *Anglo-Northern Trading Co. v. Emlyn Jones and Williams*, 2 K.B. 78; 137 A.L.R. 1199, 1216-1221. The courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counterperformance is totally or nearly totally destroyed, for frustration is no defense if it was foreseeable or controllable by the promisor, or if counterperformance remains valuable. *La Cumbre Golf & Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 425, 271 P. 476; *Johnson v. Atkins*, 53 Cal.App.2d 430, 434, 127 P.2d 1027; *Grace v. Croninger*, 12 Cal.App.2d 603, 606, 607, 55 P.2d 940; *Industrial Development & Land Co. v. Goldschmidt*, 56 Cal.App. 507, 511, 206 P. 134; *Burke v. San Francisco Breweries, Ltd.*, 21 Cal.App. 198, 201, 131 P. 83; *Megan v. Updike Grain Corp.*, 8 Cir., 94 F.2d 551, 553; *Herne Bay Steamboat Co. v. Hutton*, 1903, 2 K.B. 683; *Leiston Gas Co. v. Leiston Cum Sizewell Urban District Council*, 1916, 2 K.B. 428; *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733; 6 Williston, op.cit. supra, §§ 1939, 1955, 1963; Restatement, Contracts, § 288.

Thus laws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to

perform a contractual obligation. *Sample v. Fresno Flume, etc., Co.*, 129 Cal. 222, 228, 61 P. 1085; *Klauber v. San Diego Street-Car Co.*, 95 Cal. 353, 358, 30 P. 555; *Texas Co. v. Hogarth Shipping Co.*, 256 U.S. 619, 630, 41 S.Ct. 612, 65 L.Ed. 1123; *Columbus Ry., Power & Light Co. v. Columbus*, 249 U.S. 399, 414, 39 S.Ct. 349, 63 L.Ed. 669, 6 A.L.R. 1648; *Thomson v. Thomson*, 315 Ill. 521, 527, 146 N.E. 451; *Commonwealth v. Bader*, 271 Pa. 308, 312, 114 A. 266; *Commonwealth v. Neff*, 271 Pa. 312, 314, 114 A. 267; *London & Lancashire Ind. Co. v. Columbiana County*, 107 Ohio St. 51, 64, 140 N.E. 672; see 6 Williston, op.cit. supra, §§ 1955, 1963, pp. 5507-09. It is settled that if parties have contracted with reference to a state of war or have contemplated the risks arising from it, they may not invoke the doctrine of frustration to escape their obligations. *Northern Pac. Ry. Co. v. American Trading Co.*, 195 U.S. 439, 467, 468, 25 S.Ct. 84, 49 L.Ed. 269; *Primos Chemical Co. v. Fulton Steel Corp.*, D.C.N.Y., 266 F. 945, 948; *Krulewitch v. National Importing & Trading Co.*, 195 App.Div. 544, 186 N.Y.S. 838, 840; *Smith v. Morse*, 20 La. Ann. 220, 222; *Lithflux Mineral & Chem. Works v. Jordan*, 217 Ill.App. 64, 66; *Mederios v. Hill*, 8 Bing. 231, 131 Eng.Reprint 390, 392; *Bolckow V. & Co. v. Compania Minera de Sierra Minera, K.B.*, 115 L.T.R. 745, 747.

At the time the lease in the present case was executed the National Defense Act, Public Act No. 671 of the 76th Congress, 54 Stats. 676, § 2(a), 50 U.S.C.A. Appendix § 1152(a), approved June 28, 1940, authorizing the President to allocate materials and mobilize industry for national defense, had been law for more than a year. The automotive industry was in the process of conversion to supply the needs of our growing mechanized army and to meet lend-lease commitments. Iceland and Greenland had been occupied by the army. Automobile sales were soaring because the public anticipated that production would soon be restricted. These facts were commonly known and it cannot be said that the risk of war and its consequences necessitating restriction of the production and sale of automobiles was so remote a contingency that its risk could not be foreseen by defendant, an experienced automobile dealer. Indeed, the conditions prevailing at the time the lease was executed, and the absence of any provision in the lease contracting against the effect of war, gives rise to the inference that the risk was assumed. Defendant has therefore failed to prove that the possibility of war and its consequences on the production and sale of new automobiles was an unanticipated circumstance wholly outside the contemplation of the parties.

Nor has defendant sustained the burden of proving that the value of the lease has been destroyed. The sale of automobiles was not made impossible or illegal but merely restricted and if governmental regulation does not entirely prohibit the business to be carried on in the leased premises but only limits or restricts it, thereby making it

less profitable and more difficult to continue, the lease is not terminated or the lessee excused from further performance. *Brown v. Oshiro*, supra, 58 Cal.App.2d at page 194, 136 P.2d 29; *Davidson v. Goldstein*, supra, 58 Cal.App.2d Supp. at page 918, 136 P.2d 665; *Grace v. Croninger*, supra, 12 Cal.App.2d at page 607, 55 P.2d 940; *Industrial Development & Land Co. v. Goldschmidt*, supra; *Burke v. San Francisco Brewing Co.*, supra, 21 Cal.App. at page 202, 131 P. 83; *First National Bank of New Rochelle v. Fairchester Oil Co.*, 267 App.Div. 281, 45 N.Y.S.2d 532, 533; *Robitzek Inv. Co., Inc., v. Colonial Beacon Oil Co.*, 265 App.Div. 749, 40 N.Y.S.2d 819, 824; *Colonial Operating Corp. v. Hannan Sales & Service, Inc.*, 265 App.Div. 411, 39 N.Y.S.2d 217, 220; *Byrnes v. Balcolm*, 265 App.Div. 268, 38 N.Y.S.2d 801, 803; *Deibler v. Bernhard Bros.*, 385 Ill. 610, 53 N.E.2d 450, 453; *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883, 886, 888, 890. Defendant may use the premises for the purpose for which they were leased. New automobiles and gasoline continue to be sold. Indeed, defendant testified that he continued to sell new automobiles exclusively at another location in the same county.

Defendant contends that the lease is restrictive and that the government orders therefore destroyed its value and frustrated its purpose. Provisions that prohibit subleasing or other uses than those specified affect the value of a lease and are to be considered in determining whether its purpose has been frustrated or its value destroyed. See *Owens, The Effect of the War Upon the Rights and Liabilities of Parties to a Contract*, 19 California State Bar Journal 132, 143. It must not be forgotten, however, that "The landlord has not covenanted that the tenant shall have the right to carry on the contemplated business or that the business to which the premises are by their nature or by the terms of the lease restricted shall be profitable enough to enable the tenant to pay the rent but has imposed a condition for his own benefit; and, certainly, unless and until he chooses to take advantage of it, the tenant is not deprived of the use of the premises." 6 Williston, *Contracts*, op. cit supra, § 1955, p. 5485; see, also, *People v. Klopstock*, 24 Cal.2d 897, 151 P.2d 641. In the present lease plaintiffs reserved the rights that defendant should not use the premises for other purposes than those specified in the lease or sublease without plaintiffs' written consent. Far from preventing other uses or subleasing they waived these rights, enabling defendant to use the premises for any legitimate purpose and to sublease them to any responsible tenant. This waiver is significant in view of the location of the premises on a main traffic artery in Los Angeles County and their adaptability for many commercial purposes. The value of these rights is attested by the fact that the premises were rented soon after defendants vacated them. It is therefore clear that the governmental restrictions on the sale of new cars

has not destroyed the value of the lease. Furthermore, plaintiffs offered to lower the rent if defendant should be unable to operate profitably, and their conduct was at all times fair and cooperative.

The consequences of applying the doctrine of frustration to a leasehold involving less than a total or nearly total destruction of the value of the leased premises would be undesirable. Confusion would result from different decisions purporting to define "substantial" frustration. Litigation would be encouraged by the repudiation of leases when lessees found their businesses less profitable because of the regulations attendant upon a national emergency. Many leases have been affected in varying degrees by the widespread governmental regulations necessitated by war conditions.

The cases that defendant relies upon are consistent with the conclusion reached herein. In *Industrial Development & Land Co. v. Goldschmidt*, *supra*, the lease provided that the premises should not be used other than as a saloon. When national prohibition made the sale of alcoholic beverages illegal, the court excused the tenant from further performance on the theory of illegality or impossibility by a change in domestic law. The doctrine of frustration might have been applied, since the purpose for which the property was leased was totally destroyed and there was nothing to show that the value of the lease was not thereby totally destroyed. In the present case the purpose was not destroyed but only restricted, and plaintiffs proved that the lease was valuable to defendant. In *Grace v. Croninger*, *supra* [12 Cal.App.2d 603, 55 P.2d 941], the lease was for the purpose of conducting a "saloon and cigar store, and for no other purpose" with provision for subleasing a portion of the premises for bootblack purposes. The monthly rental was \$650. It was clear that prohibition destroyed the main purpose of the lease, but since the premises could be used for bootblack and cigar store purposes, the lessee was not excused from his duty to pay the rent. In the present case new automobiles and gasoline may be sold under the lease as executed and any legitimate business may be conducted on the premises may be subleased under the lease as modified by plaintiff's waiver. *Colonial Operating Corp. v. Hannon Sales & Service, Inc.*, 178 Misc. 879, 34 N.Y.S.2d 116, was reversed in 265 App.Div. 411, 39 N.Y.S.2d 217, and *Signal Land Corp. v. Loecher, City Ct.*, 35 N.Y.S.2d 25; *Schantz v. American Auto Supply Co., Inc.*, 178 Misc. 909, 36 N.Y.S.2d 747; *Canrock Realty Corp. v. Vim Electric Co., Inc.*, 179 Misc. 391, 37 N.Y.S.2d 139, involved government orders that totally destroyed the possibility of selling the products for which the premises were leased. No case has been cited by defendant or disclosed by research in which an appellate court has excused a lessee from performance of his duty to pay rent when the purpose of the lease has not been totally destroyed or its accomplishment rendered extremely impracticable or

where it has been shown that the lease remains valuable to the lessee.

The judgment is affirmed.

NOTE ON FRUSTRATION OF PURPOSES OF A LESSEE

The extensive litigation as to whether a lessee's duty to pay rent is discharged by frustration of the purposes for which he took the lease, the frustration being caused by destruction of buildings or by statutes and governmental orders preventing the contemplated use of the premises, must be left in the main to courses on Landlord and Tenant. A lease, especially for a long term, is distinguishable from a mere contract for occupancy for a short period. The former creates a substantial property interest in the lessee, although most leases are both conveyances and contracts. Regarded as a conveyance of property, the lease creates in the lessee the manifold rights and powers of an owner. Should he not also carry the risks that normally accompany ownership? If supervening events increase the value of his leasehold interest—the value of the use and occupation—that increase goes to the lessee, without any increase in the rent which is the price that he pays therefor. Is it not reasonable that he should carry the risk of supervening events that may reduce or destroy the value of the use of his property, taking out his own insurance against such losses? The longer the leasehold term, the more likely it is that this question will be answered in the affirmative. The shorter the term and the smaller the property interest, the more likely that the contractual aspects of the transaction will overpower its property aspects.

Even regarding a lease in its contractual aspect rather than as a property conveyance, many of the risks of partial destruction and of partial requisition by government still rest on the lessee. To an even greater extent must he still bear the risk of depreciation in the value of the use of the premises, caused otherwise than by this destruction or governmental seizure. The numerous case decisions indicate that the allocation of risks as between lessor and lessee will continue to be somewhat variable, just as the interests and sympathies and practices of men remain variable.

CRICKLEWOOD PROPERTY & INVESTMENT TRUST v. LEIGHTONS INVESTMENT TRUST, [1945] A.C. 221, [1945] 1 All Eng. 252. A tract of land was leased for building purposes for a term of 99 years, with a provision that rent on each building lot should at first be one peppercorn and should be a substantial amount after the time neces-

sary for building a shop. War time regulations put a stop to building operations. The trial court, the Court of Appeal, and the House of Lords all held that the duty to pay rent was not suspended or discharged. The purpose of the lessee—the building and letting of shops—was frustrated, but only for a few years at most and the lease had 90 years to run. Two of the Lords thought that the doctrine of frustration does not apply to leases at all; but Lords Simon and Wright thought that total destruction of the leasehold premises would terminate the lessee's contractual duties to the lessor.

PARADINE v. JANE, Aleyn, 26 (1647, K.B.) ante. The lessee's duty to pay rent was held not discharged by the fact that he was ousted for a considerable period by an invading royalist army and thereby prevented from enjoying the benefits of use and occupation.

TAYLOR v. CALDWELL, 3 Best & S. 826 (1863), ante. The use of a music hall was hired for four nights only. Its destruction by fire before possession was taken discharged *the duty of the owner* to deliver possession. Of course the hirer's duty to pay the promised rental would also be discharged. The duty of the owner is discharged by Impossibility of Performance. The duty of the hirer to pay rent is discharged by Frustration of his purpose and total "Failure of the Consideration."

VITERBO v. FRIEDLANDER, 120 U.S. 707, 7 S.Ct. 962, 30 L.Ed. 776 (1887). The lessee's duty was held to be discharged by the destruction of the property by a Mississippi flood of a kind not contemplated by the parties. But the court was applying the civil and statutory law of Louisiana, derived from the Roman law; and it said that the common law was otherwise.

There are many cases dealing with the effect of a prohibition law upon comparatively short term leases of a building for use as a liquor saloon. If the terms of the lease restrict the tenant to that one use, his purpose is wholly frustrated by the law; and in many cases his duty to pay rent has been held to be discharged if he surrenders possession. If other substantial uses are still possible, the larger number of cases have held the rent still payable. Decisions have varied with the degree of frustration. If the lessee is held discharged in these cases, it is not by reason of "Impossibility of Performance" or by "Failure of the Consideration." Instead, it is by reason of Frustration of the lessee's known purpose by which the *value* of the consideration that he bargained for and has received is appreciably lessened.

Statutes and regulations sometimes greatly reduce the value of rented premises without preventing the contemplated mode of user. In these cases the frustration of the tenant's purposes varies in degree, the decisions also varying. In *MEGAN v. UPDIKE GRAIN CORP.*, 94 F.2d 551 (1938, C.C.A.), the lessee of a grain elevator had to continue payment of rent, although a change in railroad freight rates caused him to be by-passed by shippers and made operation of the elevator at a profit impossible. Profitable operation was no part of a performance that was promised.

In *BROWN v. OSHIRO*, 58 Cal.App.2d 190, 136 P.2d 29 (1943), the Japanese lessee of a hotel was held discharged from duty to pay rent by the fact that he and his customers were evacuated by the government to other states. On a second appeal this was reversed, it appearing that some of the customers were not Japanese and that the lessee had been able (at a considerable loss) to assign his lease. 156 P.2d 976 (1945).

In *WOOD v. BARTOLINO*, 48 N.M. 175, 146 P.2d 883 (1944), the lessee of a filling station had to continue to pay rent even though government rationing of gasoline and tires reduced his business and made operation more unprofitable than it had been before.

When leased premises are taken by exercise of the power of eminent domain, the lessee is entitled to compensation for the taking of his property interest, just as is the lessor. The cases have not been consistent with respect to rent; but if the lessee is regarded as still bound to pay rent, the amount payable to him as compensation should be increased and the amount payable to the lessor decreased by the rent so payable.

(D) RESTITUTIONARY REMEDY IN CASES OF DISCHARGE BY IMPOSSIBILITY OR FRUSTRATION OF PURPOSE

A contractor who is discharged from his duty by some form of supervening impossibility after he has already received a performance of value rendered by the other party is legally bound to pay the reasonable value of that performance. He is not bound to pay damages caused by his own failure of performance, because he has committed no breach of his duty. One who has paid in advance part or all of

the price of goods to a seller whose duty to make delivery is discharged by destruction of the goods without his fault can get judgment for restitution of the money. At common law the form of action was *indebitatus assumpsit*. In like manner a defendant who has received an advance payment for a performance that now can not be rendered by him because of the outbreak of war must make restitution. The English House of Lords has so held in *Fibrosa S.A. v. Fairbairn etc. Ltd.* [1943] A.C. 32, [1942] All Eng. 122, expressly overruling previous decisions in which the courts had refused to recognize a quasi-contractual (non-contractual) duty of restitution. The American courts had long enforced quasi-contractual duties, following earlier decisions by Lord Mansfield.

Likewise a plaintiff who has rendered a part performance of value and is then discharged from his duty of completion by some form of impossibility can get judgment for the reasonable value of that part performance. The express promise of the defendant is not enforceable because the defendant's duty is conditional on substantial performance of the agreed exchange by the plaintiff. Thus one who has contracted to make repairs on an existing building, but is prevented from completion by the destruction of the building, can get judgment for the reasonable value of his labor and materials so far as they had been incorporated in the building before its destruction. See *Carroll v. Bowersock*, 100 Kan. 270, 164 P. 143 (1917). The fact that the repairs have been destroyed with the building does not prevent recovery; before their destruction they had increased the value of the defendant's property for purposes of both sale and insurance.

Observe the difference between the two preceding paragraphs. In the first, it is the defendant whose performance is impossible and who is thereby discharged from his contractual duty; in the second, it is the plaintiff whose completion of performance has become impossible, and the defendant is discharged not by impossibility of his own performance but by substantial failure of the consideration (nonperformance of a condition of his contractual duty). In the first, the plaintiff may have performed his part in full; in the second, the performance actually rendered by him is never in full.

See Restatement, Contracts, § 468. Similar rules are applicable where a contractual duty has been discharged not by impossibility of rendering the promised performance but by Frustration of the Principal Purpose for which the contract was made.

SECTION 8.—DISCHARGE BY PREVENTION OF PERFORMANCE

ANONYMOUS.

13 Hen. VII, Keilway, 34, pl. 2, 1498.

In an action of covenant upon a deed, to the effect that the defendant had covenanted for the collection of rents in a certain town, and had not performed, so that action lay against him. To this the defendant replied that he was prevented by the plaintiff himself from collecting the rents. The plaintiff moved for judgment that the plea was not good; because if the facts were as alleged, the defendant would have a good action of trespass against the plaintiff and could recover damages, and so he has no defense in this action. The Court replied that the plea was good, to avoid circuity of action, for if the defendant should bring trespass and get damages, then the plaintiff could recover in a writ of covenant against the defendant, a circuity of action which the law will not suffer.

NOTE

In *Porto Rico v. Title Guaranty & Surety Co.*, 227 U.S. 382, 389, 33 S.Ct. 362, 57 L.Ed. 561 (1913), Mr. Justice Holmes said: "If, within the time allowed for performance the plaintiff made performance impossible, it is unimaginable that any civilized system of law would allow it to recover upon the bond for a failure to perform. 2 Bl.Comm. 340, 341; *U. S. v. Arredondo*, 6 Pet. 691, 745, 746, 8 L.Ed. 547 (1832)."

In *United States v. Peck*, 102 U.S. 64, 26 L.Ed. 46 (1880), the contractor had only one convenient source of supply, as the government agents knew. Their obstruction of this source, by buying up all the goods available there, was held to be a good defense. They knew that he contracted in the reasonable belief that they would not obstruct him by competition at that source.

Where delay in construction is caused by the default of the owner, a provision for liquidated damages for delay cannot be enforced; but it may be made a condition precedent to the contractor's privilege of not paying damages that he shall make his claim that the owner has caused the delay in writing and within a fixed period. *U. S. v. United Engineering & Construction Co.*, 234 U.S. 236, 34 S.Ct. 843, 58 L.Ed. 1294 (1914), ante.

Prevention of performance is generally regarded as a breach of an implied promise. If so regarded, this case is included within Restatement, Contracts, § 397.

SECTION 9.—DISCHARGE BY EXERCISE OF A POWER OF AVOIDANCE OR BY OCCURRENCE OF A CONDITION SUBSEQUENT

Some contracts are made voidable by the law on such grounds as infancy, fraud, and duress. One of the parties is given the power to discharge. Restatement, Contracts, § 431.

It is not infrequent that one of the parties to a contract expressly reserves a power of discharging or terminating a contract after a certain period or on certain conditions. His subsequent exercise of this power operates as a discharge, and it is in one sense a discharge by mutual agreement; the power was created by mutual agreement, but its final exercise is a unilateral act, and may, at the time, be very obnoxious to the other party. For examples of this sort of discharge, see *Golden Cycle M. Co. v. Rapson C. M. Co.*, 188 F. 179, 112 C.C. A. 95 (1911), where "it is agreed that in the event the Mining Company shall acquire a substantial interest in a coal mine as owner * * * then the Mining Company may, at its option, declare this contract terminated upon giving the Coal Company 90 days' written notice of its intention to do so": *Wilmington & Raleigh R. Co. v. Robeson*, 27 N.C. 391 (1845); *Ray v. Thompson*, 12 Cush. (Mass.) 281, 59 Am.Dec. 187 (1853), ante, p. 663 (sale of chattel with "right of return").

The exercise of an expressly reserved power of discharge or termination usually operates prospectively only, without affecting rights arising out of a part performance already rendered. An employer or his employee or both of them may reserve power of terminating the employment; services previously rendered must be paid for as the contract provided.

In *Voss Bros. Mfg. Co. v. Voss*, 157 F.2d 263 (1946, C.C.A.), a contract for the sale of the controlling interest in a corporation provided that if, before the time set for closing the deal, the buyer should demand a definite reduction of the price, rejection of that demand by the seller should make the contract "null and void." Practically, this gave the buyer a power of termination. It gave him control of the price: acceptance by the seller would, as to this important item, substitute a new contract; and rejection would substitute nothing.

The nature and operation of conditions subsequent have been considered along with conditions precedent. A condition subsequent is one that occurs after a duty of immediate performance has accrued; and it operates to discharge that duty, as well as the duty to make reparation for breach. Restatement, Contracts, § 396.

SECTION 10.—ACCOUNT STATED AS A DISCHARGE

Restatement, Contracts, § 422, lists "Account Stated" as a method of Discharge, operative with respect either to a "matured debt" or to "cross demands." In order to constitute an "Account Stated" there must be a mutual accounting with agreement on the balance that is due. The Restatement says, however, that if there is error or omission in the computation the transaction "can be avoided by the party who has assented thereto in ignorance of the omission or error, unless in justifiable reliance on the statement of account the other party has materially changed his position."

The following statements are suggested for comparison:

1. A matured debt is a sufficient "past consideration" for a promise by the debtor to pay it in whole or in part, but not for a promise to pay anything in excess of the debt.

2. If the amount due from one party to the other is not "liquidated," either because of a bona fide dispute or because never agreed on, an agreement in good faith liquidating the amount is valid and enforceable. It is not an "account stated" (although that term is often used to describe it). It is a "compromise and settlement," being either an "accord executory" or an accord and satisfaction by substituted contract, depending on the reasonable interpretation of the terms of agreement.

3. If the facts are not such as to make paragraph 2 applicable, and there is an error or omission in the process of accounting and striking a balance, the "account stated" does not discharge the right to payment of the amount shown by a correct accounting to be due. It may be discharged in case there has been such a change of position as to make enforcement unjust, as provided in Restatement, Contracts, § 90.

Consider the two following Illustrations, given in Restatement, Contracts, § 422. [The present editor made no objection to them when acting as Adviser.]

"Illustration 2. A orders goods from B his grocer, no price being fixed. B employs A, an attorney at law, to render certain services for which no price is fixed. A and B agree that the value of the groceries is \$125 and the value of the legal services is \$100, and that the balance due B is \$25. There is an account stated."

NOTE: This is quite correct. They have struck a balance between two liquidated debts; and it is the correct balance. But their valuation of the groceries at \$125 was not an account stated; nor was their valuation of A's services at \$100. Each of these was a valid liquidation of an uncertain claim. If, by an error in subtraction they had stated

the balance due as \$35, the account would likewise have been "stated;" but it would have been erroneous and not binding on A, the debtor, beyond \$25. Yet the agreed valuation of the groceries at \$125 and the services at \$100 would still be binding, unless the valuations were so related as to make them both constructively conditional on the accuracy of the subtraction made. In the latter case, there would be no separate valuations, but only a valuation of the difference at \$35. This would operate as a valid liquidation of the difference, but it should not be called an "account stated." Such an agreement would usually be intended as a "substituted contract" operating as a discharge of the two unliquidated claims; but it might be so worded as to be only an "accord executory."

"Illustration 1. A owes to B a thousand dollars. A has a claim against B for B's failure to do certain work that B had contracted to do. Subsequently A and B agree that A's damages amount to \$300, and that therefore the net amount due B is \$700. This is not an account stated, but there is a valid compromise."

NOTE: This appears to be just like Illustration 2, discussed above, except that here only one valuation had to be agreed on before setting the two liquidated debts against each other. Again, the parties have made the correct subtraction. If incorrect, it would not have prevented enforcement at the correct amount.

In the two above cases, if either party should sue to enforce his original unliquidated claim, the agreed liquidation would limit his recovery if set up in defense. Further, the defendant should be held to be barred from a separate suit on his own counterclaim, if he does not set it up in the action brought against him. It might be so held even if the arithmetical account was incorrect. This is solely because of procedural convenience, not because of the substantive law of contract.

A few cases for comparative study: *Swaller v. Williamson Milling Co.*, 116 Kan. 329, 226 P. 1001 (1924), *Burch, J.*; *Standard Oil Co. v. Van Etten*, 107 U.S. 325, 1 S.Ct. 178, 27 L.Ed. 319 (1882); *Rizkalla v. Abusamra*, 284 Mass. 303, 187 N.E. 602 (1933); *Dodson v. Watson*, 110 Tex. 355, 220 S.W. 771 (1920); *Hopwood Plays v. Kemper*, 263 N. Y. 380, 189 N.E. 461 (1934); *Perkins v. Hart*, 24 U.S. 237, 11 Wheat. 237, 256, 6 L.Ed. 463 (1826); *Corey v. Jaroch*, 229 Mich. 313, 200 N.W. 957 (1924); *Mayor of Scarborough v. Butler*, 3 Lev. 237 (1685).

SECTION 11.—OTHER METHODS OF DISCHARGE

The American Law Institute, Restatement of Contracts, §§ 385–453, lists a number of other methods of discharge of contractual duties that are not considered in this chapter. A statement will here be made as to some of these methods.

DISCHARGE BY ALTERATION

A party who makes a material, physical alteration in the terms of a written contract thereby discharges the duty of the other party if the alteration was made with fraudulent purpose. By the older law, even an innocent alteration might operate as a discharge. See Restatement, Contracts, §§ 434–442, for a statement of present-day rules.

DISCHARGE BY MERGER AND ADJUDICATION

A discharge of contractual duty may take place by the judgment of a court or by the award of an arbitrator; and this is true whether the judgment or the award is in favor of the party charged with being under the duty or is opposed to him. See Restatement, Contracts, §§ 443–449.

DISCHARGE IN BANKRUPTCY

A contractual duty may be discharged by decree of the federal District Court, in accordance with the provisions of the national bankruptcy statute. That complex and frequently amended law must be studied as an independent subject.

CHAPTER 10

THIRD PARTY BENEFICIARIES

LEVER v. HEYS.

In the King's Bench, 1599. Moore, K.B. 550.

The father of a girl promised the father of a son that if the latter would give his consent to their marriage and assure £40 lands to his son, that he, the father of the girl, would pay £200 to the son upon marriage. The question was whether the son himself or his father should have an action on the case *sur assumpsit* against the father of the girl if he did not pay the £200. POPHAM and FENNER thought that the son would have the right of action. CLENCH è *contra*; *absente GAWDY*.

NOTE

From very early times, both courts and law writers have been puzzled as to the effect to be given to a contract made for the benefit of a third person. The leading English writers on contract law, even in very recent times, have stated flatly that two parties can not by contract create an enforceable right in a third person who is not a party thereto. Perhaps the cases in the old courts of common law justified this statement; but the decisions in the court of Chancery certainly did not. Decisions since the Judicature Act, 1873, uniting the two systems of courts, have sometimes followed the equity rule, as the statute requires them to do; but they are far from clear in analysis and there is some direct conflict. Some of the common law cases denying a remedy to the beneficiary, where he was not related by blood to the promisee, are *Crow v. Rogers*, 1 Strange, 592 (1723); *Bourne v. Mason*, 1 Ventr. 6 (1669); *Price v. Easton*, 4 B. & Adol. 433 (1833).

In the United States the same uncertainty and conflict have existed; but there has developed a strong modern trend that is represented in Restatement, Contracts, Chapter 6, §§ 133-147. The problems involved are sufficiently complex and difficult, however, to prevent the Restatement from being easily understood or applied. The analysis and comparison of a good many cases are necessary before the working rules in the Restatement can either be made to work or subjected to intelligent criticism.

ROOKWOOD'S CASE.

In the Court of Common Pleas, 1590. Cro.Ellz. 164.

Rookwood having issue three sons, had an intent to charge his land with four pounds per annum to each of his two younger sons for their lives; but the eldest son desired him not to charge the land, and promised to pay to them duly the four pounds per annum; to which the two younger sons, being present, agreed; and he promised to them to pay it. And for non-payment after the death of the father, they brought an assumpsit.—The whole Court held clearly, that it was well brought, and that it was a good consideration; for otherwise his land had been charged with the rents.

NOTE

Compare the following questions: (1) Can a third party who is not a promisee enforce a contract that was made for his benefit? (2) Can a party to whom a promise is directly made enforce the promise, if the only consideration for it was given by a third party?

Restatement, Contracts, § 75(2), states that consideration, "may be given by the promisee or by some other person;" and the sections that immediately follow indicate that a consideration is not rendered insufficient by the fact that it is given by a person other than the promisee. When a promise is made by A directly to B in exchange for a consideration given wholly by C, the promisee B is not a "third party" beneficiary. He is the second party and, as the courts have put it, is in direct "privity" with A, the promisor. Nevertheless, B is the "beneficiary" of A's promise, the one to whom the promised performance is to be rendered. B can be called a "promisee beneficiary," though the term is not in common use. If C bargained with A for the latter's promised performance for the purpose of making a gift to B, the latter is a donee; but if C owes a debt to B and bargains for A's performance as a means of paying the debt, B is not a donee; instead, he is a creditor beneficiary, being a creditor of C whose debt will be discharged by A's performance. In Rookwood's case, *supra*, were the two younger brothers of the defendant donees or creditors?

The decision in the above case is supported by the American cases.

 ANONYMOUS.

1646. Style, 6.

J assumes and promiseth to B that if B will pay £50 to C his son, who was married to D the daughter of J at such a time, that he will pay £100 to D his daughter at such a time; B pays the £50 to C at the time appointed, J fails in payment of the £100 according as was agreed; B dies intestate, and E administers, and brings an action upon

the case against J upon this promise made to B the testator; and adjudged that the action did well lie by the administrator, though he should receive no benefit if he did recover.

QUESTIONS:

1. Since the £100 promised by J was to be given to D, in an action by B for breach of the promise that J made to him what amount should be awarded to him (or to his administrator) as damages?
2. Should B ask for a judgment for nominal damages, or should he ask for an equitable decree for the specific performance of J's promise? See Restatement, Contracts, §§ 135, 138.

NOTE

Cases can be found in which the promisee has been denied a remedy if he has no pecuniary interest in the promised performance. This may be a good reason for denying him a judgment for substantial damages; it is not a good reason for denying him all remedy for the enforcement of a promise made to him, one for which he gave the consideration.

In creditor beneficiary cases, the promisee has a financial interest in the discharge of his own obligation by the performance promised him, and he can maintain suit for breach. See Restatement, Contracts, § 136(b); *Meyer v. Hartman*, 72 Ill. 442 (1874); *Baldwin v. Emery*, 89 Me. 496, 36 A. 994 (1897).

DUTTON ex ux. v. POOLE.

In the King's Bench, 1677. 2 Lev. 210.

Assumpsit, and declares that the father of the plaintiff's wife being seized of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, £1,000, and avers that the father at his request forbore, but the defendant had not paid the £1,000. After verdict for the plaintiff upon non assumpsit, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her. Also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as *Yelv. Rippon v. Norton*, *Hawes v. Leader*, *Starky v. Milner*, 1 Roll. 31, 32, Sty. 296, and a case lately resolved in *Com.Banc. inter Norris & Pine, intrat. Hill. 22 and 23 Car.*

2, 1538, where the case was, "If you will marry me, I will pay your children so much," and the action being brought by the children, adjudged it lay not. On the other side it was said, if a man deliver goods or money to H. to deliver or pay to B., B. may have an action, because he is to have the benefit of the bailment, so here the daughter is to have the benefit of the promise. So if a man should say, "Give me a horse, I will give your son £10," the son may bring the action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children, for which cause affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration and in the promise, and the son had a benefit by this agreement, for by this means he hath the wood and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited 1 Roll.Ab. 31, *Oldman v. Bateman*, and *ibid.* 32; *Starky v. Meade*. Upon the first argument Wylde and Jones, JJ., seemed to think that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise or consideration. Twysden and Rainsford seemed contra, and afterwards two new judges being made, *scil.* Scroggs, C. J., in lieu of Rainsford, and Dolben in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs, C. J., said that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children, and he and Jones remembered the case of *Norris & Pine*, and that it was adjudged as aforesaid. But Scroggs said he was then and still is of opinion contrary to that judgment. Dolben, J., concurred with him that the daughter might bring the action, Jones & Wylde *hæsitabant*. But next day they also agreed to the opinion of the Chief Justice and Dolben, and so judgment was given for the plaintiff, for the son hath the benefit by having the wood, and the daughter hath lost her portion by this means. And now Jones said he must confess he was never well satisfied with the judgment in *Norris & Pine's Case*, but being it was resolved, he was loth to give his opinion so suddenly against it. And note upon this judgment error was immediately brought, and Trin. 31 Car. 2 it was affirmed in the Exchequer Chamber.

QUESTION:

Is there some theory of public policy that justifies enforcement in favor of a third party beneficiary who is related by blood or marriage to the promisee that is not applicable to others?

NOTE

In the American cases, relationship by blood or marriage has occasionally been given some weight in justifying a judgment in favor of a third party beneficiary. The existence of such a relationship may cause a court to strain the facts and to hold that the third party was also a promisee or that the promisee made the contract as his agent. See *Gardner v. Denison*, post; *De Cicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807 (1917), ante, Chapter 2.

In the following cases such relationship caused the court to hold that the promisee owed the beneficiary a legal or an equitable duty when in fact there was none: *Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724, 44 L.R.A. 170, 70 Am.St.Rep. 454 (1899); *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639, 2 A.L.R. 1187 (1918), post.

Restatement, Contracts, § 135, recognizes an enforceable right in a donee beneficiary, without regard to blood relationship.

TWEDDLE v. ATKINSON.

In the Court of Queen's Bench, 1861. 1 Best & S. 393.

The declaration stated that the plaintiff was the son of John Tweddle, deceased, and before the making of the agreement hereafter mentioned, married the daughter of William Guy, deceased; and before the said marriage of the plaintiff the said William Guy, in consideration of the then intended marriage, promised the plaintiff to give to his said daughter a marriage portion, but the said promise was verbal, and at the time of the making of the said agreement had not been performed; and before the said marriage the said John Tweddle, in consideration of the said intended marriage, also verbally promised to give the plaintiff a marriage portion, which promise at the time of the making of the said agreement had not been performed. It then alleged that after the marriage and in the lifetime of the said William Guy, and of the said John Tweddle, they, the said William Guy and John Tweddle, entering into the agreement hereafter mentioned as a mode of giving effect to their said verbal promises; and the said William Guy also entering into the said agreement in order to provide for his said daughter a marriage portion, and to procure a further provision to be made by the said John Tweddle, by means of the said agreement, for his said daughter, and acting for the benefit of his said daughter; and the said John Tweddle also entering into the said agreement in order to provide for the plaintiff a marriage portion, and to procure a further provision to be made by the said William Guy by means of the said agreement, for the plaintiff, and acting for the benefit of the plaintiff; they the said William Guy and John Tweddle

made and entered into an agreement in writing in the words following—that is to say:

“High Coniscliffe, July 11, 1855.

“Memorandum of an agreement made this day between William Guy, of, etc., of the one part, and John Tweddle, of, etc., of the other part. Whereas it is mutually agreed that the said William Guy shall and will pay the sum of £200 to William Tweddle, his son-in-law; and the said John Tweddle, father to the aforesaid William Tweddle, shall and will pay the sum of £100 to the said William Tweddle, each and severally the said sums on or before August 21st, 1855. And it is hereby further agreed by the aforesaid William Guy and the said John Tweddle that the said William Tweddle has full power to sue the said parties in any court of law or equity for the aforesaid sums hereby promised and specified.”

And the plaintiff says that afterward and before this suit, he and his said wife, who is still living, ratified and assented to the said agreement, and that he is the William Tweddle therein mentioned. And the plaintiff says that the said August 21st, 1855, A. D., elapsed, and all things have been done and happened necessary to entitle the plaintiff to have the said sum of £200 paid by the said William Guy or his executor, yet neither the said William Guy nor his executor has paid the same, and the same is in arrear and unpaid, contrary to the said agreement.

Demurrer and joinder therein.

WIGHTMAN, J. Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if he stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of those cases is that cited in *Bourne v. Mason*, 1 Vent. 6, in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit.

CROMPTON, J. It is admitted that the plaintiff cannot succeed unless this case is an exception to the modern and well-established doctrine of the action of assumpsit. At the time when the cases which have been cited were decided the action of assumpsit was treated as an action of trespass upon the case, and therefore in the nature of a tort; and the law was not settled, as it now is, that natural love and affection is not a sufficient consideration for a promise upon which an action may be maintained; nor was it settled that the promisee cannot

bring an action unless the consideration for the promise moved from him. The modern cases have, in effect, overruled the old decisions; they show that the consideration must move from the party entitled to sue upon the contract. It would be a monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, and not a party to it for the purpose of being sued. It is said that the father in the present case was agent for the son in making the contract, but that argument ought also to make the son liable upon it. I am prepared to overrule the old decisions, and to hold that, by reason of the principles which now govern the action of assumpsit, the present action is not maintainable.

BLACKBURN, J. The earlier part of the declaration shows a contract which might be sued on, except for the enactment in § 4 of the Statute of Frauds, 29 Car. 2, ch. 3. The declaration then sets out a new contract, and the only point is whether, that contract being for the benefit of the children, they can sue upon it. Mellish admits that in general no action can be maintained upon a promise, unless the consideration moves from the party to whom it is made. But he says that there is an exception—namely, that when the consideration moves from a father, and the contract is for the benefit of his son, the natural love and affection between the father and son gives the son the right to sue as if the consideration had proceeded from himself. And *Dutton and Wife v. Poole*, 2 Lev. 210; 1 Ventr. 318 was cited for this. We cannot overrule a decision of the Exchequer Chamber, but there is a distinct ground on which that case cannot be supported. The cases upon Stat. 27 El. ch. 4, which have decided that, by § 2, voluntary gifts by settlement after marriage are void against subsequent purchasers for value, and are not saved by § 4, show that natural love and affection are not a sufficient consideration whereon an action of assumpsit may be founded.

Judgment for the defendant.

NOTE

For a review of the English cases, at common law, in equity, and since the joinder of the two courts, see Corbin, "Contracts for the Benefit of Third Persons", 46 Law Q.Rev. 12 (1930). It appears that there are many English cases, and some in the United States, holding that the beneficiary has a remedy on the contract because the promisee acted as a "trustee" for him in making it. See *Tomlinson v. Gill, Ambler*, 330 (1756), before Hardwicke, L. C.; *Lloyds v. Harper* (C.A.) 16 Ch.D. 290 (1880); *School Dist. of Kansas City ex rel. Koken Iron Works v. Livers*, 147 Mo. 580, 49 S.W. 507 (1899); *Forbes v. Thorpe*, 209 Mass. 570, 95 N.E. 955 (1911).

Two cases in the House of Lords cannot reasonably be reconciled. *Dunlop Tyre Co. v. Selfridge*, [1915] A.C. 847; *Les Affreteurs v. Walford*, [1919] A.C. 801. In the former case, the "trustee" device was not thought of. The latter case ought to be followed.

LAWRENCE v. FOX.

Court of Appeals of New York, 1859. 20 N.Y. 268.

Appeal from the Superior Court of the City of Buffalo. On the trial before Mr. Justice Masten, it appeared by the evidence of a bystander that one Holly, in November, 1857, at the request of the defendant, loaned and advanced to him \$300, stating at the time that he owed the sum to the plaintiff for money borrowed of him, and had agreed to pay it to him the then next day; that the defendant, in consideration thereof, at the time of receiving the money, promised to pay it to the plaintiff the then next day. Upon this state of facts the defendant moved for a nonsuit, upon three several grounds, viz.: That there was no proof tending to show that Holly was indebted to the plaintiff, that the agreement by the defendant with Holly to pay the plaintiff was void for want of consideration, and that there was no privity between the plaintiff and defendant. The court overruled the motion, and the counsel for the defendant excepted. The cause was then submitted to the jury, and they found a verdict for the plaintiff for the amount of the loan and interest, \$344.66, upon which judgment was entered, from which the defendant appealed to the Superior Court, at General Term, where the judgment was affirmed, and the defendant appealed to this court. The cause was submitted on printed arguments.

H. GRAY, J. The first objection raised on the trial amounts to this: That the evidence of the person present, who heard the declarations of Holly giving directions as to the payment of the money he was then advancing to the defendant, was mere hearsay and, therefore, not competent. Had the plaintiff sued Holly for this sum of money no objection to the competency of this evidence would have been thought of; and if the defendant had performed his promise by paying the sum loaned to him to the plaintiff, and Holly had afterward sued him for its recovery, and this evidence had been offered by the defendant, it would doubtless have been received without an objection from any source. All the defendant had the right to demand in this case was evidence which, as between Holly and the plaintiff, was competent to establish the relation between them of debtor and creditor. For that purpose the evidence was clearly competent; it covered the whole ground and warranted the verdict of the jury.

But it is claimed that notwithstanding this promise was established by competent evidence, it was void for the want of consideration. It is now more than a quarter of a century since it was settled by the supreme court of this state—in an able and painstaking opinion by the late Chief Justice Savage, in which the authorities were fully examined and carefully analyzed—that a promise in all material respects like the one under consideration was valid; and the judgment of that

court was unanimously affirmed by the court for the correction of errors. *Farley v. Cleveland*, 4 Cow. 432, 15 Am.Dec. 387; s. c. in error, 9 Cow. 639. In that case one Moon owed Farley and sold to Cleveland a quantity of hay, in consideration of which Cleveland promised to pay Moon's debt to Farley; and the decision in favor of Farley's right to recover was placed upon the ground that the hay received by Cleveland from Moon was a valid consideration for Cleveland's promise to pay Farley, and that the subsisting liability of Moon to pay Farley was no objection to the recovery. The fact that the money advanced by Holly to the defendant was a loan to him for a day, and that it thereby became the property of the defendant, seemed to impress the defendant's counsel with the idea that because the defendant's promise was not a trust fund placed by the plaintiff in the defendant's hands, out of which he was to realize money as from the sale of a chattel or the collection of a debt, the promise although made for the benefit of the plaintiff could not inure to his benefit. The hay which Cleveland bought of Moon was not to be paid to Farley, but the debt incurred by Cleveland for the purchase of the hay, like the debt incurred by the defendant for money borrowed, was what was to be paid.

That case has been often referred to by the courts of this state, and has never been doubted as sound authority for the principle upheld by it. *Barker v. Bucklin*, 2 Denio, 45, 43 Am.Dec. 726; *Canal Co. v. Westchester County Bank*, 4 Denio, 97. It puts to rest the objection that the defendant's promise was void for want of consideration. The report of that case shows that the promise was not only made to Moon but to the plaintiff Farley. In this case the promise was made to Holly and not expressly to the plaintiff; and this difference between the two cases presents the question, raised by the defendant's objection, as to the want of privity between the plaintiff and defendant. As early as 1806 it was announced by the supreme court of this state, upon what was then regarded as the settled law of England, "That where one person makes a promise to another for the benefit of a third person, that third person may maintain an action upon it." *Schemerhorn v. Vanderheyden*, 1 Johns. 140, 3 Am.Dec. 304, has often been reasserted by our courts and never departed from. * * *

[The court here included a review of *Arnold v. Lyman*, 17 Mass. 400, 9 Am.Dec. 154 (1821); *Hall v. Marston*, 17 Mass. 575 (1822); *Brewer v. Dyer*, 7 Cush. (Mass.) 337 (1851); and *Mellen v. Whipple*, 1 Gray (Mass.) 317 (1854).]

But it is urged that because the defendant was not in any sense a trustee of the property of Holly for the benefit of the plaintiff, the law will not imply a promise. I agree that many of the cases where a promise was implied were cases of trusts, created for the benefit of the promisor. The case of *Felton v. Dickinson*, 10 Mass. 287, and others that might be cited are of that class; but concede them all to have

been cases of trusts, and it proves nothing against the application of the rule to this case. The duty of the trustee to pay the cestui que trust, according to the terms of the trust, implies his promise to the latter to do so. In this case the defendant, upon ample consideration received from Holly, promised Holly to pay his debt to the plaintiff; the consideration received and the promise to Holly made it as plainly his duty to pay the plaintiff as if the money had been remitted to him for that purpose, and as well implied a promise to do so as if he had been made a trustee of property to be converted into cash with which to pay. The fact that a breach of the duty imposed in the one case may be visited, and justly, with more serious consequences than in the other, by no means disproves the payment to be a duty in both. The principle illustrated by the example so frequently quoted (which concisely states the case in hand) "that a promise made to one for the benefit of another, he for whose benefit it is made may bring an action for its breach," has been applied to trust cases, not because it was exclusively applicable to those cases, but because it was a principle of law, and as such applicable to those cases.

It was also insisted that Holly could have discharged the defendant from his promise, though it was intended by both parties for the benefit of the plaintiff, and, therefore, the plaintiff was not entitled to maintain this suit for the recovery of a demand over which he had no control. It is enough that Holly did not release the defendant from his promise, and whether he could or not is a question not now necessarily involved; but if it was, I think it would be found difficult to maintain the right of Holly to discharge a judgment recovered by the plaintiff upon confession or otherwise, for the breach of the defendant's promise; and if he could not, how could he discharge the suit before judgment, or the promise before suit, made as it was for the plaintiff's benefit and in accordance with legal presumption accepted by him (*Berly v. Taylor*, 5 Hill, 577-584 et seq.), until his dissent was shown?

The cases cited and especially that of *Farley v. Cleveland*, established the validity of a parol promise; it stands then upon the footing of a written one. Suppose the defendant had given his note in which for value received of Holly, he had promised to pay the plaintiff and the plaintiff had accepted the promise, retaining Holly's liability. Very clearly Holly could not have discharged that promise, be the right to release the defendant as it may. No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; nor can it be doubted that whatever may be the diversity of opinion elsewhere, the adjudications in this state, from a very early period, approved by experience, have established the defendant's liability; if, therefore, it could be shown that a more strict and technically accurate application of the rules applied, would lead to a different result (which I by no

means concede), the effort should not be made in the face of manifest justice.

The judgment should be affirmed.

JOHNSON, C. J., and DENIO, J., based their judgment upon the ground that the promise was to be regarded as made to the plaintiff through the medium of his agent, whose action he could ratify when it came to his knowledge, though taken without his being privy thereto.

COMSTOCK, J. (dissenting). The plaintiff had nothing to do with the promise on which he brought this action. It was not made to him, nor did the consideration proceed from him. If he can maintain the suit, it is because an anomaly has found its way into the law on this subject. In general, there must be privity of contract. The party who sues upon a promise must be the promisee, or he must have some legal interest in the undertaking. In this case, it is plain that Holly, who loaned the money to the defendant, and to whom the promise in question was made, could at any time have claimed that it should be performed to himself personally. He had lent the money to the defendant, and at the same time directed the latter to pay the sum to the plaintiff. This direction he could countermand, and if he had done so, manifestly the defendant's promise to pay according to the direction would have ceased to exist. The plaintiff would receive a benefit by a complete execution of the arrangement, but the arrangement itself was between other parties, and was under their exclusive control. If the defendant had paid the money to Holly, his debt would have been discharged thereby. So Holly might have released the demand or assigned it to another person, or the parties might have annulled the promise now in question, and designated some other creditor of Holly as the party to whom the money should be paid. It has never been claimed that in a case thus situated the right of a third person to sue upon the promise rested on any sound principle of law. We are to inquire whether the rule has been so established by positive authority. * * *

The cases in which some trust was involved are also frequently referred to as authority for the doctrine now in question, but they do not sustain it. If A. delivers money or property to B., which the latter accepts upon a trust for the benefit of C., the latter can enforce the trust by an appropriate action for that purpose. *Berly v. Taylor*, 5 Hill. 577. If the trust be of money, I think the beneficiary may assent to it and bring the action for money had and received to his use. If it be of something else than money, the trustee must account for it according to the terms of the trust, and upon principles of equity. There is some authority even for saying that an express promise founded on the possession of a trust fund may be enforced by an action at law in the name of the beneficiary, although it was made to the creator

of the trust. Thus, in Comyn, Dig. "Action on the Case upon Assumpsit," B. 15, it is laid down that if a man promise a pig of lead to A., and his executor give lead to make a pig to B., who assumes to deliver it to A., an assumpsit lies by A. against him. The case of Delaware & H. Canal Co. v. Westchester County Bank, 4 Denio, 97, involved a trust because the defendants had received from a third party a bill of exchange under an agreement that they would endeavor to collect it, and would pay over the proceeds when collected to the plaintiffs. A fund received under such an agreement does not belong to the person who receives it. He must account for it specifically; and perhaps there is no gross violation of principle in permitting the equitable owner of it to sue upon an express promise to pay it over. Having a specific interest in the thing, the undertaking to account for it may be regarded as in some sense made with him through the author of the trust. But further than this we cannot go without violating plain rules of law. In the case before us there was nothing in the nature of a trust or agency. The defendant borrowed the money of Holly and received it as his own. The plaintiff had no right in the fund, legal or equitable. The promise to repay the money created an obligation in favor of the lender to whom it was made and not in favor of any one else. • • •

The judgment of the court below should, therefore, be reversed, and a new trial granted.

GROVER, J., also dissented.

Judgment affirmed.

QUESTIONS:

1. Did Holly make the contract with Fox with intent to confer a benefit on Lawrence? Is it material whether he did or not?
2. Did Holly make this contract acting as an agent or trustee for Lawrence?
3. If Lawrence fails to collect his judgment against Fox, can he get another judgment against Holly?
4. If Holly pays his own debt to Lawrence, what can he do to Fox?
5. Did Fox receive the \$300 as a trust fund for Lawrence? Does he have any other "assets" that "belong" to Lawrence?
6. If Holly becomes insolvent, do his other creditors have a right that the \$300 shall be paid by Fox into the general assets to be shared by all?
7. Is Lawrence's right against Fox "legal" or "equitable"? (Before 1859, New York had by statute merged its courts of common law and chancery.)
8. After Lawrence learns of Fox's promise to pay him, does Holly have power to release Fox?

9. Is Lawrence's right against Fox "derived from," or one that he gets "by subrogation to," Holly's right against Fox, so that if Holly's right is later barred or discharged (Statute of Limitations, Bankruptcy, etc.) Lawrence's right will likewise be barred or discharged?

NOTE

The above questions may look like puzzles; and they are what they look like. But they have all "puzzled" lawyers and judges and writers; and they are likely to do so again. There is need to read the cases that follow (and still others) before a confident answer is made. Restatement, Contracts, §§ 136-147, contains clues indicating how other persons have answered them.

Many hundreds of decisions are in harmony with the decision above; but for a number of years the New York courts wavered in their support of it and in several instances declared that they would not extend it to any case not on all fours with its facts. See *Seaver v. Ransom and Vrooman v. Turner*, *infra*. In other jurisdictions there have been some decisions in conflict with *Lawrence v. Fox*, especially in Massachusetts and Michigan. In these two states, the creditor beneficiary would better assert his claim in the language of the old court of Chancery.

The following cases recur frequently and have generally been decided in harmony with *Lawrence v. Fox*: (1) A dealer sells his business, stock in trade, accounts receivable, or other property, and the buyer undertakes to pay the seller's debts, the parties to whom the debts are due not always being specifically identified.

(2) A business partnership takes in a new partner who promises the old partners to pay a share of the previous debts.

(3) The owner of mortgaged property insures the buildings, the insurer promising in the policy to pay the mortgagee "as his interest may appear." On destruction of the buildings, the mortgagee claims the insurance money to the extent of the unpaid mortgage debt.

NATIONAL BANK v. GRAND LODGE.

Supreme Court of the United States, 1878. 98 U.S. 123, 25 L.Ed. 75.

This is an action by the Second National Bank of St. Louis, Mo., against the Grand Lodge of Missouri of Free and Accepted Ancient Masons, to compel the payment of certain coupons formerly attached to bonds issued in June, 1869, by the Masonic Hall Association, a corporation existing under the laws of the State of Missouri, in relation to which bonds the Grand Lodge, October 14th, 1869, adopted the following resolution:

"Resolved, That this Grand Lodge assume the payment of the \$200,000 bonds, issued by the Masonic Hall Association, provided that stock is issued to the Grand Lodge by said association to the amount of said

assumption of payment by this Grand Lodge as the said bonds are paid."

The Court below instructed the jury that independently of the question of the power of the Grand Lodge to pass the resolution, it was no foundation for the present action, and directed a verdict for the defendant.

The jury returned a verdict in accordance with the direction of the Court, and judgment having been entered thereon, the plaintiff sued out this writ of error.

STRONG, J. It is unnecessary to consider the several assignments of error in detail, for there is an insurmountable difficulty in the way of the plaintiff's recovery. The resolution of the Grand Lodge was but a proposition made to the Masonic Hall Association, and, when accepted, the resolution and acceptance constituted at most only an executory contract *inter partes*. It was a contract made for the benefit of the association and of the Grand Lodge—made that the latter might acquire the ownership of stock of the former, and that the former might obtain relief from its liabilities. The holders of the bonds were not parties to it, and there was no privity between them and the lodge. They may have had an indirect interest in the performance of the undertakings of the parties, as they would have in an agreement by which the lodge should undertake to lend money to the association, or contract to buy its stock to enable it to pay its debts; but that is a very different thing from the privity necessary to enable them to enforce the contract by suits in their own names. We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of *assumpsit*. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands or under his control which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises from the possession of the assets, than on the express promise. Another exception is where the plaintiff is the beneficiary solely interested in the promise, as where one person contracts with another to pay money or deliver some valuable thing to a third. But where a debt already exists from one person to another, a promise by a third person to pay such debt being primarily for the benefit of the original debtor, and to relieve him from liability to pay it (there being no novation), he has a right of action against the promisor for his own indemnity; and if the original creditor can also sue, the promisor

would be liable to two separate actions, and therefore the rule is that the original creditor cannot sue. His case is not an exception from the general rule that privity of contract is required. There are some other exceptions recognized, but they are unimportant now. The plaintiff's case is within none of them. Nor is he sole beneficiary of the contract between the association and the Grand Lodge. The contract was made, as we have said, for the benefit of the association, and if enforceable at all, is enforceable by it. That the several bondholders of the association are not in a situation to sue upon it is apparent on its face. Even as between the association and the Grand Lodge, the latter was not bound to pay anything except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. The resolution of the lodge was to assume the payment of the \$200,000 bonds, issued by the association, "Provided, that stock is issued to the Grand Lodge by said association to the amount of said assumption," * * * "as said bonds are paid." Certainly the obligation of the lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the association to deliver it. If they can sue upon the contract, and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the lodge is compelled to pay whether it gets the stock or not. To this it cannot be presumed the lodge would ever have agreed. It is manifest, therefore, that the bondholders of the association are not in such privity with the lodge, and have no such interest in the contract as to warrant their bringing suit in their own names.

Hence the present action cannot be sustained, and the Circuit Court correctly directed a verdict for the defendant.

Judgment affirmed.

NOTE

A third party gets no enforceable right unless the contracting parties made a valid contract; and if the defendant's promise was either expressly or constructively conditional, the third party must show that the condition has occurred or has been excused.

For a review of the decisions in the federal courts, see article by Corbin in 39 *Yale L.Jour.* 601 (1930).

SEAVER v. RANSOM et al.

Court of Appeals of New York, 1918.
224 N.Y. 233, 120 N.E. 639, 2 A.L.R. 1187.

Action by Marion E. Seaver against Matt C. Ransom and another, as executors, etc., of Samuel A. Beman, deceased. From a judgment of the Appellate Division (180 App.Div. 734, 168 N.Y.S. 454), affirming judgment for plaintiff, defendants appeal. Affirmed.

POUND, J. Judge Beman and his wife were advanced in years. Mrs. Beman was about to die. She had a small estate, consisting of a house and lot in Malone and little else. Judge Beman drew his wife's will according to her instructions. It gave \$1,000 to plaintiff, \$500 to one sister, plaintiff's mother, and \$100 each to another sister and her son, the use of the house to her husband for life, and remainder to the American Society for the Prevention of Cruelty to Animals. She named her husband as residuary legatee and executor. Plaintiff was her niece, 34 years old in ill health sometimes a member of the Beman household. When the will was read to Mrs. Beman, she said that it was not as she wanted it. She wanted to leave the house to plaintiff. She had no other objection to the will, but her strength was waning, and, although the judge offered to write another will for her, she said she was afraid she would not hold out long enough to enable her to sign it. So the judge said, if she would sign the will, he would leave plaintiff enough in his will to make up the difference. He avouched the promise by his uplifted hand with all solemnity and his wife then executed the will. When he came to die, it was found that his will made no provision for the plaintiff.

This action was brought, and plaintiff recovered judgment in the trial court, on the theory that Beman had obtained property from his wife and induced her to execute the will in the form prepared by him by his promise to give plaintiff \$6,000, the value of the house, and that thereby equity impressed his property with a trust in favor of plaintiff. Where a legatee promises the testator that he will use property given him by the will for a particular purpose, a trust arises. *O'Hara v. Dudley*, 95 N.Y. 403, 47 Am.Rep. 53; *Trustees of Amherst College v. Ritch*, 151 N.Y. 282, 45 N.E. 876, 37 L.R.A. 305; *Ahrens v. Jones*, 169 N.Y. 555, 62 N.E. 666, 88 Am.St.Rep. 620. Beman received nothing under his wife's will but the use of the house in Malone for life. Equity compels the application of property thus obtained to the purpose of the testator, but equity cannot so impress a trust, except on property obtained by the promise. Beman was bound by his promise, but no property was bound by it; no trust in plaintiff's favor can be spelled out.

An action on the contract for damages, or to make the executors trustees for performance, stands on different ground. *Farmers' Loan & Trust Co. v. Mortimer*, 219 N.Y. 290, 294, 295, 114 N.E. 389, Ann. Cas.1918E, 1159. The Appellate Division properly passed to the consideration of the question whether the judgment could stand upon the promise made to the wife, upon a valid consideration, for the sole benefit of plaintiff. The judgment of the trial court was affirmed by a return to the general doctrine laid down in the great case of *Lawrence v. Fox*, 20 N.Y. 268, which has since been limited as herein indicated.

Contracts for the benefit of third persons have been the prolific source of judicial and academic discussion. Williston, *Contracts for the Benefit of a Third Person*, 15 *Harvard Law Review*, 767; Corbin, *Contracts for the Benefit of Third Persons*, 27 *Yale Law Journal*, 1008. The general rule, both in law and equity (*Phalen v. United States Trust Co.*, 186 N.Y. 178, 186, 78 N.E. 943, 7 L.R.A.,N.S., 734, 9 Ann.Cas. 595), was that privity between a plaintiff and a defendant is necessary to the maintenance of an action on the contract. The consideration must be furnished by the party to whom the promise was made. The contract cannot be enforced against the third party, and therefore it cannot be enforced by him. On the other hand, the right of the beneficiary to sue on a contract made expressly for his benefit has been fully recognized in many American jurisdictions, either by judicial decision or by legislation, and is said to be "the prevailing rule in this country." *Hendrick v. Lindsay*, 93 U.S. 143, 23 L.Ed. 855; *Lehow v. Simon-ton*, 3 Colo. 346. It has been said that "the establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety." Brantly on *Contracts* (2d Ed.) p. 253. The reasons for this view are that it is just and practical to permit the person for whose benefit the contract is made to enforce it against one whose duty it is to pay. Other jurisdictions still adhere to the present English rule (7 *Halsbury's Laws of England*, 342, 343; *Jenks' Digest of English Civil Law*, § 229) that a contract cannot be enforced by or against a person who is not a party (*Exchange Bank v. Rice*, 107 Mass. 37, 9 Am.Rep. 1). But see, also, *Forbes v. Thorpe*, 209 Mass. 570, 95 N.E. 955; *Gardner v. Denison*, 217 Mass. 492, 105 N.E. 359, 51 L.R.A.,N.S., 1108.

In New York the right of the beneficiary to sue on contracts made for his benefit is not clearly or simply defined. It is at present confined: First. To cases where there is a pecuniary obligation running from the promisee to the beneficiary, "a legal right founded upon some obligation of the promisee in the third party to adopt and claim the promise as made for his benefit." *Farley v. Cleveland*, 4 Cow. 432, 15 Am.Dec. 387; *Lawrence v. Fox*, supra; *Garnsey v. Rogers*, 47 N. Y. 233, 7 Am.Rep. 440; *Vrooman v. Turner*, 69 N.Y. 280, 25 Am. Rep. 195; *Lorillard v. Clyde*, 122 N.Y. 498, 25 N.E. 917, 10 L.R.A.

113; *Durnherr v. Rau*, 135 N.Y. 219, 32 N.E. 49; *Townsend v. Rackham*, 143 N.Y. 516, 38 N.E. 731; *Sullivan v. Sullivan*, 161 N.Y. 554, 56 N.E. 116. Secondly. To cases where the contract is made for the benefit of the wife (*Buchanan v. Tilden*, 158 N.Y. 109, 52 N.E. 724, 44 L.R.A. 170, 70 Am.St.Rep. 454; *Bouton v. Welch*, 170 N.Y. 554, 63 N.E. 539), affianced wife (*De Cicco v. Schweizer*, 221 N.Y. 431, 117 N.E. 807, L.R.A.1918E, 1004; Ann.Cas.1918C, 816), or child (*Todd v. Weber*, 95 N.Y. 181, 193, 47 Am.Rep. 20; *Matter of Kidd*, 188 N.Y. 274, 80 N.E. 924) of a party to the contract. The close relationship cases go back to the early King's Bench Case (1677), long since repudiated in England, of *Dutton v. Poole*, 2 Lev. 211. See *Schemerhorn v. Vanderheyden*, 1 Johns. 139, 3 Am.Dec. 304. The natural and moral duty of the husband or parent to provide for the future of wife or child sustains the action on the contract made for their benefit. "This is the farthest the cases in this state have gone," says Cullen, J., in the marriage settlement case of *Borland v. Welch*, 162 N.Y. 104, 110, 56 N.E. 556.

The right of the third party is also upheld in, thirdly, the public contract cases (*Little v. Banks*, 85 N.Y. 258; *Pond v. New Rochelle Water Co.*, 183 N.Y. 330, 76 N.E. 211, 1 L.R.A.,N.S., 958, 5 Ann. Cas. 504; *Smyth v. City of New York*, 203 N.Y. 106, 96 N.E. 409; *Farnsworth v. Boro Oil & Gas Co.*, 216 N.Y. 40, 48, 109 N.E. 860; *Rigney v. N. Y. C. & H. R. R. R. Co.*, 217 N.Y. 31, 111 N.E. 226; *Matter of International Ry. Co. v. Rann*, 224 N.Y. 83, 120 N.E. 153. Cf. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 33 S.Ct. 32, 57 L.Ed. 195, 42 L.R.A.,N.S., 1000), where the municipality seeks to protect its inhabitants by covenants for their benefit; and fourthly, the cases where, at the request of a party to the contract, the promise runs directly to the beneficiary although he does not furnish the consideration (*Rector, etc., v. Teed*, 120 N.Y. 583, 24 N.E. 1014; *F. N. Bank of Sing Sing v. Chalmers*, 144 N.Y. 432, 439, 39 N.E. 331; *Hamilton v. Hamilton*, 127 App.Div. 871, 875, 112 N.Y.S. 10). It may be safely said that a general rule sustaining recovery at the suit of the third party would include but few classes of cases not included in these groups, either categorically or in principle.

The desire of the childless aunt to make provision for a beloved and favorite niece differs imperceptibly in law or in equity from the moral duty of the parent to make testamentary provision for a child. The contract was made for the plaintiff's benefit. She alone is substantially damaged by its breach. The representatives of the wife's estate have no interest in enforcing it specifically. It is said in *Buchanan v. Tilden* that the common law imposes moral and legal obligations upon the husband and the parent not measured by the necessities of life. It was, however, the love and affection or the moral sense of the husband and the parent that imposed such obligations in the cases cited,

rather than any common-law duty of husband and parent to wife and child. If plaintiff had been a child of Mrs. Beman, legal obligation would have required no testamentary provision for her, yet the child could have enforced a covenant in her favor identical with the covenant of Judge Beman in this case. *De Cicco v. Schweizer*, *supra*. The constraining power of conscience is not regulated by the degree of relationship alone. The dependent or faithful niece may have a stronger claim than the affluent or unworthy son. No sensible theory of moral obligation denies arbitrarily to the former what would be conceded to the latter. We might consistently either refuse or allow the claim of both, but I cannot reconcile a decision in favor of the wife in *Buchanan v. Tilden*, based on the moral obligations arising out of near relationship, with a decision against the niece here on the ground that the relationship is too remote for equity's ken. No controlling authority depends upon so absolute a rule. In *Sullivan v. Sullivan*, *supra*, the grand-niece lost in a litigation with the aunt's estate founded on a certificate of deposit payable to the aunt "or in case of her death to her niece"; but what was said in that case of the relations of plaintiff's intestate and defendant does not control here, any more than what was said in *Durnherr v. Rau*, *supra*, on the relation of husband and wife, and the inadequacy of mere moral duty, as distinguished from legal or equitable obligation, controlled the decision in *Buchanan v. Tilden*. *Borland v. Welch*, *supra*, deals only with the rights of volunteers under a marriage settlement not made for the benefit of collaterals. Kellogg, P. J., writing for the court below well said: "The doctrine of *Lawrence v. Fox* is progressive, not retrograde. The course of the late decisions is to enlarge, not to limit, the effect of that case."

The court in that leading case attempted to adopt the general doctrine that any third person, for whose direct benefit a contract was intended, could sue on it. The headnote thus states the rule. Finch, J., in *Gifford v. Corrigan*, 117 N.Y. 257, 262, 22 N.E. 756, 6 L.R.A. 610, 15 Am.St.Rep. 508, says that the case rests upon that broad proposition; Edward T. Bartlett, J., in *Pond v. New Rochelle Water Co.*, 183 N.Y. 330, 337, 76 N.E. 211, 213, 1 L.R.A., N.S., 958, 5 Ann. Cas. 504, calls it "the general principle"; but *Vrooman v. Turner*, *supra*, confined its application to the facts on which it was decided. "In every case in which an action has been sustained," says Allen, J., "there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise." 69 N.Y. 285, 25 Am.Rep. 195. As late as *Townsend v. Rackham*, 143 N.Y. 516, 523, 38 N.E. 731, 733, we find Peckham, J., saying that, "to maintain the action by the third person, there must be this liability to him on the part of the promisee." *Buchanan v. Tilden* went further than any case since *Lawrence v. Fox* in a desire to do justice rather than to apply with technical accuracy strict rules calling for a legal or equitable obligation. In *Embler v.*

Hartford Steam Boiler Inspection & Ins. Co., 158 N.Y. 431, 53 N.E. 212, 44 L.R.A. 512, it may at least be said that a majority of the court did not avail themselves of the opportunity to concur with the views expressed by Gray, J., who wrote the dissenting opinion in *Buchanan v. Tilden*, to the effect that an employ   could not maintain an action on an insurance policy issued to the employer which covered injuries to employ  s.

In *Wright v. Glen Telephone Co.*, 48 Misc.Rep. 192, 195, 95 N.Y. S. 101, the learned presiding justice who wrote the opinion in this case said at Trial Term: "The right of a third person to recover upon a contract made by other parties for his benefit must rest upon the peculiar circumstances of each case rather than upon the law of some other case." "The case at bar is decided upon its peculiar facts." Edward T. Bartlett, J., in *Buchanan v. Tilden*.

But, on principle, a sound conclusion may be reached. If Mrs. Beman had left her husband the house on condition that he pay the plaintiff \$6,000, and he had accepted the devise, he would have become personally liable to pay the legacy, and plaintiff could have recovered in an action at law against him, whatever the value of the house. *Gridley v. Gridley*, 24 N.Y. 130; *Brown v. Knapp*, 79 N.Y. 136, 143; *Dinan v. Coneys*, 143 N.Y. 544, 547, 38 N.E. 715; *Blackmore v. White* [1899] 1 Q.B. 293, 304. That would be because the testatrix had in substance bequeathed the promise to plaintiff, and not because close relationship or moral obligation sustained the contract. The distinction between an implied promise to a testator for the benefit of a third party to pay a legacy and an unqualified promise on a valuable consideration to make provision for the third party by will is discernible, but not obvious. The tendency of American authority is to sustain the gift in all such cases and to permit the donee beneficiary to recover on the contract. *Matter of Edmundson's Estate* (1918) 259 Pa. 429, 103 A. 277, 2 A.L.R. 1150. The equities are with the plaintiff, and they may be enforced in this action, whether it be regarded as an action for damages or an action for specific performance to convert the defendants into trustees for plaintiff's benefit under the agreement.

The judgment should be affirmed, with costs.

HOGAN, CARDOZO, and CRANE, JJ., concur. HISCOCK, C. J., and COLLIN and ANDREWS, JJ., dissent.

Judgment affirmed.

QUESTIONS:

1. Was Marion Seaver a "donee" beneficiary or a "creditor" beneficiary? Is it material which she was?
2. Did Judge Beman receive property under his wife's will to be held by him in trust for Marion? Does the fact that Judge Beman's

executors hold his entire estate as trustees for the benefit of those having valid claims show that they are trustees for Marion?

NOTE

There are numberless cases holding that a donee beneficiary can maintain suit. An action on a life insurance policy can everywhere be maintained by the beneficiary in his own name. In England and Massachusetts this rule is established by statute; in other jurisdictions, by judicial action.

In *Carson Pirie Scott & Co. v. Parrett*, 346 Ill. 252, 178 N.E. 498 (1931), the court sustained a suit by a beneficiary who was not sole beneficiary, but who was also not a creditor of the promisee. A promised B to pay a debt owed by C to D. The court gave judgment to D against A, quoting and applying Restatement, Contracts, §§ 133(1a), 135. There is a good discussion of "intent to benefit."

BAURER v. DEVENIS et al.

Supreme Court of Errors of Connecticut, 1923. 99 Conn. 203, 121 A. 566.

Suit by Regina Baurer against Peter M. Devenis and others for the foreclosure of a mortgage made by Devenis to Bagdan and by him assigned to the plaintiff, brought to the superior court for New Haven county, where Devenis and Tarulis, a subsequent mortgagee, filed a special defense, to which a demurrer was sustained, and the cause thereafter tried to the court, and judgment rendered in favor of the plaintiff, and appeal by defendants for error in sustaining the demurrer. Error, judgment set aside, and cause remanded, with direction to overrule the demurrer.

WHEELER, C. J. The complaint alleges these facts: The defendant Devenis on January 27, 1919, gave to one Anna Bagdan his promissory note for \$1,000, and secured the same by a mortgage of even date. Mrs. Bagdan assigned the note and mortgage to William Bagdan on January 15, 1921, and on December 17, 1921, he assigned the same to the plaintiff, Regina Baurer. The defendant Devenis failed to pay, upon demand, the interest due on the note or the principal, the note being conditioned upon the payment of the principal on demand. The defendant Tarulis claims to have a mortgage bearing date October 29, 1921, upon the same premises. The defendant Devenis is still the owner, and in possession, of these premises.

The defendants in their answer admit all the allegations of the complaint except that alleging the default of Devenis, and plead a special defense admitting the making of the note and mortgage to Anna Bagdan by Devenis as alleged in the complaint, and the assignment by her to William Bagdan, and allege that Bagdan assigned the note on De-

cember 17, 1921, to the plaintiff for \$800, and that the note and mortgage were reasonably worth at that time \$1,000, and accrued interest. The defendants further allege that the assignment of the note and mortgage by Bagdan was "on condition that the assignee do not demand payment of the note from the defendants, or either of them, for a period of one year," and that this was agreed to by the plaintiff through her agent.

The plaintiff demurred to the special defense, because it did not appear that any of the defendants were party to the alleged agreement between Bagdan and the plaintiff, and that any breach of the agreement between Bagdan and the plaintiff could not be determined in this action. * * *

The condition of the contract of assignment upon which the defendants rely is the provision by which the promisor, who is the assignee of the mortgage note, agrees that he will not demand payment of this note for a period of one year from the date of assignment, December 17, 1921. This condition is a part of the contract of assignment, and, so far as appears in the allegations, is made for the direct, sole, and exclusive benefit of the defendants. The promisee of the contract has no pecuniary interest in the enforcement of this condition. That the condition is only one of several promises contained in the contract, and the only one for the benefit of these defendants, does not bar them from its enforcement. Williston on Contracts, vol. 1, § 346. Its character indicates that it was the intention of the promisee to benefit the defendants by giving them a longer time in which to pay the note. The promisor accepted the assignment with this condition a part of it.

Most state courts, as well as the federal courts, permit the third party to maintain his action against the promisor upon a contract for his benefit, whether the promisee retain a pecuniary interest in the promise to him or not. Connecticut is classed with Massachusetts, Michigan, and England, which deny to third parties this right, except in certain specified cases. The disposition of the present case requires a re-examination of our law upon this subject, and, while serving the purposes of this case, it will also tend to remove some of the erroneous impression which exists concerning the law of our state upon this subject.

The present action is an equitable one, and the special defense based upon the third party's right is as available for the defendants as an action by the plaintiff based upon such a right. Our first inquiry is whether or not such a right exists in equity in this jurisdiction. We confine our examination to the period beginning with the year 1881. In *Meech v. Ensign*, 49 Conn. 191, 44 Am.Rep. 225, we held that an action could not be maintained by a mortgagee against the purchaser of an equity of redemption who had as a part of the consideration of his purchase agreed to pay the mortgage debt. A subsequent statute

gave this remedy. The opinion cites several exceptions to the general rule it announced. Among these it says:

"There may also be cases in which a third party may have some peculiar equity in the subject matter of a contract which will enable him to maintain a bill in equity to enforce it." * * *

In each one of the cases which deny to the third party an action at law the court has been careful to point out the equitable remedy which we now hold to be open to a third party. We thus find a remedy in equity long approved of by our court, under which the third party has his action against the promisor to a contract, by which he engages with the promisee to render some performance to the third party. Neither want of privity nor lack of consideration will avail as a defense to such an action. In the equitable action in the instant case the defendants were entitled to have their special defense heard upon its merits, and the demurrer was improperly sustained. [The court here discussed *Baxter v. Camp*, 71 Conn. 245, 41 A. 803 (disapproving it) and several other cases.]

Cases where a corporation or a partnership has assumed the debts of an individual, a partnership, or a corporation do not give the creditor whose debt has been assumed an action at law. The parties are numerous and priority ought not to be accorded to any of these creditors. They should all be treated alike. That can be best done in a court of equity with its more elastic procedure. For this reason we regard the rule applied in *Morgan v. Randolph & Clowes Co.*, 73 Conn. 396, 47 A. 658, 51 L.R.A. 653, *Lamkin v. Baldwin & Lamkin Co.*, 72 Conn. 57, 62, 43 A. 593, 1042, 44 L.R.A. 786, and *Barber v. International Co. of Mexico*, 73 Conn. 589, 595, 48 A. 758, as sound, and as furnishing the remedy best adapted to such a situation.

An action by a third party will be sustained in law where he is the sole beneficiary. Where he is one of a number of creditors of the promisee and the promisor has agreed with the promisee to pay, the action cannot be maintained at law, but can be in equity. Where he is a single creditor of the promisee and the promisor has agreed with the promisee to pay this creditor, the action at law may be maintained provided there be present, not only the benefit to the third party, but also the intent of the parties to the contract that he should be benefited by the contract. Lack of privity or of consideration will not prevent the action at law under these circumstances. These exceptions to the general rule that a third party cannot maintain an action at law, upon an engagement of performance by a promisor to a promisee, for the benefit of the third party, practically include the several classes of actions by a creditor beneficiary. To all such, a want of privity with and of consideration from the third party will not avail as a defense to his action. Nor can the injustice of possibly permitting two actions against a promisor be allowed the consideration heretofore given it. It was

optional with the promisor whether he should engage in this performance for the third party. Having voluntarily so agreed, it is no hardship to require him to fulfil his agreement. The opportunity is his to avoid, not only two actions, but any action, by carrying out his agreement.

Under our law all courts administer legal and equitable rights and apply legal and equitable remedies. General Statutes, § 5554. And equitable principles prevail over legal. General Statutes, § 5554; *Pierce v. Staub*, 78 Conn. 459, 466, 62 A. 760, 3 L.R.A., N.S., 785, 112 Am.St.Rep. 163; *Baldwin v. Wolff*, 82 Conn. 559, 562, 74 A. 948. Our Practice Act disregards the technical formalities of common-law pleading and follows in the main the practice in equity. *Botsford v. Wallace*, 72 Conn. 195, 199, 44 A. 10; *Ludington v. Merrill*, 81 Conn. 400, 402, 71 A. 504. Complaints may include both legal and equitable rights and causes of action, and demand both legal and equitable remedies. While, under our rules, additional parties may be summoned in (section 189), and the prayer for relief amended from legal to equitable relief, and vice versa (section 248), under such a practice the rules of law should so far as possible apply alike in proceedings for equitable or legal relief. Unless there be numerous parties or conflicting interests, we can see no sound reason why the third party to a contract made for and intended by the parties for his benefit should not maintain his action, whether the relief demanded is legal or equitable. In beneficiary cases where the parties to the action are three, the promisee, the promisor, and the third party, our procedure is such that the interests of all can be protected as well in one court as the other.

There is error, the judgment is set aside, and the case remanded, with direction to the superior court to overrule the demurrer to the special defense.

In this opinion the other judges concurred.

QUESTIONS:

1. Did Baurer's promise to Bagdan create in Peter Devenis an enforceable right, or a privilege not to pay, or both?
2. Did the contract operate as a "temporary suspension of Peter's legal duty?"
3. Was Peter a "donee" beneficiary or a "creditor" beneficiary?

NOTE

Since the above decision the Connecticut courts have recognized and enforced the rights of third party beneficiaries in a series of decisions, bringing the law into substantial accord with the **Contracts Restatement**, with respect to both donees and creditors.

As the court's opinion in the above case shows, there is no need to say that any beneficiary's right is "in equity" rather than "at law." There is only one kind of Procedure, one that is as flexible as was that of the old court of Chancery; and in any action the court has power to cause every one with an interest to protect to be made a party. In any suit by the third party beneficiary, the promisee may also be joined. If the plaintiff is a creditor beneficiary and the promise sued on was to pay other creditors as well as the plaintiff, they too may be made parties. In some cases their rights might be no more than to procure a pro rata distribution of a fund; but as against one who has promised to pay a number of claims, each claimant can usually maintain his own action for a separate judgment.

SMITH et al. v. THOMPSON et al.

Supreme Court of Michigan, 1930.

250 Mich. 302, 230 N.W. 156, 73 A.L.R. 1389.

Bill in equity by Sarah E. Smith and others against Harry F. Thompson and others. Decree for plaintiffs, and defendant James Frederick Smith, a minor, by Helen R. Fader, his guardian ad litem, appeals.

Affirmed.

SHARPE, J. James W. Smith and Hattie Smith, his wife, each made a will on March 2, 1926. In his will he left his entire estate to his wife. He also provided that, in case she should predecease him, one-third of his estate should pass in equal shares to his mother and his three sisters, naming them, and to the two sisters and a niece of his wife, naming them. Hattie Smith, the wife, in her will left her entire estate to her husband. Then followed the same provisions as in his will for the distribution of one-third of her estate in the event that her husband predeceased her.

James W. Smith died at the city of Detroit on October 17, 1926. He left an estate said to be of the value of about one million dollars. He was then 46 years of age, and his wife one year younger. His will was duly admitted to probate and administration had thereunder.

On June 29, 1927, the widow, Hattie Smith, made another will, revoking the former one, and making a different distribution of her property. She made no provision therein for the mother of her deceased husband, but left each of his sisters, named in his will and hers, the sum of \$10,000. Hattie Smith died on January 8, 1928, and a petition for its probate was filed in the probate court by the executors named therein. Pending the hearing, plaintiffs, the mother and sisters of James W. Smith, filed the bill of complaint herein, alleging that the making of the wills executed on March 2, 1926, was pursuant to an agreement that both the husband and wife should make identical wills,

and praying for its specific performance. The hearing in the probate court was temporarily enjoined.

The proofs were taken in open court. The trial court found that the oral contract entered into between the husband and wife as to the bequests to the plaintiffs provided for in their wills was valid and enforceable, and directed the payment thereof out of the estate of Hattie Smith. From the decree entered, James Frederick Smith, an adopted son of James W. and Hattie Smith, who is yet a minor, by his guardian ad litem, has taken an appeal.

The two questions are presented:

1. Was the alleged contract established?
2. If so, may it be enforced in a court of equity?

1. The Contract.

The trial court filed an opinion in which he stated: "Without attempting a review of the evidence presented I may say that in my opinion there is abundant proof to sustain plaintiffs' contention that James W. Smith and Hattie Smith, his wife, agreed with each other to make wills which would leave a third of the estate of the survivor in equal portions to seven relatives, four of whom were the mother and three sisters of the husband and the other three, a niece and two sisters of the wife."

A reading of the testimony also satisfies us that such an agreement was made. The purpose sought to be accomplished tends strongly to support this claim. Mr. Smith was an only son. His mother, left a widow when he was a small boy, had endured much hardship in rearing him and his sisters, and when he first engaged in the trucking business she advanced the money with which he purchased his first truck. He appreciated her kindness and assistance. It was but natural that he should want to provide for her old age when making his will. The provision made for her in both wills would be inoperative unless his wife had bound herself by agreement with him that hers should not be changed in the event that she survived him.

2. Its Validity.

It is conceded that none of the plaintiffs were present at the time the contract was made. The question presented is whether, when made for their benefit, they may enforce its provisions against the estate of the wife. The contract was a mutual agreement on the part of both husband and wife that certain relatives of both should be provided for in their wills. Each of them had an interest in its performance as affecting those who were near and dear to them. The undertaking of each to perform was a sufficient consideration for the promise of the other. That it was oral does not affect its enforcement.

Bird v. Pope, 73 Mich. 483, 490, 41 N.W. 514. The breach of it by the one cannot but operate as a fraud upon the other. The husband continued to rely upon the contract, and at his death all of his property passed to his wife under his will. While by mutual consent the contract might have been abrogated during the lifetime of the husband, at his death, it became an irrevocable obligation on the part of the wife. It is urged that it may not be enforced by the plaintiffs because they were not parties to it.

Such contracts have been the source of much discussion by courts and text-book writers. While there has been, and is now, some difference of opinion in the courts of this country as to whether such a promise is enforceable in a court of law, the great weight of authority sustains the right of enforcement in a court of equity. The authorities are collected and commented on in the annotations appearing in 2 A. L.R. 1200 and 33 A.L.R. 741. In *Doyle v. Fischer*, 183 Wis. 599, 198 N.W. 763, 765, reported in 33 A.L.R. 733, the rule is thus stated on page 736: "Where an agreement is entered into by two persons, and especially by husband and wife, to make mutual and reciprocal wills disposing of their separate estates pursuant to their mutual agreement, and where mutual and reciprocal wills are made in accordance with that agreement, and where, after the death of one of the agreeing parties, the other takes under the will and accepts the benefits of said agreement, equity will enforce specific performance of said oral agreement and prevent the perpetration of fraud which would result from a breach of the agreement on the part of the one accepting the benefits thereof."

Counsel for the appellant do not discuss these authorities, but rely upon the holdings of this court to maintain their contention. They call attention to the case of *Knights of the Modern Maccabees v. Sharp*, 163 Mich. 449, 128 N.W. 786, 788, 33 L.R.A., N.S., 780, in which it was sought to enforce a mutual agreement between a husband and wife that neither would ever change the beneficiaries in their life insurance policies, and in which no consideration for the promise moved to them from the beneficiaries, and wherein this court said that: "Unless some legal interest in the performance of the promise vested in the children [the beneficiaries] when the promise of the father was made, such interest never vested." And further: "The rule, contracts creating trusts aside, is the same whether such enforcement is attempted at law or in equity." * * *

The injustice of the rule stated in the Maccabee Case, we think, soon became apparent to this court. In *Preston v. Preston*, first reported in 205 Mich. 646, 172 N.W. 371, a daughter, who was blind, sought to enforce an oral agreement, entered into between her father and mother, whereby the father agreed that, in consideration of the mother's releasing her dower and homestead rights in a farm, the deed to

the premises to be received in exchange therefor should convey to them a life estate with remainder over to the daughter. It was at first held that the daughter might have relief under the provisions of section 12361, 3 Comp.Laws 1915; but, on rehearing in 207 Mich. 681, 175 N.W. 266, it was said that, owing to a doubt in the minds of some of the justices as to the applicability of the statute, the decision might be rested on other grounds. After referring to the holding in the Maccabee Case and in *Palmer v. Bray*, 136 Mich. 85, 98 N.W. 849, and quoting from the latter that the promise there made was in effect one made to the children, it was held that the presence of the daughter made her a party to the contract and rendered it enforceable by her. [The court here discussed several other cases in which the contract was enforced in a suit by the beneficiary, finding an artificial "privity" in the fact that the beneficiary was "present" when the contract was made, although in one case he was only seven years old and in another was a three weeks old baby.]

No case involving more appealing equities has been presented than that here under consideration. The wills made by the husband and wife clearly indicate the nature of the contract they had entered into and the purpose of each to care for the relatives named on the death of the survivor of them. The husband, seeking to protect the declining years of his aged mother, would surely have made no such will, had he not felt certain that the contract was binding upon his wife and enforceable against her estate. In our opinion it should be enforced. The Maccabee Case should no longer be held to be a correct exposition of the law of this state relating to such contracts, and it is here definitely overruled.

It may not be inappropriate to add the following from Brantly on Contracts (2d Ed.) 253, quoted in *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639, 640, 2 A.L.R. 1187: "The establishment of this doctrine has been gradual, and is a victory of practical utility over theory, of equity over technical subtlety."

The decree is affirmed, with costs to appellees.

GARDNER v. DENISON.

Supreme Judicial Court of Massachusetts, 1914.
217 Mass. 492, 105 N.E. 359, 51 L.R.A., N.S., 1108.

Action by Edward Gerrish Gardner, by next friend, against Arthur W. Denison, administrator. Directed verdict for defendant, and plaintiff brings exceptions. Exceptions sustained.

RUGG, C. J. The facts upon which the plaintiff seeks to recover are these: His father, who was on friendly terms with the defendant's

testator, Edward Gerrish, told the latter, in November, 1900, that the birth of a child was expected in his family. Mr. Gerrish, after several interviews, promised that if a boy should be born and named for him, Edward Gerrish Gardner, he would make some provision for the child. When the child was born, on January 1, 1901, he was named for the defendant's testator. On January 23, 1901, the plaintiff's father, at the request of Mr. Gerrish, wrote at the latter's dictation the following:

"Jan. 23, 1901.

"I, Edward Gerrish, promise to place in trust for Joseph A. Gardner's youngest son, born Jan. 1, 1901, \$10,000, for naming his son after me.
Edward Gerrish Gardner."

No specific sum of money had been mentioned before. Mr. Gerrish then signed the paper in the presence of the plaintiff's father, who since has had the possession and control of it. Mr. Gerrish later lived in the family of the plaintiff's father and showed special attention to the child, bestowing many gifts upon him and constantly referring to him as "my boy." He died in 1906 at the age of 64 years, leaving an estate of more than \$200,000, never having made any provision for the benefit of the plaintiff.

The privilege of naming a child is a valid consideration for a promise to pay money. The child had a direct and immediate interest in his name and is more affected by it than any one else. He loses the opportunity of receiving a more advantageous name, and is compelled to bear whatever detriment may flow from the name imposed upon him. The consideration moves in part from the child, although he is not in a position personally to yield an assent to the promise at the time it is made. It is a general rule that one who is not a party to a contract cannot bring an action on it even though it be made to his benefit. But the circumstances of the parties respecting the naming of a child are so peculiar, the nearness of the relation so great, and the obligation resting on the father and mother so important, and the consequence to the child so vital, that the inference may be drawn that the father is acting in the interests of and as agent for the son in making any contract as to giving him a name. *Felton v. Dickinson*, 10 Mass. 287, as interpreted by *Marston v. Bigelow*, 150 Mass. 45, 53, 22 N.E. 71, 5 L.R.A. 43. It was said in *Eaton v. Libbey*, 165 Mass. 218, at 220, 42 N.E. 1127, 52 Am.St.Rep. 511, respecting the naming of a child: "The right of the parents is one which they have as the natural guardians of the child, and they may be presumed to act in the matter for its interest. If, for exercising the right in a particular manner, they receive a reward which they recognize and treat as belonging to the child, it should be considered as its property, even if the parents could have kept the reward as their own."

This action is brought in the name of the son by his father as next friend. That is a relinquishment of the father's personal rights, as far as they ever might have been antagonistic to the son, and is equivalent to an assertion that whatever he did was done as agent for the son. The writing signed by the plaintiff, while inartificially expressed, in substance is a declaration by the defendant's testator that he acknowledges himself indebted in the sum of \$10,000 for the privilege granted him of having the plaintiff bear his name. The words "in trust" in the absence of any definition of the terms of any trust may be treated as meaning nothing more than the expression of a general purpose that the promise was for the benefit of the plain. ff. No promisee being named in the instrument, all the attendant conditions may be examined for the purpose of determining to whom in fact the promise to pay was made. Such resort to extrinsic circumstances is not for the purpose of changing the writing, but applying it to its proper object. *Way v. Greer*, 196 Mass. 237, 81 N.E. 1002; *Willett v. Smith*, 214 Mass. 494, 497, 101 N.E. 1058, and cases cited. Under all the circumstances we are of opinion that the plaintiff was entitled to go to the jury.

Exceptions sustained.

NOTE

As to the rights of third party beneficiaries in general, Massachusetts decisions have varied. At first, the general rule seemed to be that they could sue at law. Later this rule seemed to be almost totally abandoned. In recent cases, the third person has sometimes won by the use of fiction or by using the terminology and procedure of equity. The following cases will show this development: *Felton v. Dickinson*, 10 Mass. 287 (1813), sole beneficiary and blood relation; *Arnold v. Lyman*, 17 Mass. 400, 9 Am. Dec. 154 (1821); *Hall v. Marston*, 17 Mass. 575 (1822); *Fitch v. Chandler*, 4 Cush. (Mass.) 254 (1849); *Brewer v. Dyer*, 7 Cush. (Mass.) 337 (1851), "the law, operating on the act of the parties, creates the duty, establishes the privity, and implies the promise and obligation".

The court began to shift its position in *Mellen v. Whipple*, 1 Gray (Mass.) 317 (1854). Since then, in a series of cases, easily followed in the digests, it has drawn distinctions based on the differences between common law and equity. See *Borden v. Boardman*, 157 Mass. 410, 32 N.E. 469 (1892); *Palmer S. Bank v. Insurance Co. of N.A.*, 166 Mass. 189, 44 N.E. 211 (1896); *Forbes v. Thorpe*, 209 Mass. 570, 95 N.E. 955 (1911); *Collins Mfg. Co. v. Wickwire Spencer Steel Co.*, 14 F.2d 871 (1926 D.C.). The decision in *Gardner v. Denison*, *supra*, is followed in the similar case of *Green v. Green*, 298 Mass. 19, 9 N.E.2d 413 (1937), using the theory that the promisee had contracted as an agent for her four year old son.

Mass.St.1894, c. 225, gives a remedy to the beneficiary of an insurance policy. *Attorney General v. Supreme Council American Legion of Honor*, 206 Mass. 158, 92 N.E. 136 (1910).

Another statute gives a remedy to laborers and materialmen upon a surety bond given by the general contractor in public construction con-

tracts. *Dolben v. Duncan Const. Co.*, 276 Mass. 242, 177 N.E. 105 (1931). Laborers and materialmen are refused a remedy if the bond is a nonstatutory bond in a private contract. *Central Supply Co. v. United States Fidelity & Guaranty Co.*, 273 Mass. 139, 173 N.E. 697 (1930).

THE HOME v. SELLING et al.

Supreme Court of Oregon, 1919. 91 Or. 428, 179 P. 261.

Action by The Home, a corporation, against Ben Selling and another, executors, and others. Judgment for plaintiff, and defendants appeal. Modified.

The plaintiff and the defendant Emanuel May Investment Company are corporations. Emanuel May, the individual, died during the progress of this litigation, and his personal representatives were substituted.

On November 21, 1910, George E. Jacobs and his wife gave their note to the plaintiff for \$40,000, due ten years after date, with "interest thereon quarter yearly at the rate of six per cent. per annum from date until paid." They stipulated therein that, "in case suit is instituted to collect this note or any part thereof," they would pay a reasonable attorney's fee to be determined in the suit. At the same time they gave their mortgage to the plaintiff on certain real property in Portland, Or., and "covenanted and agreed to pay all sums of money, the principal and interest, specified in said promissory note at the time therein designated." On February 25, 1913, they conveyed the premises to Emanuel May by deed duly executed, containing a statement to the effect that the property was subject to the mortgage mentioned, and that "the grantee herein in part consideration for this conveyance assumes payment of the \$40,000 unpaid balance of the first of said mortgages and the interest accrued and to accrue thereon." Afterwards May conveyed to the investment company by deed which referred to the premises and the mortgage and contained the following words: "And Emanuel May, the grantor above named, does covenant to and with Emanuel May Investment Company, the above-named grantee, its successors and assigns that he is lawfully seized in fee simple of the above-granted premises, that the above-granted premises are free from all incumbrances except the following mortgages, which are as a part of the purchase price, assumed by Emanuel May Investment Company. * * * Mortgage of \$40,000.00 in favor of The Home, a corporation, on the north half of lot 6 and the south half of lot 7, block 2, city of Portland."

This action was brought against Emanuel May, the grantee of Jacobs and his wife and against the investment company, May's grantee, to recover the interest on the note from November 21, 1915, to

February 21, 1917, amounting to \$3,000, and the plaintiff claims \$300 as a reasonable attorney's fee. A demurrer to the complaint * * * was overruled. [The defendants then pleaded that they had never made any contract with the plaintiff and that they had offered to convey the mortgaged premises to him.] The court sustained a demurrer to each of these further and separate defenses.

The action was then tried, resulting in findings of fact substantially as stated, with the addition that the court found that \$200 is a reasonable sum to be allowed as attorney's fee in the circuit court for the collection of the interest, and the sum of \$75 to be a reasonable amount to be allowed as attorney's fee in the Supreme Court, and rendered judgment against the defendants, the investment company directly, and the others in their respective capacities, for \$3,000 and for the attorney's fees as indicated above. The defendants appeal.

BURNETT, J. (after stating the facts as above). One of the principal questions to be determined is whether or not the defendants contracted to pay the mortgage, and whether the mortgagee can maintain an action directly against them.

According to the decisions in this state, where one accepts a deed which not only recites the mortgage, but adds that the grantee assumes it, he becomes personally liable to pay the mortgage. *Miles v. Miles*, 6 Or. 266, 269, 25 Am.Rep. 522; *Walker v. Goldsmith*, 7 Or. 161, 181; *Haas v. Dudley*, 30 Or. 355, 48 P. 168; *Farmers' National Bank v. Gates*, 33 Or. 388, 54 P. 205, 72 Am.St.Rep. 724; *Hoffman v. Habighorst*, 49 Or. 379, 391, 89 P. 952, 91 P. 20. It is plain, therefore, that the acceptance of the deeds mentioned, containing the clauses already quoted, made May and the investment company personally liable to pay the mortgage debt.

The original general rule was that one who is not a party to a contract cannot bring an action on it in a court of law, although he might be benefited by its fulfilment. The leading case cited by the defendants is *Keller v. Ashford*, 133 U.S. 610, 10 S.Ct. 494, 33 L.Ed. 667. * * * [In this case the right of a mortgagee beneficiary was declared to be based on and controlled by a theory of "subrogation."]

In later cases, notably *Willard v. Wood*, 135 U.S. 309, 10 S.Ct. 831, 34 L.Ed. 210, the principle was applied that the law of the forum governed the remedy, and that as the litigation in that suit was commenced in the District of Columbia the remedy would be in equity, although in New York, where the contract was made, an action at law would lie by the mortgagee against the grantee in such instances. Afterwards, in *Union Life Insurance Co. v. Hanford*, 143 U.S. 187, 190, 12 S.Ct. 437, 36 L.Ed. 118, the court recognized the condition that in various states the law, based upon the decisions of the local courts,

was that an action could be maintained under such circumstances, and that it was not necessary to resort to equity to enforce the right mentioned. It was applied to the contention there in the following manner: Under the law of Illinois, a mortgagee could sue the grantee directly at law. The corollary to this proposition was that the grantee became the principal debtor and the mortgagor from whom he had received the title was the surety, so that when the mortgagee extended the time in which the grantee might pay the debt, it released the mortgagor, who stood as a surety only. We draw from these decisions, cited by the defendants here, this doctrine, that when the grantee of a mortgagor agrees to pay the mortgage, a right at once arises in favor of the mortgagee, and that it is enforceable according to the remedy afforded by the *lex fori*. The effect of the law of the place on the remedy is discussed in *Gibson v. Victor Talking Machine Co.* (D.C.) 232 F. 225.

Oregon precedents are numerous to the effect that, on a contract properly made for the benefit of a third person, he can bring an action directly against the promisor. * * *

The present case comes within the doctrine thus announced, which, we think, is well settled by the authorities. The stipulation to pay the mortgage was for the benefit of the holder thereof, directly. There was a privity between the mortgagor, who is the promisee, and the holder of the mortgage, resulting from that instrument. There was an obligation from the original mortgagor to the mortgagee to pay; hence when the mortgagor conveyed his property to May, who assumed the mortgage, at once an obligation arose which, under our precedents, considering the *lex fori*, could be enforced by an action at law. * * *

One reason given by the courts which refuse to enforce such an obligation except in equity is that the immediate parties to the agreement could annul the same, but that matter is controlled by this doctrine, that such a contract cannot be rescinded by the parties thereto after it has been acted upon or accepted by the third party. *Davis v. Calloway*, 30 Ind. 112, 95 Am.Dec. 671; *Dodge v. Moss*, 82 Ky. 441; *Pecquet v. Pecquet*, 17 La. Ann. 204; *Mitchell v. Cooley*, 5 Rob. (La.) 240; *Gifford v. Corrigan*, 117 N.Y. 257, 22 N.E. 756, 6 L.R.A. 610, 15 Am.St.Rep. 508; *Putney v. Farnham*, 27 Wis. 187, 9 Am.Dec. 459.

Bringing an action by the mortgagee on the contract for his benefit is an acceptance thereof by him. *Taylor v. Ingersoll*, 18 Colo.App. 272, 71 P. 398; *McCoy v. McCoy*, 32 Ind.App. 38, 69 N.E. 193, 102 Am.St.Rep. 223; *Motley v. Manufacturers' Insurance Co.*, 29 Me. 337, 50 Am.Dec. 591; *Warren v. Batchelder*, 16 N.H. 580; *Zwietusch v. Becker*, 153 Wis. 213, 140 N.W. 1056; *Gilbert Paper Co. v. Whitling Paper Co.*, 123 Wis. 472, 102 N.W. 20. If the rescission of the con-

tract by Jacobs had been mooted here, it is foreclosed by the institution of this action, which makes it impossible now to abrogate it without the consent of the plaintiff. * * *

The second defense, to the effect that neither May nor the investment company ever entered into any contract or agreement with the plaintiff to pay it any sum of money whatever, is sham, in the legal sense, because, as the record discloses, the acceptance of the deed drawn in the form stated amounts to a contract to pay the mortgage to the holder thereof. Again, the offer pleaded in the third separate answer to convey to the plaintiff the property in satisfaction of the deed cannot be sustained as a defense, because that is not according to the terms of the contract. The agreement is for payment, which means the delivery of money to the payee in discharge of the debt. The plaintiff cannot be compelled to accept the land in satisfaction of its claim, any more than it could be required to accept municipal bonds or a band of cattle. The demurrer to these three separate defenses was properly sustained. * * *

In assuming the payment of the mortgage the covenant therein as distinguished from the separate personal note was the measure of the grantee's duty. The obligation assumed by him must be construed according to its terms, and is not to be enlarged beyond them. The present grantees did not agree to respond directly to the conditions of the note, but only to the mortgage, which latter instrument does not directly bind them to pay more than the principal and interest of the note; hence the attorney's fee must be laid out of the case, although the note itself is quoted in the complaint. * * *

On the authority of *Hicks v. Hamilton*, 144 Mo. 495, 46 S.W. 432, 66 Am.St.Rep. 431, the contention is made that the investment company is a remote grantee, and as such is not liable here. In that case the mortgagor conveyed his land merely "subject to the mortgage," without requiring his grantee to assume or pay the incumbrance. The latter in turn deeded the tract to another by an indenture which required that grantee to "assume and pay the mortgage." Thus the continuity of personal liability was interrupted so that its chain did not unite the original mortgagee with the ultimate grantee, and for this reason it was held that the latter was not directly liable to the former. The case at bar is different because the clause assuming and agreeing to pay the mortgage is common to both successive conveyances, which constitutes an unbroken sequence of personal liability from the original mortgagors down to the last grantee. Of course there can be but one satisfaction of the demand, although both grantees are liable.

The result is that the judgment is modified by allowing the plaintiff to recover from the defendants the sum of \$3,000, without any attorney's fees.

VROOMAN v. TURNER.

Court of Appeals of New York, 1877. 69 N.Y. 280, 25 Am.Rep. 195.

This was an action to foreclose a mortgage.

The mortgage was executed in August, 1873, by defendant Evans, who then owned the mortgaged premises. He conveyed the same to one Mitchell, and through various mesne conveyances the title came to one Sanborn. In none of these conveyances did the grantee assume to pay the mortgage. Sanborn conveyed the same to defendant Harriet B. Turner, by deed which contained a clause stating that the conveyance was subject to the mortgage, "which mortgage the party hereto of the second part hereby covenants and agrees to pay off and discharge, the same forming part of the consideration thereof."

The referee found that said grantee, by so assuming payment of the mortgage, became personally liable therefor, and directed judgment against her for any deficiency. Judgment was entered accordingly.

ALLEN, J. The precise question presented by the appeal in this action has been twice before the courts of this State, and received the same solution in each. It first arose in *King v. Whitely*, 10 Paige, 465, decided in 1843. There the grantor of an equity of redemption in mortgaged premises, neither legally nor equitably interested in the payment of the bond and mortgage except so far as the same were a charge upon his interest in the lands, conveyed the lands subject to the mortgage, and the conveyance recited that the grantees therein assumed the mortgage, and were to pay off the same as a part of the consideration of such conveyance, and it was held that as the grantor in that conveyance was not personally liable to the holder of the mortgage to pay the same, the grantees were not liable to the holder of such mortgage for the deficiency upon a foreclosure and sale of the mortgaged premises. It was conceded by the chancellor that if the grantor had been personally liable to the holder of the mortgage for the payment of the mortgage debt, the holder of such mortgage would have been entitled in equity to the benefit of the agreement recited in such conveyance, to pay off the mortgage and to a decree over against the grantees for the deficiency. This would have been in accordance with a well-established rule in equity, which gives to the creditor the right of subrogation to and the benefit of any security held by a surety for the reinforcement of the principal debt, and in the case supposed, and by force of the agreement recited in the conveyance, the grantee would have become the principal debtor, and the grantor would be a quasi surety for the payment of the mortgage debt. *Halsey v. Reed*, 9 Paige, 446; *Curtis v. Tyler*, 9 Paige, 432; *Burr v. Beers*, 24 N.Y. 178, 80 Am.Dec. 327. *King v. Whitely* was followed, and the same rule applied by an undivided court in *Trotter v. Hughes*, 12 N.Y. 74, 62 Am.Dec. 137, and

the same case was cited with approval in *Garnsey v. Rogers*, 47 N.Y. 233, 7 Am.Rep. 440.

The clause in the conveyance in *Trotter v. Hughes* was not in terms precisely like that in *King v. Whitely*, or in the grant under consideration. The undertaking by the grantees to pay the mortgage debt as recited, was not in express terms or as explicit as in the other conveyances. But the recital was, I think, sufficient to justify the inference of a promise to pay the debt, and so it must have been regarded by the Court. The case was not distinguished by the Court in any of its circumstances from *King v. Whitely*, but was supposed to be on all fours with and governed by it. Had the grantor in that case been personally bound for the payment of the debt, I am of the opinion that an action would have been sustained against the grantee upon a promise implied from the terms of the grant accepted by him to pay it and indemnify the grantor. It must have been so regarded by this Court, otherwise no question would have been made upon it, and the Court would not have so seriously and ably fortified and applied the doctrine of *King v. Whitely*. A single suggestion that there was no undertaking by the grantee and no personal liability for the payment of the debt assumed by him, would have disposed of the claim to charge him for the deficiency upon the sale of the mortgaged premises. The rule which exempts the grantee of mortgaged premises subject to a mortgage, the payment of which is assumed in consideration of the conveyance as between him and his grantor, from liability to the holder of the mortgage when the grantor is not bound in law or equity for the payment of the mortgage, is founded in reason and principle, and is not inconsistent with that class of cases in which it has been held that a promise to one for the benefit of a third party may avail to give an action directly to the latter against the promisor, of which *Lawrence v. Fox*, 20 N.Y. 268, is a prominent example. To give a third party who may derive a benefit from the performance of the promise an action, there must be, first, an intent by the promisee to secure some benefit to the third party; and, second, some privity between the two, the promisee and the party to be benefited, and some obligation or duty owing from the former to the latter which would give him a legal or equitable claim to the benefit of the promise or an equivalent from him personally.

It is true there need be no privity between the promisor and the party claiming the benefit of the undertaking, neither is it necessary that the latter should be privy to the consideration of the promise, but it does not follow that a mere volunteer can avail himself of it. A legal obligation or duty of the promisee to him will so connect him with the transaction as to be a substitute for any privity with the promisor, or the consideration of the promise, the obligation of the promisee furnishing an evidence of the intent of the latter to benefit him, and cre-

ating a privity by substitution with the promisor. A mere stranger cannot intervene and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties by which he has a legal interest in the performance of the agreement.

It is said in *Garnsey v. Rogers*, 47 N.Y. 233, 7 Am.Rep. 440, that it is not every promise made by one person to another from the performance of which a third person would derive a benefit that gives a right of action to such third person, he being privy neither to the contract nor the consideration. In the language of Rapallo, J., "to entitle him to an action, the contract must have been made for his benefit. He must be the party intended to be benefited." See, also, *Turk v. Ridge*, 41 N.Y. 201, and *Merrill v. Green*, 55 N.Y. 270, in which, under similar agreements, third parties sought to maintain an action upon engagements by the performance of which they would be benefited, but to which they were not parties and failed. The courts are not inclined to extend the doctrine of *Lawrence v. Fox* to cases not clearly within the principle of that decision. Judges have differed as to the principle upon which *Lawrence v. Fox* and kindred cases rest, but in every case in which an action has been sustained there has been a debt or duty owing by the promisee to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent for the third party, who by bringing his action adopts his acts, or upon the doctrine of a trust the promisor being regarded as having received money or other thing for the third party is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit.

In *Lawrence v. Fox* a prominent question was made in limine, whether the debt from Holly to the plaintiff was sufficiently proved by the confession of Holly made at the time of the loan of the money to the defendant. It was assumed that if there was no debt proved the action would not lie, and the declaration of Holly the debtor was held sufficient evidence of the debt. Gray, J., said "All the defendant had the right to demand in this case was evidence which as between Holly and the plaintiff was competent to establish the relation between them of debtor and creditor." In *Burr v. Beers*, 24 N.Y. 178, 80 Am.Dec. 327, and *Thorp v. Keokuk Coal Co.*, 48 N.Y. 253, the grantor of the defendant was personally liable to pay the mortgage to the plaintiff, and the cases were therefore clearly within the principle of *Lawrence v. Fox*, *Halsey v. Reed*, and *Curtis v. Tyler*, *supra*. See also *Bosworth, J.*, *Doolittle v. Naylor*, 15 N.Y.Super.Ct. 225; and *Ford v. David*, 14 N.Y.Super.Ct. 569. It is claimed that *King v. Whitely* and the cases following it were overruled by *Lawrence v. Fox*. But it is very clear that it was not the intention to overrule them, and that

the cases are not inconsistent. The doctrine of *Lawrence v. Fox*, although questioned and criticised, was not first adopted in this State by the decision of that case. It was expressly adjudged as early as 1825 in *Farley v. Cleveland*, 4 Cow. 432, 15 Am.Dec. 387, affirmed in the Court for the correction of errors in 1827, per totam curiam, and reported in *Cleveland v. Farley*, 9 Cow. 639. The chancellor was not ignorant of these decisions when he decided *King v. Whitely*, nor was Denio, J., and his associates unaware of them when *Trotter v. Hughes* was decided, and Gray, J., in *Lawrence v. Fox* says the case of *Farley v. Cleveland* had never been doubted.

The Court below erred in giving judgment against the appellant for the deficiency after the sale of the mortgaged premises, and so much of the judgment as directs her to pay the same must be reversed with costs.

All concur except EARL, J., dissenting.

Judgment accordingly.

NOTE

This case has also been cited with approval in many cases holding that no action lies in favor of a citizen against a water company on the latter's contract with a municipality to supply water to citizens. These cases are collected and discussed in 19 *Yale L.Jour.* 425 (1910).

Cases in conflict with this decision are the more numerous. Among them are *Schneider v. Ferrigno*, 110 Conn. 86, 147 A. 303 (1929); *McDonald v. Finseth*, 32 N.D. 400, 155 N.W. 863, L.R.A.1916D, 149 (1915); *Casselman's Adm'x v. Gordon & Lightfoot*, 118 Va. 553, 88 S.E. 58 (1916); *Title Guaranty & Trust Co. v. Bushnell*, 143 Tenn. 681, 228 S.W. 699, 12 A.L.R. 1512 (1921).

A decision in accord with *Vrooman v. Turner* is *Fry v. Ausman*, 29 S.D. 30, 135 N.W. 708, 39 L.R.A.,N.S., 150, Ann.Cas.1914C, 842 (1912), collecting the cases.

The vendor, not being himself personally bound to pay the mortgage debt, has very little reason to cause the purchaser to assume a personal obligation to pay it. Sometimes the personal promise to pay may be included merely because it is in a form of deed in common use. If included by mistake a court will order its cancellation.

BYRAM LUMBER & SUPPLY CO. v. PAGE et al.

Supreme Court of Errors of Connecticut, 1929. 109 Conn. 256, 146 A. 293.

Action by the Byram Lumber & Supply Company against Mary Zehnder Page and others to foreclose a mechanic's lien and recover on a contractor's bond. On trial to the court there was judgment for plaintiff, and defendant *Ætna Casualty & Surety Company* appeals. No error.

MALTBIE, J. George H. Warhurst, Incorporated, was general contractor for the construction of a dwelling at Greenwich for one of the defendants in this action, Mary Zehnder Page. On July 12, 1927, the Warhurst corporation, as principal, and the defendant surety company, as surety, executed a bond in favor of the defendant Page to assure the performance of the provisions of the contract. The condition of this bond runs as follows: "Now therefore, the Condition of this Obligation is such that if the Principal shall faithfully perform the Contract on his part, and satisfy all claims and demands, incurred for the same, and shall fully indemnify and save harmless the Owner from all cost and damage which he may suffer by reason of failure so to do, and shall fully reimburse and repay the owner all outlay and expense which the Owner may incur in making good any such default, and shall pay all persons who have contracts directly with the Principal for labor or materials, then this obligation shall be null and void; otherwise it shall remain in full force and effect."

Subsequent to the execution of the bond the plaintiff entered into a contract with the Warhurst corporation to furnish materials for the building, and thereafter did furnish such materials to a considerable amount. Before the plaintiff entered into its contract with the Warhurst corporation it was informed that there was a bond on the job, but it never saw the bond or knew its terms. On October 1, 1927, the Warhurst corporation abandoned its contract, and the defendant Page thereafter completed it, at a cost in excess of the contract price, and was reimbursed by the defendant surety company for this excess cost. The plaintiff has not been paid for the materials it furnished. It duly notified the defendant Page of its intention to claim a mechanic's lien upon the premises, and did lodge with the town clerk at Greenwich a proper certificate of lien. By its complaint in this action it seeks in its first count a foreclosure of this lien, but the trial court's conclusion that nothing was secured by the lien stands unquestioned, and this count may be disregarded. In the second count it seeks to recover the value of the materials furnished by it from the defendant surety company, relying upon the condition of the bond we have quoted, and particularly upon the clause reading as follows: "and shall pay all persons who have contracts directly with the principal for labor or materials." From a judgment in favor of the plaintiff, the surety company has appealed.

In *Baurer v. Devenis*, 99 Conn. 203, 121 A. 566, we re-examined our prior decisions upon the subject and definitely settled it as the law of this state that a third party for whose benefit a provision has been inserted in a contract may sue thereon. *Dresser & Son, Inc., v. Insurance Companies*, 101 Conn. 626, 646, 126 A. 912; *Tuttle v. Jockmus*, 106 Conn. 683, 693, 138 A. 804; *Levy v. Daniels U-Drive Auto Renting Co., Inc.*, 108 Conn. 333, 338, 143 A. 163. In *Baurer v. Devenis* we

recognized that the intent which must exist on the part of the parties to the contract in order to permit the third party to sue was not a desire or purpose to confer a particular benefit upon him, but an intent that the promisor should assume a direct obligation to him. Thus we said (page 212 of 99 Conn. [121 A. 569]): "If the parties to the contract did intend to confer upon the third person a right against the promisor, or the promisor intended by such agreement to assume a legal obligation to the third person, these would be indicative of the intent of the parties to benefit the third person. Where the third person knew of the agreement of the promisor, or under the contract he was to be informed of it, it must be found that the parties to the contract did intend to benefit him." That it is in this sense of an intent to create a direct obligation to the third party that we spoke of the intended benefit to him, rather than in the sense of a desire to advance his interests, becomes apparent when we consider our decision in the Daniels Case, *supra*; for there, having held that the provisions of a statute making any person renting or leasing a motor vehicle to another liable for the damage caused by it became a part of the contract of hiring, we upheld the right of an injured person to sue upon the ground that the provision so read into the contract was one for his benefit within the rule we are considering; and surely it would be a far cry to attribute to the person leasing the motor vehicle a purpose or desire to confer a benefit upon one injured by its operation. This view accords with that adopted by the American Law Institute, where the right of a donee beneficiary to enforce a provision in a contract is recognized "if it appears from the terms of the promise in view of the surrounding circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary." Amer.Law Institute Restatement, Contracts, §§ 133, 135. The Institute also states, in accordance with our ruling in the Daniels Case, *supra*, that the beneficiary need not be identified at the time the promise is made. Amer.Law Institute Restatement, Contracts, § 139.

The question then is, Does it appear from the terms of the bond viewed in the light of surrounding circumstances that the purpose of the promisee, that is, the defendant Page, was to bestow upon those who had or should thereafter have contracts directly with the Warhurst corporation for labor and materials to be used in the construction of the building a right to proceed directly against the surety upon the bond? In the first place we attach little significance to the fact that the provision here in question is stated in the "condition" of a bond. "An enforceable agreement may be contained in that part of a bond called the condition." *New Britain v. New Britain Telephone Co.*, 74 Conn. 326, 329, 50 A. 881, 883. Of a provision contained in the condi-

tion of a bond we said in *Tomlinson v. Ousatonie Water Co.*, 44 Conn. 99, 104: "We think that, taking into consideration the relation of the parties, and the surrounding circumstances to which we have alluded, this clause was intended to create, and did create, an independent, original obligation on the part of the defendant; that is, independent of the rest of the agreement, and original, inasmuch as an obligation of this character had not been previously entered into in writing". If then the provision in the bond we are considering was intended to create an enforceable obligation in those occupying such a relation as did the plaintiff to the principal contractor, that it is contained in the condition is not of consequence. See *Corbin*, 28 Yale Law Journal, pp. 9, 13.

The question of the right of subcontractors, materialmen, and workmen to recover against the surety in bonds of the general nature of the one before us has been the subject-matter of considerable litigation, and different conclusions have been reached. [Cases pro and con were here cited.] The subject has been recently discussed in a very illuminating way by Professor Corbin. 38 Yale Law Journal, 1. The only case we have come upon in which the precise condition before us has been construed is *Hartford Accident & Indemnity Co. v. W. & J. Knox Net & Twine Co.*, 150 Md. 40, 132 A. 261, where the right of recovery by a subcontractor was sustained, two judges dissenting.

The jurisdictions where the right to recover has been recognized are apparently considerably more numerous than those where the right has been denied. Inasmuch as most of the jurisdictions passing upon the question now recognize, with greater or less liberality, the right of a third party beneficiary to sue, the question usually presented is whether, from the terms of the particular instrument before the court, read in the light of the surrounding circumstances, an intent to confer upon the plaintiff a right to proceed directly against the promisors in the bond can be discerned. As the instruments before the courts have differed widely in their terms, the various decisions must for the most part be regarded rather as aids to reasoning than as precedents. This is particularly true of the decisions in certain jurisdictions where there are statutes bearing directly upon the matter. Moreover, there are two other situations rather sharply to be distinguished. Undoubtedly the tendency has been stronger to uphold the right of action in the case of contracts with municipalities or other public agencies, because of the greater likelihood that in the making of such contracts regard would be paid to the interests of those who might furnish labor or materials, and to the broader considerations arising out of the policy of assuring them a more secure basis for entering upon the work. Again, the right of subcontractors or materialmen to come directly upon the property being improved by way of a lien has frequently been regarded as furnishing a reason for attributing to the owner an intention to afford them a direct right of recovery.

If we turn to the particular bond before us, we find that after referring to the agreement it states as the conditions upon the fulfillment of which it is to be void: Faithful performance of the contract by the principal contractor, satisfaction of all claims and demands incurred for the same, full indemnity to the owner for all costs and damages by reason of the failure to keep these stipulations, and reimbursement of the owner for all expense in making good any such default, and then the provision upon which reliance is placed in this case, but the principal contractor "shall pay all persons who have contracts directly with the principal for labor or materials." In the first place it is at once apparent that the clause quoted adds nothing to the obligations before stated as regards the right of the owner to recover upon the bond; if any person furnishing labor or materials under contract with the principal in the bond had a claim against the owner, it would be the duty of the obligors under the stipulations preceding the one quoted to satisfy it, or, if the owner had paid the claim, to reimburse him.

Every provision in a contract is to be given effect if it can reasonably be done, for parties do not ordinarily insert meaningless terms; *Eastern Bridge & Structural Co. v. Curtis Building Co.*, 89 Conn. 571, 575, 94 A. 921; and that would be particularly true of such an instrument as the one before us, wherein a corporation engaged in the business of issuing bonds assumes for a premium responsibility for the defaults of a building contractor. Again, there is significance in the fact that in the particular clause here in question those "who have contracts directly with the principal" are singled out for special regard; if protection for the owner alone was in the minds of the parties, it is difficult to see why this should be done; his concern would be to guard against all claims of whatsoever nature which might be made upon him, without regard to the way in which they had arisen, while this clause is made to turn upon a direct contractual relationship with the principal. If it be suggested that the purpose was to make doubly sure the protection of the owner against such subcontractors as might file liens upon the property, it is to be noted that the provision is not broad enough to include all those who, aside from the general contractor, may have liens under our law; for the right is extended to those who may furnish labor or materials by agreement with a subcontractor. *General Statutes*, § 5219. Nor can we in considering the terms of the bond shut our eyes to the fact that it is in the form adopted by the American Institute of Architects and approved by various national organizations of contractors, *Blake, Architecture & Building* (2d Ed.) p. 317; so that, had the intent been to protect the owner against subcontractors who might file liens, some language would naturally have been used which would have been adequate to meet the demands of the varying statutes in the different states. Protection to the owner is not an adequate explanation for the insertion of the clause we are considering.

On the other hand, all persons who have contracts directly with the principal contractor for furnishing labor or materials for a building have under our law a right to file a lien, and so to impose a charge upon the owner. General Statutes, § 5219. It is therefore decidedly to his interest that such persons should have a direct right of recovery upon a bond such as this, rather than to have a situation where the immediate obligation is to him and they could work out their rights only through him. The avoidance of such circuitry of action is certainly for the benefit of the owner. Moreover, if we adopt the view that the purpose of the provision was to give rise to a direct obligation to subcontractors, a reason for the restriction of the provision to those who have directly contracted with the principal appears; by reason of such a contract they would have a right of action against him, and the effect of the bond would be merely to extend that right as against the surety; this might seem a reasonable provision whereas the parties might hesitate to create entirely new rights of action against the principal contractor and extend those to include the surety.

As we have pointed out, this form of a bond has been adopted by the American Institute of Architects for general use, a fact which this large surety company now appealing surely knew, as witness its reference to the matter in its brief. In considering the terms of such an instrument, chosen by such a body, one would expect to find in them a regard for the interest of the public and the trade in the carrying on of building operations, and certainly that would be served by extending to those having contracts to furnish labor or materials with a principal contractor the additional security which would be afforded by the protection of a bond.

As a paid surety, the appellant is not entitled to the benefit of the rule of construction which favors volunteer sureties. *New Haven v. Eastern Paving Brick Co.*, 78 Conn. 689, 702, 63 A. 517. It would be to close our eyes to the ordinary methods of such a business as it was conducting to doubt that it knew of the diverse views taken in regard to the construction of such bonds in different states; that it did not stand ready to accept a construction favorable to a direct action by persons situated like the plaintiff, if we should so construe the bond, and did not fix its premium accordingly. In that construction there can be no injustice to the appellant, and we can recognize the sound policy which it will serve.

It is said that, if the subcontractors on default of the contractor in its obligation to them may proceed upon the bond, the security of the owner may be impaired by the depletion or exhaustion of the penal sum, to his possible loss in the event of a default in the contractor's obligation to him. We should hesitate to adopt a construction of a bond which would militate against any rights the owner might claim under it, but it is obvious that the difficulty here pointed out does not concern

his rights, but only the danger that the penal sum may prove too low to meet all obligations arising on the bond. This danger does no doubt exist as a possibility, but it does not seem to us that it is sufficiently likely to be entitled to great weight in determining what the intent of the parties was when the bond was executed. Ordinarily, as far as constituting a charge upon the amount of the bond is concerned, it would not matter whether sums due subcontractors were, on default of the principal contractor, paid to them as a direct result of a provision in the bond, or in order to discharge the obligation to the owner to settle claims and demands against him and to save him harmless from liens which might be filed. It seems to us that it would be a rare case where the defaults by the contractor were of so serious a nature as to exhaust the entire penal sum stated in the bond. Moreover, this argument rather begs the question; for if the parties, as we hold, intended to create a direct obligation to subcontractors, then we must assume that they fixed the amount of the bond accordingly; and it is only by assuming that they did not intend to create such an obligation that danger of loss to the owner from recognizing it would become material. At any rate, such weight as this argument may have seems to us insufficient to overcome the contrary considerations we have suggested. Our conclusion is that the plaintiff was entitled to recover upon the bond.

There is no error.

All the Judges concur.

NOTE

The weight of authority is with this decision, especially in determining the effect of the standard builder's contract and bond used by the American Institute of Architects; but there are many cases contra. See the discussion of them by Corbin, "Beneficiaries of Contractors' Surety Bonds," 38 Yale L.Jour. 1 (1928).

In *Kentucky Rock Asphalt Co. v. Fidelity & Casualty Co. of New York* (C.C.A.) 37 F.2d 279, 77 A.L.R. 4 (1930), the defendant had executed a bond to a city securing performance of a building contract by which the builder promised "that it will furnish the said city with satisfactory evidence that all persons who have done work or furnished material under this agreement and are entitled to a lien therefor have been fully paid or are no longer entitled to such a lien." This was held not to be a promise to pay materialmen and not to create any right in such persons against the surety company.

Commercial surety companies executing contractors' surety bonds can not carry the risk of having to pay laborers and materialmen without adjusting the premium charged for the service. But if they do not wish to assume this risk, they should not execute a bond expressly or impliedly assuring payment of these accounts. The fact that the surety's promise is made to the owner and not direct to the claimants is not a sufficient reason for refusing to pay.

In many jurisdictions there are statutes requiring contractors on public works to **give a bond** for the express protection of laborers and materialmen.

Observe that these beneficiaries are not creditors of the promisee, although there are statutes everywhere that enable them to enforce a lien on a privately owned building they have assisted to erect. They are creditors of the contractor who employed them or who bought the materials.

A very recent case in which the law is fully reviewed is *Wilmington Housing Authority v. Fidelity and Dep. Co.*, 47 A.2d 524 (Del.1946). The rules of the Restatement, Contracts, are approved and are applied in favor of a supplier of labor suing on the general contractor's surety bond under seal. The court overrules earlier cases to the contrary, follows the *Byram Lumber* case and the article in 38 *Yale L.J.* 1, cited above.

BASSETT et al. v. HUGHES.

Supreme Court of Wisconsin, 1877. 43 Wis. 319.

Appeal from the Circuit Court of Dodge County.

Action for the balance of an indebtedness due originally from Hugh W. Hughes (defendant's father) to the plaintiffs.

In April, 1870, Hugh W. Hughes conveyed to the defendant certain real estate and all of his personal property, in consideration whereof defendant covenanted, among other things, to pay all debts of the former. This covenant is contained in a bond executed by defendant to said Hugh W. Hughes. When the bond was executed the covenantee owed plaintiffs the demand in suit, for which they held his note. The defendant knew of the existence of this note when he covenanted to pay his father's debts, and afterwards made a payment of \$300 upon it, leaving unpaid the balance claimed in this action. These facts appear from the pleadings and proofs and the findings of fact by the court.

On the trial, defendant offered testimony in various forms for the purpose of showing that his covenant to pay his father's debts was rescinded in 1873, by an agreement to that effect between him and his father; but the court refused to admit the testimony.

The cause was tried by the court without a jury, and resulted in a judgment for the plaintiffs for the unpaid balance due them on the note of Hugh W. Hughes. Defendant appealed from the judgment.

LYON, J. 1. It is settled in this state, that when one person, for a valuable consideration, engages with another to do some act for the benefit of a third person, the latter may maintain an action against the former for a breach of such engagement. This rule applies as well to covenants under seal, as to simple contracts. Mc-

Dowell v. Leav, 35 Wis. 171, and cases cited. In the present case, the defendant, for a valuable consideration, engaged with his father to pay the debt which the latter owed the plaintiffs, and, within the above rule, the plaintiffs may maintain this action to recover the unpaid balance of such debt.

2. It is quite immaterial, if the defendant's covenant to pay his father's debts was afterwards rescinded by mutual agreement between the parties to it. Before that was done, the plaintiffs had been informed of the covenant, and made no objection thereto; indeed, the fair inference from the testimony is, that the plaintiffs fully assented thereto. Whether it was or was not competent for the parties to the covenant to rescind it before such notice to and assent by the plaintiffs, we need not here determine. Certainly after such notice and assent, the covenant could not be rescinded to the prejudice of the plaintiffs, without their consent.

To support the position that it was competent for the defendant and his father to rescind the contract, and thus defeat the plaintiffs' right of action against the defendant, the learned counsel for the defendant cites two New York cases: *Kelly v. Roberts*, 40 N.Y. 432, and *Kelly v. Babcock*, 49 Id. 318. These cases do not sustain the position. In the first, it was held that an agreement, upon no new consideration, between debtor and creditor, that the debtor shall pay the amount of his debt to a third person, to whom the creditor is indebted, is not, in the absence of any notice or acceptance of or assent to the arrangement by such third person, irrevocable by the creditor. In the latter case, it was held that "an agreement in a bill of sale or instrument of transfer of personal property, that a portion of the purchase money of the goods sold may be paid to and among the creditors of the vendor, without a consent or agreement on the part of the vendee thus to pay, creates no trust; the balance unpaid is a debt due the vendor, and can be reached by and held under an attachment against his property." In this case, the defendant covenanted to pay his father's debts; there was a new and valid consideration for such covenant; and the plaintiffs were notified that it had been made, and gave their assent thereto. Thus we find here all the conditions essential to the plaintiffs' right of action, which were wanting in those cases. We conclude that the testimony offered to show a rescission of the covenant was properly rejected. * * *

Judgment affirmed.

NOTE

It is time for any court to disregard the older cases holding that the fact that a contract is under seal prevents any one other than the promisee specified therein from maintaining an action for its enforcement. See *Restatement, Contracts*, § 134, approved and followed in *Wilmington Housing Authority v. Fidelity and Dep. Co.*, 47 A.2d 524 (Del.1946).

A discharge by the promisee is not effective as against a creditor beneficiary, if made after knowledge of and reliance upon the contract by the latter. Restatement, Contracts, § 143. In § 142, of the Restatement it is said that, as against a donee beneficiary, the promisee has from the beginning no power to vary the contract or to release the promisor, unless he makes a reservation of such a power. The cases in support of this statement are found mainly in the field of life insurance; it is supported also by *Pruitt v. Pruitt*, 91 Ind. 595 (1883), *Tweeddale v. Tweeddale*, 116 Wis. 517, 93 N.W. 440 (1903), and *Wetutzke v. Wetutzke*, 158 Wis. 305, 148 N.W. 1088 (1914).

SEDGWICK v. BLANCHARD et al.

Supreme Court of Wisconsin, 1919. 170 Wis. 121, 174 N.W. 459.

Action by Edith Sedgwick against Ernest B. Blanchard and another. From judgment for plaintiff, defendants appeal. Judgment reversed, and cause remanded, with directions to enter judgment dismissing the complaint.

On the 31st day of December, 1903, H. C. Blanchard, an aged widower, was the owner of a farm, consisting of 160 acres, in Dunn county, Wis. On that day he entered into a contract with his son, E. B. Blanchard, whereby the son agreed to at once take possession of said premises and personal property, till the farm, and provide the said H. C. Blanchard with support and maintenance. The father agreed "to give to said first party by deed or otherwise, to take effect at the death of said second party," the east 80 acres of said farm, and to Edith Sedgwick (plaintiff herein and daughter of H. C. Blanchard) the west half of said farm. It was further agreed in said contract that any failure on the part of the son to keep and perform any of the conditions thereof on his part to be performed should render said contract null and void, and that thereupon, on demand, said son should at once deliver to said father possession of said premises as well as the personal property. The said H. C. Blanchard died March 23, 1915. This action was commenced by Edith Sedgwick, daughter of H. C. Blanchard, to compel the conveyance to her by E. B. Blanchard and wife of the west 80 acres of said farm. * * *

OWEN, J. * * * The court found that, within a few days after the execution of the contract alleged in the complaint, the defendant E. B. Blanchard and his wife entered into possession of the premises and personal property described in the contract, and for a year and a half faithfully performed the conditions of the contract; that on or about July 8, 1905, the said E. B. Blanchard and his wife, Elizabeth, having become dissatisfied with the terms of the contract, voluntarily breached the same, left and abandoned said premises, and left the father, H. C. Blanchard, in exclusive control thereof; that about a

month later the father, upon promise of making better terms with them, induced them to return to the premises, and on August 8, 1905, they did return to the premises, and continued to work and farm the same, and to support and maintain the father down to the time of his death, March 23, 1915; that on March 11, 1915, the father executed a deed to the son, whereby he conveyed the entire farm to him upon condition that he provide support and maintenance for the father during the remainder of his life, and upon his death pay to the plaintiff, Edith Sedgwick, the sum of \$1,000. * * *

Whatever right the plaintiff, Edith Sedgwick, has to a conveyance of the 80 acres claimed by her, is referable to the contract of December 31, 1904. As we have seen, the terms and conditions of that contract were never executed. The contract was breached by E. B. Blanchard, who left the premises, refused to further perform the conditions thereof, and the father, H. C. Blanchard, was restored to the exclusive possession of the farm and personal property. The contract itself provided that the failure of the said E. B. Blanchard to keep or perform any of the conditions thereof should render the contract null and void. It is difficult to perceive why, in view of that provision in the contract itself, the breach thereof on the part of E. B. Blanchard, coupled with a reentry on the part of the father, did not effectually put an end to the contract and all rights created by it. It is true that this court has gone a great ways in sanctifying contracts made for the benefit of third parties. In *Wetutzke v. Wetutzke*, 158 Wis. 305, 148 N.W. 1088, in a similar transaction between father and son, where the son agreed to pay certain sums to third parties, and executed a mortgage to secure such payments, it was held that the relation of debtor and creditor was established between the son and such beneficiaries, which relation could not be changed by agreement between the father and son without the consent of the beneficiaries, and the mortgage executed by the son was enforced against the premises, notwithstanding the fact that the premises had been reconveyed to the father when it became apparent that the original arrangement could not be agreeably carried out. That case probably marks the limit to which this court will go in enforcing contracts of an executory nature made for the benefit of third parties.

In the *Wetutzke Case* there was no provision in the contract that in case of a breach thereof it should be null and void, nor was there a re-entry pursuant to a breach, which facts distinguish that case from this. It seems plain that the rights of plaintiff in and to the premises, a conveyance of which she seeks, were put at an end upon the termination of the contract by its own terms upon the occasion of the breach thereof by E. B. Blanchard July 8, 1905, followed by a re-entry on the part of the father, and that she cannot compel a conveyance thereof.

It is argued by respondents that the defendants should not be permitted to profit by their own breach of the original contract. We fail to appreciate the force of this argument. Upon the breach of the contract the father was in a position where he was compelled to negotiate with some one relative to the management of the farm in such a way as would assure him his future support and maintenance. It is quite plain that, if he had entered into an arrangement with a third party, plaintiff would have had no claims upon such third party. We know of no reason why his right in this respect should be limited to third parties, nor why he and his son might not enter into a new arrangement, with the same force and effect that would be accorded an agreement between the father and a third person. The first contract was at an end, and had no more existence than as though it had never been executed. Being at an end, it could constitute no barrier to the right of the father and son to enter into the new arrangement. It follows, from what has been said, that the judgment should be reversed.

Judgment reversed, and cause remanded, with directions to enter judgment dismissing plaintiff's complaint.

QUESTION:

Would it be a breach of legal duty to the beneficiary for the promisor to prevent performance of a condition precedent, either by agreement of rescission with the promisee or otherwise? See Restatement, Contracts, §§ 295, 315.

NOTE

Where the promisor's duty to the promisee is subject to an express or implied condition precedent, it is generally true that his duty to the third party is subject to the same condition.

If the contract is void or voidable as against the promisee, on grounds of fraud, mistake, or infancy, it is so likewise against the third party. See Restatement, Contracts, § 140, quoted and applied in *Tuttle v. Jockmus*, 111 Conn. 269, 149 A. 785 (1930), fraud.

GULLA v. BARTON.

Supreme Court of New York, Appellate Division, 1914.
164 App.Div., 293, 149 N.Y.S. 952.

Action by Joseph Gulla against Louisa Barton, as surviving partner. From a judgment in favor of defendant upon a nonsuit, plaintiff appeals. Reversed, and new trial granted.

JOHN M. KELLOGG, J. Plaintiff worked in the defendant's brewery in the years 1911-1912 for 29 weeks, and in the years 1912-1913 for

20 weeks, for which work he received \$9 per week, which apparently was the wage agreed upon between him and the defendant. He brings this action to recover \$9 more for each week's service, basing his claim upon an agreement made between the defendant and the Malsters' Union, No. 48, of Syracuse, N. Y., and vicinity, of which he was a member, and which was a local subordinate branch of the International Union of the United Brewery Workmen of America; the former being incorporated under the laws of the state of New York, and the latter incorporated under the laws of the state of Ohio. While the services were being performed, the brewery was a union brewery; the defendant having entered into a written agreement with the said union by which none but union men were to be employed in the brewery, and, if extra help were needed, members of the International Union of United Brewery Workmen of good standing should be employed at union wages, and that all employés were to receive \$18 per week. This agreement was to continue in force one year from October 1, 1912, and was renewed for another year. The defendant's object in making the agreement with the union was to prevent strikes and to secure the use of the union label. The union furnished labels, and the defendant used them, and did business all the time referred to as a union brewery.

The union was formed for the benefit and protection of its members, and especially for the purpose of securing to them a reduction in the hours of toil and an increase in wages. The union is based upon the idea that the individual workmen cannot fully protect themselves against their employers, but that by united action they can be better protected in the respects mentioned. It is supported by dues and fees paid by its members, which dues the member pays for the benefit which he expects to realize from the organized action of himself and his coworkers. The agreement referred to was a valid contract, which may be enforced in any proper manner. The renewal of the agreement indicates that it was beneficial to the defendant's firm. The union entered into the contract for the benefit of the plaintiff and the other employés in the defendant's brewery, and for the benefit of all union workmen.

It is urged, however, that the plaintiff cannot maintain an action upon the agreement, and that he has waived the benefits of it by contracting for himself. Apparently he did not know of the agreement between the defendant and the union until May, 1913, when a dispute arose between the plaintiff, the defendant, and other employés. An officer of the union was called to the brewery, and then showed plaintiff the agreement, and insisted that thereafter union wages must be paid according to the agreement, and for the remainder of the season such wages were paid; the plaintiff stating to the defendant at the time that he would look for his back pay through law. The evi-

dence does not show any act of the plaintiff, made with knowledge of the facts, which would waive the benefit of the contract with the union in his behalf. We have, therefore, a situation where the plaintiff received from week to week the wages contemplated by the contract of employment between him and the defendant, and his union unbeknown to him had made a contract for his benefit, based upon a separate consideration passing from the union, that he as a member thereof should receive a greater compensation. In payment for the labels and the use of the union name in marketing the brewery product, the defendant had agreed to pay a stated union wage to the plaintiff and to the other men working with him as members of the union. The union label had force and value, and the union had strength by reason of the moneys which it received as fees and dues from the plaintiff and other members. The plaintiff is therefore connected with the consideration and was a party intended to be benefited by the agreement. *Smith v. City of New York*, 203 N.Y. 106, 96 N.E. 409. It was a contract made by his representative for his benefit, and its validity is not affected by the independent agreement, express or implied, between him and defendant. The contracts are concurrent, and neither one destroys the other. The nonsuit was therefore improper.

Upon the evidence as it stood, the plaintiff was entitled to receive \$18 per week for the time served. Having received only \$9 per week for the time mentioned, he may recover the difference. Judgment, however, cannot be directed for him, as the defendant's case has not been put in.

The judgment appealed from should therefore be reversed, and a new trial granted, with costs to the appellant to abide the event. All concur.

NOTE

The facts as reported in this case do not enable us to classify the plaintiff as a donee beneficiary or a creditor beneficiary of the contract between the Union and the defendant. The plaintiff as a member of local No. 48 of the incorporated International Union might be regarded as having authorized the Union to contract in his behalf as his agent; but this does not appear. Undoubtedly he was an intended beneficiary of the Union contract. Also, it seems nearly certain that the Union was under some duty to the plaintiff as a dues-paying member of the local branch.

At common law, whether regarded as a donee or as a creditor of the promisee (the Union), the plaintiff had power to extinguish his rights under the Union contract, by disclaimer or by individual contract. *Restatement, Contracts*, § 137. In absence of knowledge of the Union Contract, his individual contract to work for the lower wages can not be regarded as either a disclaimer or a discharge by substituted contract.

Under the National Labor Relations Act, 49 Stat. 457, 29 U.S.C.A. 151-166, an employee is subject to the provisions of a collective bargain negotiated by his duly chosen bargaining representatives. Both he and his

employer are deprived of power to affect his rights under the collective bargain while he remains in service; and this is true whether he is a member of the bargaining Union or not. He has no power to disclaim or to discharge by substituted contract. Even his personal contract made prior to the collective bargain is no limitation on the powers of the collective bargaining representatives. Willy nilly, he is a "beneficiary" of the collective bargain, whether it is beneficial or detrimental to him. See *J. I. Case Co. v. Nat. Labor Rel. Board*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944). Thus far, it seems that the employee has no power to terminate his "status" as such a "beneficiary" otherwise than by quitting the service.

RIDDER et al. v. BLETHEN et al.

Supreme Court of Washington, 1946. 24 Wash.2d 552, 166 P.2d 834.

Action by Herman H. Ridder and Clarence B. Blethen, II, against Rae Kingsley Blethen and others, as executors of the estate of Clarence B. Blethen, deceased, and others to establish plaintiff Blethen's position as a third-party beneficiary under a contract between deceased and others. From a judgment of dismissal, plaintiffs appeal.

Affirmed.

BLAKE, Justice. Clarence B. Blethen died testate October 30, 1941. Four sons survived him—Clarence B. Blethen, William K. Blethen, John Alden Blethen, and Francis A. Blethen. On December 30, 1929, some twelve years before his death, Colonel Blethen, on the one hand, and Bernard H. Ridder, Joseph E. Ridder, and Victor F. Ridder, co-partners, on the other, entered into a contract which contained the following paragraph:

"Eighth: Blethen agrees, immediately after the issuance of class B common stock to him to make a last Will and Testament, or some other instrument in writing, which will provide in effect that his Class B common stock be held in trust by his Trustees after his death for a period of twenty-one years after the date hereof. Such last Will and Testament or other trust instrument shall also provide that Blethen's Class B common stock shall not be sold by his trustees until the termination of such trust. Such last Will and Testament or other trust instrument shall constitute, nominate and appoint the widow of said Blethen as one of the trustees, Bernard H. Ridder, another of such trustees, and Elmer E. Todd, the third of such trustees. It shall further provide that in the event of the death, resignation or disability of his widow at any time, the vacancy caused thereby shall not be filled but the surviving trustees shall act. In the event of the death, resignation or disability of Bernard H. Ridder at any time, one of his brothers shall act as trustee in his place and stead and, in the event of the death, resignation or disability of Elmer E. Todd at any time,

one of the partners of the law firm now representing Blethen shall act as trustee in his place and stead. Such last Will and Testament or other trust instrument shall also provide that upon the termination of the trust, Blethen's Class B common stock shall be distributed by the trustees among the surviving sons of said Blethen and the issue of such of them as may be deceased, in equal shares, per stirpes. Such last Will and Testament, or other trust instrument, shall further provide that, in case of any difference or differences of opinion between the said trustees as to any question connected with the management of the corporation, the Class B common stock of which is to constitute the corpus of the trust, any trustee may submit such a question for arbitration, upon notice to the other trustees, to the then general manager of The Associated Press, and in any such case the decision of the said then general manager of The Associated Press shall be final and conclusive and be binding upon all of said trustees."

In his last will and testament, executed December 4, 1940, Colonel Blethen disinherited his son Clarence and bequeathed the Class B stock of the Seattle Times Company—a corporation organized pursuant to the agreement with Ridder Brothers—to his sons William K., John Alden, and Francis A.

Clarence B., Jr., assigned his alleged rights under the contract of December 30, 1929, executed by his father and Ridder Brothers, to Herman H. Ridder. The latter, with Clarence, Jr., joining as co-plaintiff, brought this action to establish the latter's position as a third-party beneficiary under the contract.

We shall not attempt to summarize the pleadings upon which issue was joined. It will suffice to say that the question presented to the trial court was whether Blethen, Jr., was a *donee beneficiary* in contemplation of the contract between his father and Ridder Brothers. If he was, he and his assignee are entitled to maintain the action. If, however, he was merely an incidental beneficiary in contemplation of the contract, he has no enforceable interest. 12 Am.Jur. 831, § 279.

Much evidence was introduced to determine the status of Blethen, Jr. The trial court held that he was merely an incidental beneficiary, and entered judgment dismissing the action. Plaintiffs appeal.

Appellants' assignments of error raise but two questions: (1) Whether parol evidence was admissible to establish the status of Clarence, Jr., as a third-party beneficiary—donee or incidental; and (2) whether, under the evidence, the court was warranted in finding him to be merely an incidental beneficiary.

First. The generally accepted definition of a donee beneficiary is stated in 1 Restatement of the Law of Contracts, p. 151, § 133, as follows:

"(1) Where performance of a promise in a contract will benefit a person other than the promisee, that person is, * * *:

"(a) a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary:
* * *"

Appellants' assertion that Clarence, Jr., comes within this definition, under the express terms of the contract between his father and the Ridder Brothers, cannot be denied. They contend, therefore, that since the terms of the contract are plain and unambiguous, resort may not be had to parol evidence to show his status to be other than a donee beneficiary. Solution of the question, however, is not quite so simple as that. To constitute one a donee beneficiary, it must appear that the contract was designed for his benefit, or that it was the intent and purpose of the parties to bestow a benefit or gift upon him. *Simon v. Brown*, 68 N.Y. 355; *Riegel v. Central Hanover Bank & Trust Co.*, 266 App.Div. 586, 42 N.Y.S.2d. 657; *Burton v. Larkin*, 36 Kan. 246, 13 P. 398, 59 Am.Rep. 541; *Seaver v. Ransom*, 180 App.Div. 734, 168 N.Y.S. 454, affirmed 224 N.Y. 233, 241, 120 N.E. 639, 2 A.L.R. 1187; *Ball v. Cecil*, 285 Ky. 438, 148 S.W.2d 273; *O'Neil v. Ross*, 98 Cal.App. 306, 277 P. 123.

The purpose and intention of the parties is to be ascertained from the contract as a whole, construed in the light of the circumstances under which it is made. *Grand Lodge, Etc., v. United States F. & G. Co.*, 2 Wash.2d 561, 98 P.2d 971; *Fidelity Trust Co. v. Travelers' Ins. Co.*, 320 Pa. 161, 181 A. 594; and in *Sayward v. Dexter Horton & Co.*, 9 Cir., 72 F. 758, 765, 19 C.C.A. 176, it is stated:

"It is not every contract for the benefit of a third person that is enforceable by the beneficiary. It must appear that the contract was made and was intended for his benefit. The fact that he is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to demand its fulfillment. It must appear to have been the intention of the parties to secure to him personally the benefit of its provisions. *National Bank v. Grand Lodge*, 98 U.S. 123 [25 L.Ed. 75]; *Wright v. Terry*, 23 Fla. 160, 2 So. 6; *Burton v. Larkin*, 36 Kan. 246, 13 P. 398 [59 Am.Rep. 541]; *Chung Kee v. Davidson*, 73 Cal. 522, 15 P. 100; [*Lake Ontario Shore*] *Railroad Co. v. Curtiss*, 80 N.Y. 219; *Vrooman v. Turner*, 69 N.Y. 280 [25 Am.Rep. 195]; *Greenwood v. Sheldon*, 31 Minn. 254, 17 N.W. 478; *Austin v. Seligman, C.C.*, 18 F. [519], 520. There is nothing in the contract made by *Harrington & Smith* with *Herrick* indicative of an intention to protect *Sayward* from suit ex-

cept for Herrick's own benefit. The parties to that agreement evidently had in view their own advantage, and not Sayward's. It was clearly for Herrick's protection primarily and chiefly that the stipulation in question was inserted. If it was the intention to protect Sayward also, that purpose was only incidental and secondary."

Unless the contract is expressly designed for the benefit of a third party, resort, of necessity, must be had to extrinsic evidence to ascertain whether it was the purpose and intent of the parties to the contract to bestow a benefit or gift upon a third party. This necessity was recognized by this court in *Hutton v. Gonser*, 159 Wash. 219, 292 P. 743, to which we shall advert later at some length. Appellants themselves recognized this, for, when the case was called for trial, their counsel, in the course of his opening statement to the court said:

"Of course, under many of the authorities the contract which the parties had made and the language which they have used is deemed sufficient to indicate their purpose, at least *prima facie*, and it was upon that theory that it seemed to me there was no occasion or would be in the opening case no occasion to go further. In fact, I think it was urged on the last hearing of the general demurrer that because the complaint did not contain specific allegations of the purpose and intent on the part of the promisee, that the demurrer should be sustained. *But, nevertheless, the whole background and testimony might just as well, I think, be presented and the logical way to do it is probably to take it up right in the first instance.*" (Italics ours.)

And, again, early in the examination of appellants' first witness, their counsel stated to the court:

"* * * in order to show what purpose and object the promisees had in mind, we shall undoubtedly have to go into matters of discussion between them, which were not in the presence of the other parties to the transaction.

"Now, that, of course, I realize, is not binding on the other side, or it is not binding on Colonel Blethen; but it is relevant to the question of what these parties had in their minds and what their objects and purposes were; and if the matter of intent or purpose is relevant here, as your Honor has indicated you consider it to be—and *apparently it is under the authorities*—then certainly a party has a right to testify what is in his mind." (Italics ours.)

While appellants did not expressly allege in their complaint that the purpose and intent of the parties to the contract was to bestow a gift on Clarence, Jr., they took upon themselves the burden of proving the fact by parol evidence. They say they were forced into that position because of certain observations made by the court in ruling on demurrers to the complaint. We think it is apparent, however, from their counsel's own statements, that appellants voluntarily assumed the burden on the issue; and, in view of the fact that they introduced much

parol evidence in support of their position, they are hardly in a position to claim error for violation of the rule. *Vieser v. Bellows*, 209 App.Div. 540, 205 N.Y.S. 26; 239 N.Y. 622, 147 N.E. 221; *Hackney v. Hargrove*, Mo.App., 259 S.W. 495; *Pathe Exchange v. Miller*, 51 App.D.C. 284, 278 F. 997; *Mann v. O'Neil*, 29 Wash. 115, 69 P. 635; *Richeson v. Wood*, 158 Va. 269, 163 S.E. 339, 82 A.L.R. 1189.

Second. On the record made, the evidence, as we view it, conclusively shows that the Blethen sons were merely incidental beneficiaries under a contract the principal purpose of which was to provide for the management and control of the *Seattle Times*.

The contract itself was supplemental to a tripartite agreement executed the same day (December 30, 1929) by Colonel Blethen, as party of the first part, his mother and sisters, as parties of the second part, and Ridder Brothers, as parties of the third part.

These contracts were the culmination of negotiations which started in August of that year, when Bernard H. Ridder, on a tip that the *Seattle Times* was for sale, visited Seattle and called on Colonel Blethen. The paper was owned at that time by the *Seattle Times, Incorporated*, a Nevada corporation, the capital stock of which was owned by Blethen, his mother, sisters, and sister-in-law—Blethen himself owning about thirty-five per cent of the stock.

Blethen informed Ridder that the paper was not for sale, and he made it clear at all stages of the negotiations that he was not interested in any plan whereby he and the members of the Blethen family would lose control of the *Times*. He desired, however, to get the control of the paper into his own hands, and, to that end, he suggested to Ridder that the stock of the other members of his family might be for sale.

The tripartite agreement was executed in contemplation of the supplemental agreement between Blethen and Ridder Brothers. The design of the tripartite agreement was the formation of a new corporation under the laws of the state of Delaware which would acquire all the stock of the *Seattle Times, Incorporated* (the Nevada corporation), at specified considerations to the various members of the Blethen family, who owned the stock.

The stock setup and financing plans for the new corporation were specified in great detail. We are concerned, however, only with the class B common stock, which was to consist of one thousand shares. This, so far as we are here concerned, was the only stock having voting rights. Ridder Brothers were to get 440 shares of this class B common stock as part consideration for some \$1,500,000 cash they put into the deal. Colonel Blethen was to get 560 shares of class B common stock as part consideration for his stock in *Seattle Times, Incorporated*, the Nevada corporation. This arrangement for the division

of the class B common stock, was, of course, designed to effectuate Blethen's main objective in going into the deal: to get control of the paper into his own hands.

It was expressly provided in the tripartite contract that it should have no force nor effect unless Blethen and Ridder Brothers executed the supplemental agreement and carried out the obligations they undertook of organizing and financing the new corporation.

It is plain from the very terms of the supplemental agreement that the main purpose of Blethen and Ridder Brothers, in executing it, was to carry out the obligations assumed under the tripartite agreement and to provide for the management and control of the Seattle Times, not only during Blethen's lifetime, but also in the contingency of his death within twenty-one years. For, on the one hand, Blethen covenanted that he would at all times maintain his ownership and control of at least fifty-one per cent of his class B common stock for twenty-one years; and, on the other, Ridder Brothers covenanted that they would maintain control of their class B common stock for the same period.

The object which the parties had in mind in making these covenants was to ward off encroachment by any powerful newspaper publisher who might desire to get control of the Times. To maintain this objective, in the event of Colonel Blethen's death, paragraph eight was agreed upon, whereby Blethen was to make a will setting up a trust of his class B common stock, effective for the remainder of the twenty-one-year period after his death.

There were several conversations, in the course of which different proposals were made concerning the provisions with respect to the disposition of the class B stock at the expiration of the trust. Blethen, at one time, proposed to leave the stock to his wife. Ridder Brothers objected to this and countered with a proposal that provision should be made in the will giving them the right, at the expiration of the trust, to purchase seven to ten per cent of Blethen's stock—an amount of stock sufficient to bring their holdings to fifty-one per cent of the class B stock. This proposal, Blethen rejected, saying, in effect, that he would not consent to the loss of control of the Seattle Times by the Blethen family. He came back with the proposal to leave the class B stock to his "surviving sons," which proposal was incorporated in paragraph eight.

If there is anything clear from these contracts and the circumstances surrounding their execution, it is that Colonel Blethen's unswerving purpose was to maintain his own and (after his death) his family's control of the Seattle Times. And, to this end, he disinherited his son Clarence. That he had good and sufficient reason for so doing, is not only demonstrated by the evidence, but also in the very incep-

tion of this suit. What he greatly feared has come to pass: The control of the Times by the Blethen family is threatened by the action of an irresponsible son. Obviously, to hold that Clarence is a donee beneficiary under paragraph eight, would be to defeat one of Colonel Blethen's main objectives in his deal with Ridder Brothers. He wanted to get control of the Times into his own hands, but not at the cost of letting its control ultimately get away from his family.

The Ridder Brothers now say that, at the time the subject was under discussion, they insisted that the class B stock be left to Blethen's surviving sons, rather than to his wife, having the thought in mind that they might find one among them whose interest they could acquire and thus obtain control of the Times. Of the testimony to this effect, the trial court said:

"Now, under the testimony the motive or the primary purpose, taking Mr. Ridder's testimony, was not to confer a benefit upon the surviving sons of Blethen but primarily to strengthen the possible position of the Ridder Brothers after the trust period, in that it gave to the Ridder Brothers the opportunity to deal with one of the sons for the benefit of the Ridder Brothers. * * *

"In the end, gentlemen, I dislike to do this but I believe we come just straight down to a question of veracity. Had the Ridder Brothers' position been merely that they had a hidden purpose, perhaps there might be a consistent line. If they had required Col. Blethen to make this agreement to divide his stock equally among the sons, the consideration would have been ample to enforce it. Now that Mr. Ridder says that he not only had this purpose but that he disclosed it and discussed it with Blethen, who had steadfastly refused all attempts at giving up control or letting it out of his family, the Court is unable to give the statement credit. I just don't believe it."

We have no reason to disagree with the trial court's appraisal of the testimony. None of the Ridders knew any of Blethen's sons. From the contracts and the evidence relating to the circumstances under which they were executed, we can find no basis for the claimed motive and purpose on their part to bestow a benefit or gift on Clarence, Jr.

In *Hutton v. Gonser*, 159 Wash. 219, 292 P. 743, *supra*, we were confronted with a situation which, in its legal aspects, is so closely analogous to that presented here as to be controlling of the controversy. In that case, a husband and wife executed a contract to make mutual wills, each leaving his or her property to the other; and covenanted that the survivor would leave his or her estate to his or her *own* collateral relatives. The wife died first. The husband made a will which breached the covenant. *His* relatives brought an action to enforce it. Denying their right to recovery, we said, page 222 of 159 Wash., page 744 of 292 P.:

"Manifestly the provision in each will in that respect in favor of the collateral kin of the testator was wholly voluntary and without any consideration to support it except love and affection between the testator and his own collateral kin. There is an entire absence of evidence that any remainderman under either will ever performed any service or gave any valuable consideration to either testator, or that either testator was even acquainted with any remainderman under the other's will, other than a slight acquaintance of Mrs. Hutton with one of the remaindermen under Mr. Hutton's will. The stipulation in his will of December 2, 1913, in favor of his collateral kin as remaindermen, constituted neither consideration nor promise to her, nor was it for her benefit. They were not heirs of hers under the statutes of descent, nor natural objects of her bounty as those words are understood in the law of wills, and, as already noticed, with the exception of a slight acquaintance with one of them, they were all total strangers to her.

"Assuming without deciding it to be true as counsel for appellants contend that in the making of the wills of December 2, 1913, Mr. Hutton promised his wife that he would provide for his own separate kin as remaindermen, what of it? It was nothing to her, so far as this record shows. The remaindermen had done nothing in the way of valuable service or consideration on her behalf which made it justifiable on her part to undertake to exact a promise in their behalf, nor is there anything to show that that provision of his will was intended for any such purpose. It was a promise that did not bind him; he received nothing for it and was at liberty to wholly ignore it as he did in his later will."

We are convinced that, at the time the supplemental contract was executed, there was no intent or purpose in the mind of any of the parties to it to bestow a gift upon Clarence B. Blethen, Jr. He was merely an incidental beneficiary under its provisions. Therefore, this action cannot be maintained.

Judgment affirmed.

QUESTIONS:

1. Were William, John, and Francis Blethen, to whom Colonel Blethen left the Class B stock by his will, also "incidental" beneficiaries of the Ridder contract?
2. Did the provision that the Colonel should by Will or other instrument, provide that his stock should be distributed "among the surviving sons . . . and the issue . . . in equal shares, per stirpes" have any legal operation?
3. If Colonel Blethen had left no will or other instrument with respect to the stock, would the contract provision have entitled the four sons to it?

4. Was the Colonel legally privileged to sell the stock to strangers during his life?

NOTE

This case deserves close study and analysis with respect to Interpretation and the Parol Evidence Rule as well as to Third Party Beneficiaries.

Since the courts seem inclined to accept the rules of Restatement, Contracts, Chapter 6, §§ 133-147, with or without some modifications, the most active zone of litigation is likely to be along the line separating "Incidental" beneficiaries from those having an enforceable right?

In *ROBINSON'S WOMEN'S APPAREL v. UNION BANK & T. Co.*, 67 F.Supp. 395 (1946, D.C.), property was sold to the defendant, payment to be made in instalments. It was expressly provided that in case of the seller's death before full payment the unpaid instalments should be paid to a specified third party. The seller having died, the court held that the third party had a right to the unpaid balance. The fact that the third party would have received nothing if the seller had lived long enough to receive full payment did not prevent him from being an intended donee beneficiary. His right was subject to a condition precedent; but the event constituting the condition actually occurred. See Restatement, Contracts, § 134.

There may be more than one beneficiary in a contract. A different benefit may be allotted, and promised, to each one. Moreover, the beneficiaries may be alternative, the right of one being on one condition and the right of another on another condition. During and since World War II, the U. S. Government issued savings bonds to the amount of some billions of dollars, each one payable to a named purchaser or in case of his death to a named beneficiary. The purchaser of such a bond is the promisee and is, of course, the principal beneficiary of the bond. But the third party has an enforceable right, conditional on the purchaser's death before payment. See *In re DiSanto's Estate*, 142 Ohio St. 223, 51 N.E.2d 639 (1943).

CROKER v. NEW YORK TRUST CO. et al.

Court of Appeals of New York, 1927. 245 N.Y. 17, 156 N.E. 81.

Action by Richard Croker, Jr., against the New York Trust Company as temporary administrator of the goods, chattels and credits which were of Richard Croker, deceased, and others. Judgment for plaintiff was affirmed by the Appellate Division (216 App.Div. 832, 215 N.Y.S. 833), and the defendant named appeals. Reversed, and new trial granted.

POUND, J. Plaintiff sued in equity to recover on an oral contract made by him with his father, Richard Croker, deceased, whose administrator, the New York Trust Company, is one of the defendants, for the benefit of the other defendants, his brother Howard and his sister Ethel, whereby, in consideration of plaintiff's promise to trans-

fer to Howard his share in his mother's estate, Richard Croker agreed, upon being notified of the amount of such share, to pay a like amount to Howard and to Ethel. Plaintiff established the amount of his one-fourth interest in the estate of his mother at \$76,191.15 and the payment thereof to Howard. The total of each share with interest has been computed at \$114,587.29, and plaintiff has recovered for the benefit of his brother and his sister the sum of \$229,174.58.

After the unanimous affirmance by the Appellate Division prior to July 15, 1926, no question of fact remains for our consideration.

Appellant contends that although the defendants Howard and Ethel might have recovered the amount of their shares in an action at law against Richard Croker or the administrator of his estate as third party beneficiaries under the rule of *Lawrence v. Fox*, 20 N.Y. 268, and *Seaver v. Ransom*, 224 N.Y. 233, 120 N.E. 639, 2 A.L.R. 1187, the plaintiff may not maintain an action in equity for the enforcement of their cause of action. That plaintiff's remedy in law would be inadequate is obvious. He has suffered no pecuniary damage by the failure of the promisor to perform his agreement. His injury in law is, therefore, purely technical. It has been suggested (*Williston on Contracts*, §§ 358, 359) that a court of equity is the only proper forum for such actions so that all parties in interest may be before the court. Although the right of the beneficiary in such a contract to maintain an action thereon has been upheld, and although no reported case has been cited where equity has been invoked by the promisee to enforce the liability of the promisor to the third party beneficiaries, the suit in equity should be sustained in principle. The contract is with the promisee and the promisor was under an equitable obligation to him to perform. The promisee, while not financially interested in the result, except as to the question of costs, is interested in asserting the duty of the promisor to carry out the terms of the contract. "Equity insists upon the conscientious obligations of the suitors." Otherwise we must hold that a promisee who has parted with a substantial sum in exchange for the promise of another to pay a similar amount to third party beneficiaries is remediless. The procedure adopted provides adequately for the situation and should be upheld.

[The only evidence of the oral contract between Richard Croker, Sr., and the plaintiff, his son, was the testimony of the plaintiff himself. The court here held that this testimony was erroneously admitted, by reason of a statute disqualifying a witness to a transaction with one deceased if the witness is "interested in the event" of the suit. The plaintiff here was interested to the extent that he was chargeable with costs.]

NOTE

In accord as to the right of the promisee to a decree that the promisor shall specifically perform his promise to pay the beneficiaries, see *Re-*

statement, *Contracts*, § 138; *In re Book's Estate*, 297 Pa. 543, 147 A. 608 (1929).

The reason that Howard and Ethel did not bring their own suit against their father's administrator may have been a belief that the New York court would not recognize the right of a donee beneficiary. See the rule laid down in *Vrooman v. Turner*, ante. The promisee, Richard Croker Jr., owed them no "legal or equitable duty." Yet the relation of brother and sister between them would no doubt satisfy this supposed requirement. See *Seaver v. Ransom*, ante. In such a suit brought by them, the promisee Richard Jr. should be competent as a witness to the transaction alleged to have occurred between him and his father, since he would have no pecuniary interest in the outcome of the suit. The refusal of the decree in the present suit would not bar a later action brought by Howard and Ethel.

CHAPTER 11

ASSIGNMENT

INTRODUCTORY NOTE

This chapter deals with the present day law as to the assignment of contract rights and the delegation of performance of contract duties. The subject has a long history in Anglo-American law; and there have been many misunderstandings and disputes, both as to analytical theory and as to the statement of the rules of law to be drawn from the court decisions. Only very brief reference can be made here to that history and those disputes. Many of the misunderstandings have been caused by inadequate legal analysis and insufficient knowledge of history.

Much has been written about the "inalienability" (or the "alienability") of a "chose in action." See the articles in "Selected Readings on the Law of Contract," under the title "Assignment." The word "chose" is a remnant left over from the Norman period of English law. Its nearest equivalent in English is "thing;" in Latin "res." A "chose in possession" is a thing over which one has physical control. It was always alienable (transferable, assignable) because it can be physically handed over. The possession changes; and possession is said to be nine points in law. A "chose in action" on the other hand was regarded, when the phrase was invented, as a thing that is not in the possession of the party asserting a claim to it; to secure its possession would require his physical seizure of it or an action at law to get official assistance. If the facts were such that this assistance would be given, the thing was the claimant's "chose in action;" he had a "right" to its possession.

In the course of time, a "chose in action" ceased to be a specific "thing" to which one has a right; it became the "right" or claim to the thing. Meanings of words go through their own evolutionary process. "A word is the skin of a living thought," says Holmes. The skin retains its form and appearance; the thought within, the meaning that it is used to express, is alive and subject to change. "Chose in action" came to include any right or claim to a performance by another person, even though there was no specific "thing" to which it referred. One who has a right to the payment of money (not any specific coins or bills) by another has a "chose in action." For the purposes of this chapter, that term means any contract right against another person. It is the transfer of a contract right by a process called "assignment" with which we are dealing.

But can a mere legal relation called a "right" be transferred? It was once thought not, by our ancestors of the common law. See the leading article by Dean Ames on "The Inalienability of Choses in Action," 3 Harv.L.Rev. 337 (1890), reprinted in his *Lectures on Legal History*, 210, and in 3 *Select Essays in Anglo-American Legal History*, 580. Men frequently do things that "can not be done;" of this we have here an illustration. A, who has a legal right to the payment of \$100 by B, buys goods of C and pays therefor by giving to C a writing addressed to B: "Please pay to C the \$100 due me; I hereby assign to him my right against you." Men of affairs performed such transactions as this in such vast numbers that the Chancellors and common law judges had to recognize the fact and give them the effect expected by the parties.

At first the Judges, saving face, said: A chose in action can not be assigned (except by the King, who can do things that can not be done); but you may give to your pretended assignee a power of attorney authorizing him to bring suit in your name. With such a power of attorney, C in the illustration above could bring an action in the name of A against B and get judgment for the money due, the court resolutely asserting that "A" was the plaintiff and that the "right" to payment was still his, but just as resolutely preventing A from controlling the action or discharging B or receiving the \$100 when the sheriff collects it from B. In this they followed somewhat lamely in the wake of the Chancellors. Before long, it became unnecessary for C to obtain a power of attorney in writing from A; the fact of assignment itself operated as a grant of such a power. Thus the doctrine that at common law a chose in action is not assignable became an empty shell; but it was repeated by judges and writers and was taught to law students as late as the beginning of the present century.

The Chancellors recognized the hollowness of the shell (not having been responsible for it) before the Judges did, and permitted the assignee to sue in his own name in Chancery, as long as it had not become quite certain that the right of the assignee would be fully recognized and enforced by the courts of common law. Thus, it came to be said that a chose in action was assignable in equity, though not at common law, and that the assignee's right is "equitable," not "legal."

One casebook cannot contain enough cases to present all this history or to prove the accuracy of the foregoing statements. Some illustrations are taken from earlier times; but the cases are selected for the purpose of making some headway in the determination of the law of the present day. The cases should be continually used to test the soundness of the tentative rules given in *Restatement, Contracts*, Chapter 7. See also Corbin, "Assignment of Contract

Rights," 74 Univ. of Pa.L.Rev. 207 (1926), reprinted in *Selected Readings on the Law of Contracts*, 718.

Far back in world history, bills of exchange were invented by international traders. From their customary practices there developed rules of law. By this practice and in accordance with these rules, bills of exchange were "negotiable." The "law merchant" was not known to or enforced by the common law Judges of England; but there were various local courts in which it was known and applied. Eventually a statute made it applicable to promissory notes of a certain form. Lord Mansfield played a major part in incorporating the Law Merchant into the continually developing Common Law of England. In all of our states, the law of Bills and Notes has been embodied in the uniform Negotiable Instruments Law. This law is not considered in the present chapter on Assignment.

SECTION 1.—EFFECTS GIVEN TO AN ASSIGNMENT BY THE GROWING COMMON LAW.

MOWSE v. EDNEY.

In the Queen's Bench, 1600. Rolle's Abr. 20 pl. 12.

If A is indebted to B by bill and B indebted to C, and B in payment of his debt to C assigns A's bill to him, and before the day for the payment of the money A comes to C and promises him that if he will forbear to enforce the payment of the money then he, A, will pay him; upon which C forbears. Still there is no consideration to maintain any action on this promise, because notwithstanding the assignment of the bill, still the property of the debt remains always in the assignor.

NOTE

Even when Rolle was making this statement, the assignee could sue in the courts of common law in the name of the assignor, acting in accordance with a written power of attorney or in accordance with a power to be inferred from the mere fact of the assignment itself. Soon after this, the Court of Chancery recognized and enforced the rights of an assignee, allowing him as matter of course to sue in his own name. See *Fashion v. Atwood*, 2 Cas. in Ch. 36 (1680); *Crouch v. Martin*, 2 Vernon, 595 (1707); *Row v. Dawson*, 1 Ves.Sr. 331 (1749).

In *J. R. v. M. P. and J. B.*, 37 Hen.VI, f. 13, pl. 3 (1458), translated in 1 Ames' Cases on Eq.Jur. 1, J.R. assigned certain debts, owed to him by third parties, to M. P. and J. B., in return for which they executed their

sealed obligation to pay a price. Finding that the courts of common law would enforce this sealed obligation, even though they still recognized J. R. as the only one entitled to payment of the debts, M. P. and J. B. applied to the Chancellor for an order to compel J. R. to surrender the sealed obligation for cancellation or to execute a sealed release. The Chancellor after full argument in the Exchequer Chamber before himself and the common law Judges, granted the application. It was unconscionable that J. R. should enforce the obligation and also remain entitled to payment of the debts that he had assigned. It does not appear what the Chancellor would have done if M. P. and J. B. had asked him to compel payment to them of the assigned debts, leaving them bound by their obligation to J. R.; but a century and a half later such a decree would have been granted. Apparently, J. R. had not given his assignees a power of attorney to sue the debtors in his name.

The forbearance of C, in *Mowse v. Edney*, above, to sue A (either at law in the name of the assignor B, or in equity in his own name) should have been held to be a sufficient consideration for A's express promise to C. It had been held in *Dowdenay v. Oland*, Cro.Eliz. 768 (1599), and *Rivett v. Rivett*, 1 Leon. 118 (1588), that forbearance to bring a suit in Chancery was such a consideration.

CASE OF BRADSHAW et al.

In the Common Pleas, 1605. Cro.Jac. 105.

Divers debts were assigned to the plaintiffs, being creditors, by the commissioners upon the statute of 13 Eliz. c. 7, of Bankrupts, and they sued an action in their own names for those debts.—And it was ruled, that it well lies; for it is a debt transferred by Parliament.

Being upon a contract, the defendant gaged his law, and was admitted thereto; for although the Parliament transferred the debt, yet it is not any debt of record; but as he might have gaged his law against the bankrupt, so he may against the plaintiffs.

NOTE

From this it appears that Commissioners in Bankruptcy, as a means of realizing the assets of the bankrupt, had power to make an effective sale and assignment of debts due to him from third parties. What the king could do and what Parliament could authorize, an ordinary citizen could also do; but the procedure for enforcement by his assignee was more complicated.

Even though the assignment was effective, the assignee's right was then, as it is now, subject to the same defenses that could have been made against the assignor. "Wager of law" was a form of defense that was good in the action of debt, but not in *assumpsit*. It has now long been abolished.

REDFIELD v. HILLHOUSE.

Superior Court of Connecticut, 1774. 1 Root, 63.

Scire facias against him, as agent and factor to Isaac Colton, an absconding debtor.

The case was—Isaac Colton assigned a note he had against one Hull, to William Colton, with a power of attorney; William puts it into the hands of Mr. Hillhouse to collect, and he collected the money upon it; Redfield instituted an action against said Isaac as an absconding debtor, and served Mr. Hillhouse with a copy; he recovered a judgment and execution against Isaac and the execution was returned non est inventus, and thereupon he brings this scire facias against Mr. Hillhouse; and the defendant pleads that he never was agent, factor or attorney to said Isaac, etc.

The only question upon this issue, was—Whether the property of this money was in Isaac, the promisee, or in William, the assignee of the note?

THE COURT decided the property to be in the assignee, and that said Hillhouse was not agent, factor or attorney to said Isaac. * * *

NOTE

The writ of scire facias was an order to Mr. Hillhouse to show cause why he should not be ordered to pay the money that he had collected from Hull into court for the benefit of Redfield, the judgment creditor of Isaac Colton. Hillhouse showed sufficient cause.

WINCH v. KEELEY.

In the King's Bench, 1787. 1 Term.R. 619, 99 Eng.Rep. 1284.

Indebitatus assumpsit for work and labour, money paid, laid out, and expended, money lent, and on an account stated.

Pleas, 1st, non assumpsit. 2dly, that after the day of making the promises, etc. the plaintiff became a bankrupt, etc. and that his commissioners assigned over his effects to the assignees, etc. by virtue of which he the defendant is chargeable to pay the sums of money mentioned in the declaration to the assignees, etc. 3dly, set-off for goods sold and delivered, money paid, laid out, and expended, money lent, and for money due on an account stated.

The replication admitted the matters contained in the 2d plea to be true; and as to all the promises in the declaration mentioned, and all the sums therein contained, except as to £73. 12s. 9d. parcel, etc. the plaintiff acknowledged that he would not further prosecute. Then the

replication proceeded as follows [with abbreviations]: And as to that sum, he says that, before the time that the plaintiff became a bankrupt, * * * upon an account fairly and justly taken between the said plaintiff and the said defendant there was then due and owing from the defendant to him the said plaintiff, on the balance of such account, the sum of £73. 12s. 9d. * * * and the said plaintiff farther saith, that he the said plaintiff, before the time that he became and was a bankrupt, * * * was justly indebted to one Joseph Searle * * * in the sum of £73. 12s. 9d. And, being so indebted, he the said plaintiff * * * before he became a bankrupt, * * * by his certain deed poll, * * * in consideration of the said sum of money so as aforesaid due and owing from him the said plaintiff to the said Joseph Searle, did bargain, sell, assign, and transfer to the said Joseph Searle the said sum of £73. 12s. 9d. * * * to hold the same to the said Joseph Searle from thenceforth to his own proper use, * * * and did thereby constitute and appoint the said Joseph Searle his true and lawful attorney irrevocably, and did give and grant unto him, his executors and administrators, full power and authority in his name, to the only proper use and behoof of the said Joseph, to ask, demand, and sue for, the aforesaid sum of £73. 12s. 9d. * * * The plaintiff further saith that the original writ in this suit was sued out in the name of him the said plaintiff for and on the behalf of the said Joseph Searle, and for the purpose of enabling the said Joseph Searle to receive the said sum of £73. 12s. 9d. * * * according to the form and effect of the said deed poll, and not for the benefit, use, or behoof, of the said plaintiff; * * * and this he is ready to verify, wherefore he prays judgment, etc. as to the said £73. 12s. 9d. To this replication there was a general demurrer and joinder.

Morgan in support of the demurrer, contended that this debt, being a chose in action, could not be assigned. Co.Litt. 214a. 2 Rol.Abr. 45, F. 6. Although the King by his prerogative may assign a chose in action, yet his grantee cannot. Cro.Eliz. 180. Bills of exchange are assignable by the law of merchants; but promissory notes can only be assigned under the 3 & 4 Ann. c. 9, which shews that at common law they could not. That being the law generally, that inconvenience will result from permitting persons subject to the bankrupt laws to assign over their effects to particular creditors on the eve of a bankruptcy.

Lawrence, contra, did not dispute the general principle; and admitted that if the action had been brought in the name of Searle, those cases would have applied; and that this assignment could not have been supported if it had been fraudulent. But he observed that the question here was, whether a chose in action can be assigned for an antecedent debt, so that the assignee may recover on it in the name

of the assignor. The cases cited only prove that the action cannot be maintained by the assignee. It cannot now be disputed that Courts of Equity will protect a chose in action when assigned; and Courts of Law have frequently permitted the assignee to sue in the name of the assignor. A Court of Equity has held such an assignment to be good, even though the assignor afterwards became a bankrupt. *Unwin v. Oliver*, cited by Lord Mansfield, in 1 Burr. 481. *Ex parte Byas*, 1 Atk. 124. If then such an assignment be good in a Court of Equity, the only question is, whether or not this Court will take notice of such a trust. Now Courts of Law have taken notice of trusts in many instances. * * * It has likewise been since recognized in *Webster v. Scales*, M. 25 Geo. 3, where it was held by the Court that a bankrupt's interest as a trustee was not assignable by the commissioners. Immediately on this assignment the plaintiff became a mere trustee; if so, this case falls within the principle of that of *Webster v. Scales*. For by the 1 Jac. 1, c. 15, § 15, the commissioners are only empowered to assign those things which are for the benefit of the bankrupt. Therefore this debt could not pass under the assignment from the bankrupt's commissioners to his assignees; because, when recovered, it cannot be applied to the bankrupt's benefit. * * *

ASHHURST, J. The cases which have been cited by the plaintiff's counsel go a great way in determining this question. It is true that formerly the Courts of Law did not take notice of an equity or a trust, for trusts are within the original jurisdiction of a Court of Equity: but of late years, it has been found productive of great expense to send the parties to the other side of the Hall; wherever this Court have seen that the justice of the case has been clearly with the plaintiff, they have not turned him round upon this objection. Then if this Court will take notice of a trust why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this Court will take notice of a trust, and consider who is beneficially interested; as in *Bottomley v. Brooke*, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her. The only difference between that case and this is, that there the plaintiff himself was not originally interested in the debt, but this plaintiff was: but that does not make any essential difference, because if it be once established that this Court will take notice of trusts, it is immaterial whether the person who sues were originally a trustee or afterwards becomes so. Nor is it material at what time they became a trustee; for whether he became such by the assignment, or was so originally, it is sufficient to say that he is a trustee now, and as such has a right to maintain this action. If this had been a fraudulent assignment, it would have raised a different question: but on these pleadings it must be taken to have been assigned for a valuable consideration. The case

of Webster and Scales is in point; and on the authority of that and on the other cases cited, I am of opinion that the plaintiff may recover.

BULLER, J. This action is brought in the name of the assignor of this bond; and therefore it does not involve in it the question whether a chose in action may be so assigned as to give a legal title to the assignee. The plea only says, that the plaintiff is become a bankrupt, and that this debt is transferred to his assignees; the answer to that is, that this is a debt due in form to the plaintiff, but in substance to a third person; and therefore it is not such a debt as passed under the commission; if not, it is still in the plaintiff, and he is entitled to maintain this action. The statute of the 1 Jac. 1, c. 15, only says that such debts are to be assigned as are for the benefit of the bankrupt. This construction was put upon the statute soon after it passed in a case in March, 38; where it was held that such things as the bankrupt held as trustee did not pass under the commission. Here it must be taken on these pleadings that this debt did not pass under the commission; therefore it remained in the bankrupt, and he may maintain this action.

Judgment for the plaintiff.

QUESTIONS:

1. Was there a consideration for the assignment?
2. Did not the "property in the debt" remain always in the assignor Winch, so that the assignees under the bankruptcy should get the money instead of Joseph Searle?
3. Does the court apply the common law, equity, the law merchant, or a parliamentary statute?
4. What made bills of exchange "assignable"? Promissory notes?
5. Was Winch a "trustee" for Searle?
6. What is meant by "legal title" to a "chose in action"?
7. Would Winch have won this case if he had made no assignment to Searle?
8. Did Winch win this case?

NOTE

Bradshaw's case, ante, held that Commissioners in Bankruptcy could effectively assign the bankrupts "choses in action". In the present case the King's Bench recognizes that an assignment for value by the bankrupt himself, before bankruptcy, prevents the assigned claim from being an asset that the Commissioners, later appointed can collect.

The courts of common law did not like to see cases go to the Chancellor, sitting on the opposite side of Westminster Hall, because of their own failure to recognize just claims and to give effective remedies.

LEGH v. LEGH.

In the Court of Common Pleas, 1799. 1 Bos. & P. 447.

On a former day Shepherd, Serjt., shewed cause against a rule Nisi obtained by Le Blanc, Serjt., for setting aside a plea of release in an action on a bond, and ordering the release to be cancelled.

The case as disclosed by the affidavits in support of the rule appeared to be this: Frances Legh having given a bond to Sarah Legh to secure £75, Sarah assigned it to John Legh as a security for the payment of a lesser sum, of which Frances had notice: John having brought an action on the bond against Frances in the name of Sarah, Sarah gave a release to Frances by whom she had been satisfied her debt, and this release was pleaded.

EYRE, C. J. The conduct of this Defendant has been against good faith, and the only question is, whether the Plaintiff must not seek relief in a Court of Equity? The Defendant ought either to have paid the person to whom the bond was assigned, or have waited till an action was commenced against him, and then have applied to the Court. Most clearly it was in breach of good faith to pay the money to the assignor of the bond and take a release, and I rather think the Court ought not to allow the Defendant to avail himself of this plea, since a Court of Equity would order the Defendant to pay the Plaintiff the amount of his lien on the bond, and probably all the costs of the application.

BULLER, J. There are many cases in which the Court has set aside a release given to prejudice the real Plaintiff. All these cases depend on circumstances. If the release be fraudulent, the Court will attend to the application.

The Court recommended the parties to go before the prothonotary, in order to ascertain what sum was really due to the Plaintiff on the bond.

Shepherd on this day stated that the Defendant objected going before the prothonotary, upon which the Court said, that the rule must be made absolute. He then applied for leave to plead payment of the bond, and contended that as this was not an application under the Statute to plead several pleas, the Court had no discretion.

EYRE, C. J. The Court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real Plaintiff, this Defendant has colluded with the nominal Plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the

Court. And if so, the Defendant cannot be permitted to plead payment of the bond, as that would amount to the same thing.

BULLER, J. The Court proceeds on the ground, that the Defendant has in effect agreed not to plead payment against the nominal obligee.

Upon this the Defendant consented to go before the prothonotary.

NOTE

If the assignor's release to his debtor is effective, because the debtor had no notice of the assignment or for other reason, the assignee has an action against the assignor. The law recognized this right against the assignor even before it acknowledged that the assignee had a right against the debtor. *Deering v. Farrington*, 1 Mod. 113, 3 Keb. 2 (1674); *Caister v. Eccles*, 1 Ld.Raym. 683, Salk. 68 (1702).

In *Gerard v. Lewis*, L. R. 2 C. P. 305 (1867), an assignee sued in the assignor's name by power of attorney; and the assignor discharged the debtor from arrest, thus causing the plaintiff to lose in the action. The assignee sued the assignor for damages; and the court sustained the action as one for breach of "an implied covenant" in the sealed power of attorney.

The "Warranties of an Assignor" are stated in Restatement, Contracts, § 175.

WELCH v. MANDEVILLE.

Supreme Court of the United States, 1816. 1 Wheat. 233, 4 L.Ed. 79.

Error to the Circuit Court for the District of Columbia for Alexandria County. This was an action of covenant brought in the name of Welch (for the use of Prior) against Mandeville and Jamieson. The suit abated as to Jamieson by a return of no inhabitant. The defendant, Mandeville, filed two pleas. The second plea, upon which the question in this Court arises, states, that, on July 5th, 1806, James Welch impleaded Mandeville and Jamieson, in the Circuit Court of the District of Columbia, for the county of Alexandria, in an action of covenant, in which suit such proceedings were had, that, afterward, to wit, at a session of the Circuit Court, on December 31st, 1807, "the said James Welch came into Court and acknowledged that he would not farther prosecute his said suit, and from thence altogether withdraw himself." The plea then avers, that the said James Welch, in the plea mentioned, is the same person in whose name the present suit is brought, and that the said Mandeville and Jamieson, in the former suit are the same persons who are defendants in this suit, and that the cause of action is the same in both suits. To this plea the plaintiff filed a special replication, protesting that the said James Welch did not come into Court and acknowledge that he would not farther prosecute the said suit and from thence altogether withdraw himself; and avers

that James Welch, being indebted to Prior, in more than \$8,707.09, and Mandeville and Jamieson being indebted, by virtue of the covenant in the declaration mentioned, in \$8,707.09, to Welch, he, Welch, on September 7th, 1799, by an equitable assignment assigned to Prior, for a full and valuable consideration, the said \$8,707.09, in discharge of the said debt, of which assignment the replication avers Mandeville and Jamieson had notice. The replication further avers, that the suit in the plea mentioned was brought in the name of Welch, as the nominal plaintiff for the use of Prior, and that the defendant, Mandeville, knew that the said suit was brought, and was depending for the use and benefit of the said Prior; and that the said suit in the plea mentioned, without the authority, consent, or knowledge of the said Prior, or of the attorney prosecuting the said suit, and without any previous application to the court, was "dismissed, agreed." The replication farther avers, that the said James Welch was not authorized by the said Prior to agree or dismiss the said suit in the plea mentioned; and that the said Joseph Mandeville, with whom the supposed agreement for the dismissal of the said suit was made, knew, at the time of making the said supposed agreement, that the said James Welch had no authority from Prior to agree or dismiss said suit. The replication farther avers, that the said agreement and dismissal of the said suit were made and procured by the said Joseph Mandeville, with the intent to injure and defraud the said Prior, and deprive him of the benefit of the said suit in the plea mentioned. The replication also avers, that the said Prior did not know that the said suit was dismissed until after the adjournment of the Court at which it was dismissed; and, farther, that the supposed entry upon the record of the Court in said suit, that the plaintiff voluntarily came into Court and acknowledged that he would not further prosecute his said suit, and from thence altogether withdraw himself, and the judgment thereupon was made and entered by covein, collusion, and fraud; and that the said judgment was, and is, fraudulent. To this replication the defendant filed a general demurrer, and the replication was overruled. It appeared by the record of the suit referred to in the plea, that the entry is made in these words: "This suit is dismissed, agreed," and that this entry was made by the clerk without the order of the Court, and that there is no judgment of dismissal rendered by the court, but only a judgment refusing to reinstate the cause.

STORY, J., delivered the opinion of the Court.

The question upon these pleadings comes to this, whether a nominal plaintiff, suing for the benefit of his assignee, can, by a dismissal of the suit under a collusive agreement with the defendant, create a valid bar against any subsequent suit for the same cause of action.

Courts of law, following in this respect the rules of equity, now take notice of assignments of choses in action, and exert themselves to af-

ford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law. They will not, therefore, give effect to a release procured by the defendant under a covinous combination with the assignor in fraud of his assignee, nor permit the assignor injuriously to interfere with the conduct of any suit commenced by his assignee to enforce the rights which passed under the assignment. The dismissal of the former suit, stated in the pleadings in the present case, was certainly not a retraxit; and if it had been, it would not have availed the parties, since it was procured by fraud. Admitting a dismissal of a suit, by agreement, to be a good bar to a subsequent suit (on which we give no opinion), it can be so only when it is bona fide, and not for the purpose of defeating the rights of third persons. It would be strange, indeed, if parties could be allowed, under the protection of its forms, to defeat the whole objects and purposes of the law itself.

It is the unanimous opinion of the Court, that the judgment of the Circuit Court, overruling the replication to the second plea of the defendant, is erroneous, and the same is reversed, and the cause remanded for further proceedings.

Judgment reversed.

NOTE

After notice of the assignment, given to the debtor, the assignor has no power to discharge the debtor, either by a release, or by receiving payment, or by accord and satisfaction: *Carrington v. Harway*, 1 Keb. 803 (1676); *McCullum v. Coxe*, 1 Dall. (Pa.) 139, 1 L.Ed. 72 (1785).

Payment to the assignor by the debtor extinguishes the debt, if the debtor had no notice of the assignment. See *Restatement, Contracts*, § 170.

If, in disregard of his assignment, an assignor wrongfully collects from the debtor, he holds the money in trust for the assignee. See *Garrott v. Jaffray*, 73 Ky. (10 Bush) 413 (1874); *Brown v. Brown*, 40 Hun (N.Y.) 418 (1886); *Puterbaugh v. McCray*, 25 Cal.App. 469, 144 P. 149 (1914).

In *Camp v. Tompkins*, 9 Conn. 545 (1883), the court sustained an action of assumpsit by an assignee against one who had wrongfully collected the money from the debtor. The court said: "It is well known, that an entire revolution in opinion has taken place upon that subject. The antipathy, which formerly existed against the assignment of a chose in action, has gradually yielded to sentiments more congenial to the demands of commerce and the state of society. The history of this change is given by Judge Buller, in his able opinion in the case of *Master v. Miller*, 4 T.R. 320, 341. He there held, that the courts of law in that country, had, on that subject, adopted all the principles of a court of equity, except that they would not allow a suit in the name of the assignee; and he did not hesitate to say, that he saw no use in preserving the shadow, when the substance was gone. And in pursuance of that opinion, the courts in

that country have refused to suffer a defendant, who had notice of an assignment of a chose in action, to plead a discharge from the assignor obtained after such assignment."

CARTER & MOORE v. UNITED INS. CO. of NEW YORK.

Court of Chancery of New York, 1815. 1 Johns.Ch. 463.

The bill was filed by the plaintiffs, as assignees of a policy of insurance, underwritten by the defendants, for William Titus and George Gibbs, on which the plaintiffs claimed payment for a total loss. The insurance was on 500 barrels of flour from Newport to St. Jago de Cuba, on board the Spanish brig *Patriota*, which was captured by a Carthagena privateer. On the 21st of December, 1814, the policy was assigned by Titus & Gibbs to the plaintiffs, in trust, for themselves and other creditors of Titus & Gibbs. The bill charged that the defendants refused to pay the loss, alleging, among other things, that the plaintiffs had no title to the property insured, which, in fact, belonged to one J., a Spaniard, and not to Titus & Gibbs. The bill prayed that the defendants might answer the matter charged in the bill, and be compelled to pay the plaintiffs the amount insured as for a total loss.

To this bill the defendants demurred on the following grounds: that it appeared by the bill that the plaintiffs' demand, or cause of action, was properly cognizable in a Court of Law; as it is not alleged that Titus & Gibbs refused to let the plaintiffs make use of their names, in a suit at law; or that they are, in any way, hindered from prosecuting at law; or that they stood in need of any discovery to aid them in such action.

THE CHANCELLOR [KENT]. The demand is properly cognizable at law, and there is no good reason for coming into this Court to recover on the contract of insurance. The plaintiffs are entitled to make use of the names of Gibbs & Titus, the original assured, in the suit at law; and the nominal plaintiffs would not be permitted to defeat or prejudice the right of action. It may be said here, as was said by the chancellor, in the analogous case of *Dhegetoft v. The London Assurance Company*, Mosely, 83, that, at this rate, all policies of insurance would be tried in this Court. In that case the policy stood in the name of a nominal trustee; but that was not deemed sufficient to change the jurisdiction; and the demurrer to the bill was allowed, and the decree was afterwards affirmed in parliament. 3 Bro.P.C. 525. The bill, in this case, states no special ground for equitable relief; nor is any discovery sought which requires an answer.

Bill dismissed, with costs.

NOTE

The court of Chancery ordinarily took jurisdiction of a case only when in its opinion the rights recognized and the remedies given by the courts of common law were not adequate to do complete justice. From very early times, the Chancery had sustained suits by an assignee, on the ground that he could not get full justice in the law courts. Finally, the common law courts did so much for an assignee that the Chancellors thought it unnecessary for them to continue to exercise their jurisdiction.

SECTION 2.—EFFECT OF STATUTES ON THE MANNER OF
ENFORCEMENT BY ACTION—IS THE ASSIGNEE AN AGENT

JEMISON v. TINDALL.

Supreme Court of New Jersey, 1916. 89 N.J.L. 429, 99 A. 408.

Action by Margaret R. Jemison against Enoch N. Tindall. From a judgment for plaintiff, defendant appeals. Affirmed.

PARKER, J. The appellee, plaintiff below, employed appellant, Tindall, and two other men, named Miller and Cohen, to sell her farm, and agreed in writing to pay them \$300 commission, which they earned by effecting a sale. Mrs. Jemison then paid the commission to Tindall, who receipted both for himself and the others, but concealed from them the fact of payment. Later they learned of it, and, instead of bringing suit against Tindall for their shares of the commission, sued Mrs. Jemison jointly and recovered judgment against her for \$200 as for their shares in the amount earned. The propriety of that judgment is not in question here. Mrs. Jemison paid the judgment, at the same time taking from Miller and Cohen an assignment by parol of their claim against Tindall, and then sued him to recover back so much of the commission as her assignors were entitled to have on a settlement between them and Tindall. This the trial court found was \$150 and gave her a judgment for that amount and interest, from which Tindall appeals.

The principal point urged for the appellant is that the parol assignment was invalid, or, at most, enforceable only in equity; but neither branch of this proposition is sound. A chose in action arising out of contract is assignable by parol (*Hutchings v. Low*, 13 N.J.L. 246; *Allen v. Pancoast*, 20 N.J.L. 68; *Sullivan v. Visconti*, 68 N.J.L. 543, 549, 53 A. 598; *New Jersey Produce Co. v. Gluck*, 79 N.J.

L. 115, 74 A. 443), in which last case the subject of assignment was a right of action on book account. And by section 19 of the Practice Act of 1903 (P.L. p. 540), choses in action arising on contract are assignable at law, and the assignee may sue thereon in his own name. This is applicable to suits in district courts. C.S. p. 1977, § 68.

The other grounds of appeal are either irrelevant or without merit, and the authorities cited in support of them need not be particularly noticed.

The validity of the parol assignment being clear, Mrs. Jemison acquired thereby the rights that Miller and Cohen jointly or severally had to recover from Tindall such part of the commission as they were entitled to under their arrangement with Tindall; or if it be assumed that Tindall had no right to collect the whole commission in the name of the three, and that Mrs. Jemison still remained liable to Miller and Cohen for their shares, she was then entitled to recover back such amount as Tindall was overpaid.

In either event, the judgment should be affirmed.

NOTE

By statute everywhere in this country contract rights and other choses in action have been made assignable, so that in an ordinary action at law the assignee may (and very generally must) sue in his own name. He, and not the assignor, is "the real party in interest." See N.Y.Code Civ. Proc. § 449; Personal Property Law, § 41 (Consol.Laws, c. 41).

Mass.Rev.Laws, c. 173, § 4, requires the assignment to be in writing to enable the assignee to sue in his own name, but very informal writings may suffice. See *New England Cabinet Works v. Morris*, 226 Mass. 246, 115 N.E. 315 (1917). This requirement does not generally prevail.

"The ancient prejudice against assigned rights of action having worn itself out, the only practical consequence left is in the manner of naming the plaintiff. * * * The act [Pennsylvania statute] requires two witnesses to an assignment. If the assignment has but one witness, it does not pass legal title, and suit is brought in the name of the assignor to the use of the assignee. Either assignment is good to all intents and purposes. One is a legal assignment; the other is an equitable one; but one is as good as the other." In *re Hawley Down-Draft Furnace Co.* (D.C.) 233 F. 451 (1916).

Conn.R.S.1930, § 5531, reads: "The assignee and equitable and bona fide owner of any chose in action, not negotiable, may sue thereon in his own name; but he shall in his complaint, allege that he is the actual bona fide owner thereof, and set forth when and how he acquired title thereto."

WHITING v. GLASS.

Court of Appeals of New York, 1916. 217 N.Y. 333, 111 N.E. 1082.

Action by Myron W. Whiting against Allie J. Glass. From a judgment of the Appellate Division (160 App.Div. 915, 145 N.Y.S. 1149), unanimously affirming a judgment (81 Misc.Rep. 402, 142 N.Y.S. 512), entered upon a verdict directed by the court in favor of plaintiff, defendant appeals. Reversed, and judgment granted, dismissing the complaint.

HISCOCK, J. This action was brought to recover the value of various articles of personal property claimed to have been sold and delivered by respondent to appellant. The sale originated in a verbal contract for the exchange of this property owned by the former for a farm owned by the latter and which contract it is alleged the appellant was unable or unwilling to complete, although he had received respondent's property.

It is unnecessary to consider all the various objections urged by appellant's counsel to the recovery which has been directed in the action, for in our opinion there was developed on the trial one very simple and effective bar to the right to recover. This was the circumstance that prior to the commencement of the action respondent had transferred to a third party his title to any claim which he held. He executed an instrument which in its substantial features, so far as concerns the present question, was a general assignment and which specifically covered and included any claim which he had against the appellant springing out of the transaction referred to, and such transfer defeated his right to bring this action. *Foster v. Central Nat. Bank of Boston*, 183 N.Y. 379, 76 N.E. 338.

It is urged by the respondent that after the transfer the assignee was the trustee of an express trust and both by law and by express provision of the assignment was authorized to bring an action in the name of the assignor. Without considering this proposition broadly, it is sufficient to say that there is nothing to indicate that the assignee had anything whatever to do with bringing the action or that it was anything other than an action brought by an assignor after he had fully and completely transferred to another the title to the cause of action. * * *

Under the circumstances, instead of directing a verdict for the respondent the trial court should have directed a nonsuit for the appellant, and inasmuch as the facts which bar the former's right of recovery cannot be changed on a new trial, not only should the judgment appealed from be reversed, but judgment should be granted dismissing the complaint, with costs to the appellant in all courts.

NOTE

Although, centuries ago, an assignee could not sue at common law unless he had a power of attorney from the assignor, he was even then neither an agent nor a trustee for the assignor. He brought the suit for his own benefit; and when he got judgment and collected the money he kept it. A creditor can, however, assign his claim to an agent for purposes of enforcement and collection, the money when collected to be remitted to the assignor. In such a case, the assignee is not the real party in interest and suit should be brought in the name of the assignor, who retains full power to control the action and to discharge the debtor. A purported assignment of this kind is not a transfer of the right. Restatement, Contracts, § 150, declares that by an assignment the right of the assignor is "extinguished" and a right substituted in the assignee. This is also recognized in Id. § 423, where assignment is treated as a method of discharge that is closely related to novation.

Frequently a debtor who has claims against other parties assigns these claims to his creditor as security for payment of his own debt. In such a case both the assignor and the assignee are real parties in interest; but the assignor has no power to collect or to discharge the assigned claims unless and until he otherwise discharges his own debt to the assignee.

SPENCER v. STANDARD CHEMICALS & METALS CORPORATION.

Court of Appeals of New York, 1924. 237 N.Y. 479, 143 N.E. 651.

Action by Harold R. Spencer against the Standard Chemicals & Metals Corporation. From a judgment of the Appellate Division (206 App.Div. 794, 200 N.Y.S. 950), affirming judgment of Trial Term on directed verdict for plaintiff, defendant appeals. Reversed, and new trial granted.

ANDREWS, J. When we adopted our scheme of reformed practice, one purpose being to end in part the ancient distinctions between law and equity, we provided that every action must be prosecuted in the name of the real party in interest. Code of Procedure, § 111. A few exceptions were made. A trustee of an express trust, for instance, might still sue without joining with him the person for whose benefit the action is prosecuted, and later such a trustee was defined to include one with whom or in whose name a contract is made for the benefit of another. Code of Procedure, § 113. Theretofore, as the commissioners on practice and pleadings pointed out in their report, if the assignee sued at law he was turned out of court, and if the assignor sued in equity he was turned out also. So the rule adopted in courts of equity was made general, "that he who has the right is the person to pursue the remedy." First Report, p. 124. It was not the

design to give a new cause of action where none previously existed, but to permit and require the beneficial owner to enforce his rights in his own name.

The real party in interest has been defined by this court:

"If, as between the assignor and assignee, the transfer is complete, so that the former is divested of all control and right to the cause of action, and the latter is entitled to control it and receive its fruits, the assignee is the real party in interest." *Cummings v. Morris*, 25 N. Y. 625.

In other words, the plaintiff must have some title, legal or equitable, to the thing assigned. *Hays v. Hathorn*, 74 N.Y. 486. If the assignee have such title it is enough. The consideration paid, the purpose of the assignment, the use to be made of any proceeds collected, is immaterial. *Allen v. Brown*, 44 N.Y. 228; *Meeker v. Claghorn*, 44 N.Y. 349; *Sheridan v. Mayor, etc., of New York*, 68 N.Y. 30; *Brown v. Powers*, 53 App.Div. 251, 65 N.Y.S. 733. But legal title or equitable interest he must have.

This action is brought by Harold R. Spencer to recover the balance of the purchase price of certain ore said to have been sold by one Quan Kai to the defendant. It was alleged in the complaint that the cause of action had been duly assigned to the plaintiff. This was denied. At the close of the plaintiff's case the purported assignment was offered in evidence. This instrument named Spencer as attorney for Quan Kai, and gave him, among other things, "power to commence or prosecute any suit or action or other legal proceedings for the recovery of damages, * * * debts, demands, choses in action, causes or things whatsoever in the United States of America due or to become due to me and to prosecute and follow and discontinue the same if he shall deem it proper and for me and in my or his name to take all steps and remedies necessary and proper for the recovery * * * of any * * * sum or sums of money, choses in action or other things whatsoever that is, are or shall be by my said attorney thought to be due * * * to me in my right or otherwise, and also for me and in my name to compromise, settle, and adjust all causes." The attorney was also authorized to sign any release or receipt and he was given power to substitute other attorneys in his place. When this instrument was offered in evidence objection was made that it was not competent because it did not constitute an assignment but was a mere power of attorney. The attention of the trial judge was therefore sharply called to this question. The paper was received in evidence and an exception taken.

The plaintiff is clearly not within any of the definitions the trustee of an express trust. No legal title to the claim against the defendant was assigned to him. Neither does it appear that he has any equitable

interest therein. Upon the face of the paper the attorney's duty is simply to collect what may be due to Quan Kai solely for the latter's benefit, and to transmit it to him. It is the ordinary case of the appointment of an attorney in fact. The attempt to authorize such an attorney to sue in his own name is, under the provisions of section 210 of the Civil Practice Act, which in this respect follows the original Code, entirely unavailing.* * *

The judgment appealed from must be reversed, and a new trial granted, with costs to abide the result.

MCLAUGHLIN, J. (dissenting). I dissent. What is termed in the prevailing opinion as a power of attorney is, I think more than that. It assigns Quan Kai's interest in the claim against defendant to the plaintiff. It is true the words "assign" and "transfer" are not used, but an inspection of the instrument will show that the plaintiff is not only authorized to bring an action in his own name but he is also authorized to "sell, assign, transfer, or dispose" of the ore or the claim which is the subject-matter of this action. The authority thus given to the plaintiff necessarily implies a transfer of title to the plaintiff. Where one is given authority to do a particular act, he is deemed to have whatever is necessary for its performance. The plaintiff, therefore, is a real party in interest. The defendant would be fully protected in paying any judgment recovered by him in the action.

* * *

NOTE

An assignee is neither the agent nor the attorney of the assignor. Conversely, an agent or attorney is not an assignee, even though he is empowered to effectuate an assignment to himself in trust by the act of collecting or receiving the subject-matter involved. *Farmers' Loan & Trust Co. v. Winthrop*, 238 N.Y. 477, 144 N.E. 686 (1924). See article on "Assignment of Contract Rights," by Corbin, 74 U. of Pa.L.Rev. 207 (1926).

SECTION 3.—ASSIGNMENTS FOR SECURITY—THE ASSIGNMENT OF UNMATURED AND CON- DITIONAL RIGHTS.

CROUCH v. MARTIN & HARRIS et al.

In Chancery, 1707. 2 Vern. 595.

The plaintiff lent Arthur Harris, late husband of the defendant, £100 on Bottom-Rhea; and as a farther security assigned to the plaintiff the wages that would become due to him in the voyage to the In-

dies, as surgeon of the ship at £4. 10s. per month; the ship returned safe to London, and £145 became due on the Bottom-Rhea bond. Arthur Harris died in the voyage; the defendant, his widow, took out administration; and there being a bond given by her husband on her marriage to leave her £400 if she survived him, she confessed judgment thereon, and insisted that judgment ought to be first paid, and the wages due to the husband applied to that purpose.

PER CURIAM. Seamen's wages are assignable, and the assignment specifically binds the wages; and in truth the advancing the £100 on the credit of the wages is, as it were, paying the wages beforehand; and the seaman or his widow must not have his wages twice.

It is a chose en action, being due by contract, although the service not then done, and a chose en action is assignable in equity upon a consideration paid.

QUESTIONS:

1. Is a contract right assignable if the time for performance has not yet arrived and if the other party's duty of immediate performance is conditional on some event that may never occur?
2. Are wages assignable before they are "earned"?
3. Are future wages assignable if either party has reserved power to terminate the employment at will?

NOTE

A few cases bearing on these questions are *Rodijkeit v. Andrews*, 74 Ohio St. 104, 77 N.E. 747, 5 L.R.A., N.S., 564, 6 Ann.Cas. 761 (1906); *Duluth, S. S. & A. R. Co. v. Wilson*, 200 Mich. 313, 167 N.W. 55, L.R.A. 1918E, 763 (1918); *Field v. Mayor, etc., of City of New York*, 6 N.Y. 179, 57 Am.Rep. 435 (1852); *Augur v. New York Belting & Packing Co.*, 39 Conn. 536 (1873).

A seaman on a whaler has power to assign his "lay" (contingent share of profits) before the voyage begins, in spite of the fact that such an assignment will reduce his interest in the success of the voyage. *Gardner v. Hoeg*, 18 Pick (Mass.) 168 (1836); *Cooper v. Douglass*, 44 Barb. (N.Y.) 409 (1864); *Tripp v. Brownell*, 12 Cush. (Mass.) 376 (1853).

See Restatement, Contracts, §§ 154, 155.

TAYLOR v. BARTON-CHILD CO.

Supreme Judicial Court of Massachusetts, 1917. 228 Mass. 126, 117 N.E. 43.

Suit by Violet I. Taylor against the Barton-Child Company, defended by Forest F. Collier, trustee in bankruptcy of defendant. Reserved for determination of full court upon bill of complaint, amended answer, replication, and master's report. Bill dismissed, without costs.

RUGG, C. J. This is a suit in equity to enforce rights of the plaintiff under an assignment of book accounts made to her assignor by the defendant corporation as security for a loan. It is undisputed that on December 3, 1910, one McCarthy, who is the assignor of the plaintiff, lent to the defendant \$5,000 and received its seven notes with different due dates, the most remote being June 3, 1913. As security for and in consideration of the loan, on the same day the defendant executed and delivered to the plaintiff's assignor an instrument which, it is contended, was an assignment of its present and future book accounts. Some of the notes were extended, some have been paid and a balance remains unpaid. This bill was filed on February 2, 1914. An injunction respecting the book accounts was issued on February 13, 1914. The defendant was adjudicated a bankrupt on February 13, 1914. Its trustee in bankruptcy is defending this cause.

At the time of the loan the defendant was engaged in dealing at wholesale in butter, eggs and similar products and needed the money borrowed of the plaintiff's assignor for carrying on its business, and used it for that purpose. The book accounts at the time of the assignment were between \$25,000 and \$30,000, some of which were due, but the greater part of them would become due within the next 60 days.

The crucial question is whether the assignment of book accounts, which are to come into existence in the future in connection with an established business, will be enforced in equity against a trustee in bankruptcy.

It is a well recognized principle of the common law that a man cannot sell or mortgage property which he does not possess and to which he has no title. The vendor must have a vested right in personal property in order to be able to make a sale of it. "A man cannot grant or charge that which he hath not." *Jones v. Richardson*, 10 Metc. 481, 488; *Moody v. Wright*, 13 Metc. 17, 46 Am.Dec. 706; *Leverett v. Barnwell*, 214 Mass. 105, 109, 101 N.E. 75.

The ground of our decision may be stated shortly. There can be no present conveyance or transfer of property not in existence, or of property not in the possession of the seller to which he has no title. A sale of personal chattels is not good against creditors unless there has been a delivery. Manifestly there can be no delivery of chattels not in existence. In order that after-acquired chattels may be brought under the lien of a mortgage, or of hypothecation, there must be some act of the parties subsequent to the time when such chattels come into existence and into the ownership and possession of the mortgagor. The mortgage is held not to have the effect of changing the title to after-acquired chattels without some further act of the parties.

There is an exception at the common law to the effect that one may sell that in which he has a potential title although not present actual

possession. The present owner might sell the wool to be grown upon his flock, the crop to be harvested from his field or the young to be born of his herd, or assign the wages to be earned under existing employment. *Kerr v. Crane*, 212 Mass. 224, 229, 98 N.E. 783, 40 L.R.A., N.S., 692; *St. Johns v. Charles*, 105 Mass. 262; *Farrar v. Smith*, 64 Me. 74, 77; *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am.Dec. 262; *Dugas v. Lawrence*, 19 Ga. 557. But see now Sales Act, St. 1908, c. 237, § 5(3). That principle of the common law has never been carried so far as to include the case at bar. The catch of fish expected to be made upon a voyage about to begin cannot be sold. *Low v. Pew*, 108 Mass. 347, 11 Am.Dec. 357. There can be no sale of the wool of sheep, the crop of a field, or the increase of herds not owned but to be bought, and there can be no assignment of wages to be earned under a contract of employment to be made in the future. *Eagan v. Luby*, 133 Mass. 543; *Citizens' Loan & Trust Co. v. Boston & Maine R. R.*, 196 Mass. 528, 531, 82 N.E. 696, 14 L.R.A., N.S., 1025, 124 Am.St.Rep. 584, 13 Ann.Cas. 365.

It is also the established doctrine in this commonwealth that a mortgage of future acquired property will not be enforced in equity before actual possession taken by the mortgagee as against persons subsequently acquiring an interest therein for value and having possession. That has long been settled although the contrary rule prevails more widely. *Federal Trust Co. v. Bristol County St. Ry. Co.*, 222 Mass. 35, 45, 46, 109 N.E. 880, where cases are collected. It would be anomalous for a court governed by these principles as to sales and mortgages of future acquired goods and chattels to hold that there could be an assignment of future acquired book accounts valid and enforceable under circumstances where a like attempt to hypothecate future acquired chattels would be held unenforceable.

A book account is a chose in action. It is "a right not reduced into possession" which "can only be reduced into beneficial possession by an action or suit." *Haskell v. Blair*, 3 Cush. 534, 535. It is property. While some of its incidents differ from those of a tangible thing, these are not sufficient to warrant the application to it of principles of law different in the respect here involved from those governing transactions concerning property with a physical and tactile body. Where it is reasonably practicable, it is desirable in the development of an harmonious system of jurisprudence that the same general rules of law should be applicable to the same classes of facts and that exceptions having their foundation more upon appearances than upon differences of substance should not be multiplied.

Practical difficulties of no small consequence would be encountered in the operation of the contrary doctrine. Assignments of book accounts do not require recording or any public act for their validity. *Marsh v. Woodbury*, 1 Metc. 436; *Gilligan Co. v. Casey*, 205 Mass.

26, 91 N.E. 124. Notice need not be given in order that they be valid against third persons. *Thayer v. Daniels*, 113 Mass. 129; *Cropper v. Gorham*, 221 Mass. 119, 125, 109 N.E. 161. Merchants and manufacturers well might acquire a considerable credit upon the supposed strength of book accounts which later might turn out to have been assigned long before they came into existence. A door would be opened for the accomplishment of fraud in business.

There are decisions by the courts of other jurisdictions where a contrary result has been reached. *Union Trust Co. v. Bulkeley*, 150 F. 510, 80 C.C.A. 328; *In re Macauley* (D.C.) 158 F. 322; *Tailby v. Official Receiver*, 13 App.Cases, 523. These decisions follow naturally from *Holroyd v. Marshall*, 10 H.L.C. 191, *Central Trust Co. v. Kneeland*, 138 U.S. 414, 419, 11 S.Ct. 357, 34 L.Ed. 1014, and other cases holding that mortgages of future acquired personal property are enforceable in equity. But as has been pointed out, that is not the law of this commonwealth.

The principles and spirit of our jurisprudence have been that owners of personal property ought not to acquire any false credit by creating incumbrances more or less secret and unknown to the world upon property of which they are to come into possession in the future as ostensible owners in absolute right. *Blanchard v. Cooke*, 144 Mass. 207, 223, 227, 11 N.E. 83; *Wasserman v. McDonnell*, 190 Mass. 326, 76 N.E. 959; *Schlatter v. Young*, 197 Mass. 36, 38, 83 N.E. 2; *Chick v. Nute*, 176 Mass. 57, 57 N.E. 219; *Wilson v. Russell*, 136 Mass. 211; *Harriman v. Woburn Elec. Light Co.*, 163 Mass. 85, 39 N.E. 1004. It was held in *Hall v. Jackson*, 20 Pick. 194, that an irrevocable power of attorney to bankers to collect debts due to a manufacturer from his customers, as security for advances made by the bankers, did not constitute a lien superior to an attachment by trustee process, in the absence of possession, control or disposing power in the person claiming the lien over the subject matter in which the lien was claimed. See, also, *Elmore v. Symonds*, 183 Mass. 321, 67 N.E. 314. In the light of these decisions it would be illogical and discordant with the policy of our law to uphold the assignment in the case at bar. It was held in *Purcell v. Mather*, 35 Ala. 570, 76 Am.Dec. 307, *Skipper v. Stokes*, 42 Ala. 255, 94 Am.Dec. 646, and *Clanton Bank v. Robinson*, 195 Ala. 194, 70 So. 270, that assignments similar to those here in question were invalid.

In accordance with the terms of the reservation let the entry be:

Bill dismissed without costs.

QUESTIONS:

1. Does one have "potential title" to an automobile in the show room if he has the money to pay for it?

2. Does a teacher have "potential title" to his next month's salary?
3. In either of the two cases, is there a power of assignment? A power to make a contract to assign? See Restatement, Contracts, §§ 154, 166.
4. If a man purchases a large annuity for life, giving in return some cash and an assignment of "all his future earnings," would the assignment be effective as against the man's subsequently deserted wife or unpaid grocer?

NOTE

An "assignment" of a right that is expected to be created by a contract not yet made has been held valid as between assignor and assignee. *Field v. Mayor, etc., of City of New York*, 6 N.Y. 179, 57 Am.Dec. 435 (1852).

Restatement, Contracts, § 154(2), says that it is "operative only as a promise by the assignor to assign the right and an authorization to the assignee to enforce it, but neither imposes a duty upon the obligor nor precludes garnishment by the obligee's creditors." Its chief difference from an assignment is stated in the last seven words. Query: Is this difference grounded on some definite public interest?

Benedict v. Ratner, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991 (1925), held that a mortgage of existing and future book accounts, allowing the mortgagor to collect and reinvest as he saw fit, was void as against the mortgagor's trustee in bankruptcy. See Glenn, "Book Accounts as Collateral," 26 Col.L.Rev. 809 (1926).

The owner of property that was subject to a mortgage held by X arranged to sell it to B. The latter would not buy mortgaged property; and the owner wished to be free from the debt. Thereupon X gave a release of the mortgage and the owner assigned to X his expected right to the price to become payable by B. Immediately thereafter the owner executed a bill of sale to B and the latter became bound to pay the price. The assignment to X was not invalidated by the fact that B had not yet executed a written contract. The tripartite transaction was in course of consummation; and at the time of his assignment to X the assignor already had a right against B that was conditional on final execution of documents. The assignment created in X a right superior to the claims of the assignor's other creditors or of a receiver appointed to liquidate and distribute his property. *Bergson v. Hood & Sons*, 300 Mass. 340, 15 N.E.2d 196, 116 A.L.R. 951 (1938).

ROCKMORE v. LEHMAN.

Circuit Court of Appeals of the United States, Second Circuit, May 24, 1942.
128 F.2d 564.

Before AUGUSTUS N. HAND, CLARK, and FRANK, Circuit Judges.

AUGUSTUS N. HAND, Circuit Judge.

On December 7, 1939, certain creditors of Surf Advertising Corporation filed a petition for a reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq. On December 26, Max Rockmore was appointed trustee. Surf had previously entered into three contracts with Calvert Distillers Corporation, whereby Surf was to furnish and maintain advertising signs for Calvert and the latter was to make instalment payments therefor. These contracts were dated May 28, 1937, July 28, 1937, and September 30, 1937, respectively. The contracts were assigned by Surf to the respondent Abrams in consideration of advances by the latter to enable Surf to erect and maintain the signs. Surf performed the contracts with Calvert from the time they were made until October 3, 1939, when Schub, the president of Surf, died. During the periods between the making of the contracts and the death of Schub, Abrams advanced to Surf \$38,210.29. Subsequent to October 3, 1939, and prior to the appointment of the trustee, Abrams personally supervised the servicing of the signs under the contracts and expended \$846.44 for that purpose. Checks aggregating \$31,889.38, which Calvert issued as instalment payments under its contracts with Surf, were delivered by Schub to Abrams, leaving a difference between his total advances of \$39,056.73 and his receipts from Surf of \$31,889.38 amounting to \$7,167.35.

On May 18, 1938, Calvert made a contract for the installation and servicing of an advertising sign with Fiegel Advertising Company Inc. whereby Calvert agreed to pay Fiegel \$165 per month for three years, making a total for the period of \$5,940. The latter performed all the obligations under the contract prior to the appointment of the trustee. On June 8, 1938, Fiegel made a contract with Mathilde Lehman reciting that it had made the agreement for installing and servicing the sign with Calvert and had acquired a lease of property on which the sign was to be erected. Fiegel promised to erect the sign at a cost of \$1,000 and to service the same for three years. Lehman was to advance \$1,000 to Fiegel and the latter was to repay the \$1,000 in six instalments during the months of July, August, September, October, November and December, 1938, and also to pay \$23 per month beginning with July 15, 1938, for the three succeeding years. The agreement between Fiegel and Lehman also provided that, "as security for the payment of the sums" provided to be paid to Lehman, Fiegel assigned all its rights and title both to the lease and to its contract with

Calvert. The agreement also provided that Fiegel on receipt of payments from Calvert should forward them, or its own checks for like amounts, to Lehman, or, in the event of failure to do this, Lehman should have the right to receive the payments from Calvert direct. It was further provided that no written notice of the assignment should be given to Calvert, unless a default in the payments had taken place, and that after the repayment of the \$1,000 to Lehman had been made Fiegel should be entitled to a re-assignment from Lehman of the lease and the contract upon Lehman's receiving from Fiegel satisfactory security covering the payments to be made for the balance of the term. After Fiegel had made the above assignment to Lehman it assigned its contract with Calvert to Surf. The payments received from Calvert by Fiegel were paid over to Lehman, but \$964.52 still remained due under the terms of her agreement with Fiegel.

Calvert deposited \$5,960 in the registry of the District Court which represented sums due after October 1, 1939, from Calvert under the various contracts of which Abrams and Lehman held assignments.

Out of the fund of \$5,960 the District Court awarded \$4,410.16 to Abrams and \$964.52 to Lehman. The court awarded the balance amounting to \$585.32 to the trustee as reimbursement to him for servicing the various signs. The trustee appealed from the order of distribution in so far as it directed the payments of \$4,410.16 to Abrams and \$964.52 to Lehman. In his petition he alleged that the assignments to Abrams were fraudulent because the debtor Surf was at the time insolvent and the consideration for the assignments was inadequate and contrary to the Bankruptcy Act and the laws of the State of New York applicable thereto. In respect to the assignment to Lehman of the indebtedness of Calvert to Fiegel it is claimed by the trustee that Fiegel agreed to repay its indebtedness out of a fund to be created in the future through services to be rendered by Fiegel under its contract. The trustee's contention seems to us sound in respect to both the Abrams and the Lehman assignments.

The court below did not determine whether the assignments to Abrams and Lehman were absolute or were only given as security for the advances and evidently thought it unimportant which view was adopted. The special master was of much the same mind as to lack of importance, though he seemed to regard the assignments given to Abrams as absolute rather than as security for the latter's advances. We think they were given both to Abrams and Lehman as security. Abrams filed his proof as one for a "Secured Claim" and therein reserved the right to collect moneys due and to become due under the contracts assigned. Moreover, he testified that the transactions with Surf consisted of "lending * * * money * * * " under assignments. A so-called master contract (Trustee's Exhibit 14) made

in 1934 between Surf and Abrams provided in terms for securing advances out of all contracts assigned "and to be assigned."

The following assignment to Abrams of the rights of Surf in the contract between Surf and Calvert dated May 28, 1937, is typical of the other assignments covering the contracts of July 28 and September 30, 1937:

"June 2, 1937.

"Abrams & Company,

"1140 Broadway,

"New York, N. Y.

"Gentlemen:

"The undersigned, Surf Adv. Corp. by its President, Samuel Schub, does hereby acknowledge the receipt of the sum of One Thousand Dollars (\$1000.00) as evidenced by your check of even date #12664 and in consideration therefore, does hereby sell, assign, transfer and convey unto you Abrams & Co., all right, title and interest in the account of Calvert Distillers Corp., 405 Lexington Ave., N. Y. C., in the total sum of Seventeen Thousand Four Hundred Dollars (\$17400.00) covering the service and maintenance of one sign board at W. 8th St., & Boardwalk, Coney Island, Bklyn., N. Y., for a period of three years.

"This said One Thousand Dollars (\$1000.00) will be used for immediate requirements to bring this sign into working order on or about June 15, 1937.

"There will be an additional advance of Twelve Hundred and Fifty Dollars (\$1250.00) required to complete the work on this bulleting and we will deliver to you invoices, statement and an accounting of all the money disbursed on the One Thousand Dollars (\$1000.00) together with the additional advance of Twelve Hundred and Fifty Dollars (\$1250.00) which will be required between now and the 15th of June, 1937.

"Very truly yours,

"Surf Adv. Corp.,

"By Samuel L. Schub."

The contract between Calvert and Surf, dated May 28, 1937, contained a provision giving Calvert the right to cancel it on sixty days' notice. The same right of cancellation is applicable to the supplementary contract dated July 28, 1937. The third contract of September 30, 1937, was made subject to cancellation by Calvert on thirty days' notice in writing to Surf. In view of all the circumstances we cannot suppose that Abrams would neglect to save for himself the right to require the repayment of his advances from Surf as the personal obligation of the latter. Because of cancellations, the contracts, out of which the funds to repay the advances by Abrams would normally be realized, might at any time disappear from the picture and no recourse remain to Abrams other than the enforcement of his claim against Surf. Moreover he not

only filed his claim as a secured creditor, but Sanders testified before the referee that Abrams declared before the creditors that he "had a lien on the Calvert contracts" and not that he owned them through the purchase and consequent elimination of all the rights of Surf.

[1] For the foregoing reasons we hold that Abrams' rights were those of a secured creditor and that Lehman had similar rights. Indeed the position of Lehman as a secured creditor is even clearer than that of Abrams for her assignment was given as security in express terms. The arrangement in the case of both Abrams and Lehman was for the assignor to turn over all checks received from Calvert in liquidation of the assignees' advances. * * *

We think that the assignments constituted no more than promises to pay the assignees out of funds to be created by the assignor's labor which could not withstand the attack of the trustee in bankruptcy. It is manifest that the distribution of the moneys in question to Abrams or Lehman would result in a preference.

The order of the District Court is reversed and the proceeding is remanded with directions that the sums of \$4,410.16 awarded to Abrams and \$964.52 awarded to Lehman be paid over by the Clerk to Max Rockmore as trustee in bankruptcy of Surf Advertising Corporation.

CLARK, Circuit Judge (dissenting).

As is the case with so many problems of creditors' rights, New York law is none too clear on the point at issue. But if we take the matter irrespective of statute, I do not believe the decisions require so ancient a theory as that an assignment of definite contract rights, future only in the sense that they are conditioned upon the performance which the promisee has promised, is only a promise to pay out of future funds, and not a present transfer. The New York cases cited, to my mind, are all distinguishable. Some deal with after-acquired property; and some with future accounts receivable. Such cases emphasize the distinction between assignment of rights under an already existing contract and of rights to be created by promises in the future. See Restatement, Contracts, §§ 150, 154, 155, 161. The validity of an assignment of the former kind seems to me upheld by *Niles v. Mathusa*, 162 N.Y. 546, 57 N.E. 184, holding an assignment of a liquor license as security valid as against a judgment creditor. * * *

Judge Hincks, in a careful and persuasive opinion also reached the conclusion that an assignment, similar to the one before us, was valid under New York law. In *re New York, N. H. & H. R. Co.*, D.C.Conn. 25 F.Supp. 874. And the cases distinguished in the opinion herewith certainly tend to support validity of the assignments. See, also, *Central Trust Co. v. West India Imp. Co.*, 169 N.Y. 314, 323, 324, 62 N.E. 387.

Furthermore, assignments of moneys to become due under a contract seem in reality more nearly comparable to an assignment of existing book accounts than to a mortgage of after-acquired property. Under *Benedict v. Ratner*, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991, such assignments are valid unless the assignor exercises "dominion" over the accounts. * * *

I am not willing now to assign these funds to the trustee upon what seems to me the unreal ground that, even though the parties intended and thought they were assigning rights in an existing contract, they succeeded only in making a promise of a future transfer.

QUESTIONS:

1. On June 2, 1937, did Surf have a valid contract right against Calvert?
2. What was the condition precedent to Surf's right to payment by Calvert?
3. Assuming a valid contract between Surf and Calvert, did Surf have power on June 2, 1937, to make an effective and irrevocable assignment to Abrams?
4. In determining the validity of Surf's assignment to Abrams, is it material whether it was made as collateral security for a loan or was an outright purchase by Abrams?
5. Was the decision made as above in conflict with the decisions made in *Crouch v. Martin* and *Winch v. Keeley*?

NOTE

Within a few days after the above opinions were in print, counsel for many of the New York banks and for the Reconstruction Finance Corporation, appearing as amici curiae, petitioned for a rehearing and were allowed to file briefs. One reason for their solicitude was that their clients had very recently, with government approval, made loans to contractors for the making of munitions and other war supplies in amounts aggregating billions of dollars, for the repayment of which they had accepted, as either the sole or the principal collateral security, assignments by the contractors of their conditional contract rights to future payment by the government. If the majority opinion was correct, their "collateral security" was insecurity, and full collection of the money advanced would be impossible in case the contractors became insolvent; the lenders would then have to share the assets with the general creditors. Of course, for several hundred years, loans had been made on similar "security." Witness a letter of credit issued by a bank to a professor of law to finance his trip abroad, the bank receiving his promissory note and an assignment of his next year's salary.

ROCKMORE v. LEHMAN

Circuit Court of Appeals of the United States, Second Circuit, Aug. 19, 1942.
129 F.2d 892.

Before AUGUSTUS N. HAND, CLARK, and FRANK, Circuit Judges.

AUGUSTUS N. HAND, Circuit Judge.

The parties have had full opportunity to present their views upon all phases of this appeal in the briefs filed on the motion for a rehearing. We shall accordingly treat the petition for a rehearing as granted, a rehearing had and proceed to a final disposition of the appeal.

Upon a further examination of the authorities we have become convinced that the majority opinion did not correctly interpret the New York law as applied to loans upon bilateral contracts not completely performed on either side and the view of that law expressed in Judge Clark's dissenting opinion should in general be adopted.

In each of the cases before us, advances were made upon contracts whereby Surf in the first case and Fiegel Advertising Company in the second case were to furnish and maintain advertising signs for Calvert in return for which Calvert bound itself to pay fixed sums over a period of years for the furnishing and maintenance of the signs. The advances were not made upon a mere agreement to assign rights which might arise in the future and did not exist at the time contracts were made, but upon assignments of definite contractual obligations.

We are convinced that the New York Court of Appeals has differentiated assignments of existing contracts by way of pledge from agreements to assign rights that have not yet come into being, even as interests contingent upon counter-performance. The most recent decision is *Kniffin v. State*, 283 N.Y. 317, 28 N.E.2d 853, where a building contractor assigned his contract with the State of New York to a subcontractor as security for a pre-existing indebtedness, and then became bankrupt. The State made payments under the contract to the assignor, but the assignee was allowed to recover the amount of its claim in spite of the fact that the assignment embraced moneys "to become due" under the contract. See 1 Restatement, Contracts, § 154, sub. 1, Illustration 1; also Judge Hincks' opinion in *Re New York N. H. & H. R. Co.*, D.C.Conn., 25 F.Supp. 874, 877; *Central Trust Co. v. West India Importing Co.*, 169 N.Y. 314, 62 N.E. 387; *Arrow Iron Works, Inc., v. Greene*, 260 N.Y. 330, 183 N.E. 515.

We cannot agree with appellant's contention that Section 60, sub. a, of the present Bankruptcy Act, 11 U.S.C.A. § 96, sub. a, affects our decision, and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency. On the contrary we hold that the date of the assignments governed the imposition of

the liens on any sums due from Calvert. This is because the contracts, and not the moneys accruing under them, were the subjects of the assignments. Section 60, sub. a, provides that: "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein." It has long been the New York law that such an assignment is good against a bona fide purchaser, even though the bona fide purchaser is the first to give notice to the obligor. *Fortunato v. Patten*, 147 N.Y. 277, 283, 41 N.E. 572; *Hooker v. Eagle Bank of Rochester*, 30 N.Y. 83, 86 Am.Dec. 351. The same thing is true of an execution creditor or a trustee in bankruptcy. *Harris v. Taylor*, 35 App.Div. 462, 54 N.Y.S. 864; see for an interpretation of it *Sullivan v. Rosson*, 223 N.Y. 217, at page 226, 119 N.E. 405, 4 A.L.R. 1400; *Conley v. Fine*, 181 App.Div. 675, 679, 169 N.Y.S. 162; *In re New York, N. H. & H. R. Co.*, D.C.Conn., 25 F.Supp. 874, 877; *Williams v. Ingersoll*, 89 N.Y. 508.

[The court here discussed certain New York lien statutes.]

It follows from the foregoing that our former decision in this matter was erroneous and that the decision of the court below in both cases should have been affirmed.

Orders affirmed.

NOTE

The history of the foregoing case, in one of the ablest of our courts, indicates the pressing necessity of a general improvement in the analysis of legal relations. This is especially true with respect to the difference between conditional and unconditional rights and duties, between the rights and duties that are created when a contract is first made and the subsequently arising right and duty of immediate performance by a promisor. Most especially is it true of those cases in which the legal relations are more complex by reason of the fact that three or more parties are involved instead of only two. This is the reason for the intellectual confusion that has existed in the fields of Assignment, Contracts for the Benefit of Third Persons, Joint Contracts, and Suretyship. A lawyer or a law student may dislike the effort involved in the analysis of facts and legal relations, especially if he was never adept in mathematics or in the analysis of language; but his ability to understand his client's case, to draw contracts that are so clear that litigation will be avoided, and to make convincing briefs and arguments will depend directly on the keenness of his analysis and the accuracy of his expression.

What we call "legal relations" are nothing but the facts of the past on the basis of which we are able with some confidence to predict (and to direct) the societal action of the future.

The problem of factual analysis discussed above must be sharply distinguished from the problem of social policy. Analysis merely clarifies the issue; that issue is still to be determined in accordance with what

we believe that our best interests require (that is, sound policy or the general human welfare). Of course, anyone may believe that he is competent to determine "sound policy" without having any clear understanding of the issue to be determined. Many thousands have fought and died for their "inalienable rights" or for one or more "freedoms," without understanding "right," "freedom," or "alienability." In winning a jury's verdict, clear analysis may in occasional instances be less effective than mere advertising repetition and assertion; but most legal work (and the best paying) is in the office or before the court.

In re NEW YORK, N. H. & H. R. CO.

District Court of the United States, D. Connecticut, 1938. 25 F.Supp. 874.

HINCKS, District Judge.

Facts

On October 23, 1935 the New Haven filed its petition for reorganization in these proceedings. Long prior thereto the New Haven and the New York Central, which between them had complete control of much real estate in the Grand Central area in New York City, agreed to embark upon a joint enterprise for the improvement of said real estate for their joint advantage. In pursuance of this enterprise they entered into an agreement with a third party, hereinafter called the obligor, whereby the obligor agreed to develop and manage the property and the two railroads agreed in equal shares to advance certain capital to be used by the obligor either for the development of the property or for the amortization of the obligor's indebtedness incurred in such development; all under an arrangement whereby the obligor agreed to pay interest upon all such advances and to reimburse the railroads therefor, the reimbursement for advances used for development purposes to be made unconditionally according to stated schedules and the reimbursement for advances used for the amortization of the obligor's indebtedness to be made from income from the property in excess of certain stated carrying charges against the property.

Pursuant to these agreements, the New Haven made advances to the obligor both for development and amortization, for which as of September 30, 1934, it had a right to be reimbursed in the aggregate amount of \$7,903,047.05, its said right with respect to advances for development being absolute and with respect to advances for amortization being conditioned upon the receipt of income to the obligor from specific property as aforesaid.

On October 1, 1934, the Interstate Commerce Commission, having found that the public interest did not then demand a financial reorganization of the debtor within the meaning of Sec. 15 of the Emergency Railroad Transportation Act of 1933, 49 U.S.C.A. § 265, approved a

loan by Reconstruction [Finance Corporation] to the debtor of \$6,000,000 to be advanced in installments upon receipt of satisfactory collateral. When the debtor was unable to furnish satisfactory collateral whereby to obtain the final installments of said loan, it thereupon offered to assign as additional security all its right to be reimbursed for the Grand Central advances described above. This offer was accepted by Reconstruction and approved by the Interstate Commerce Commission. Accordingly, under date of December 22, 1934, the debtor executed and delivered to Reconstruction a written instrument under seal whereby it purported to assign to Reconstruction as additional security for the loan aforesaid all its right, title and interest pertaining to its said advances aggregating \$7,903,047.05, it being "expressly understood and agreed by the corporation (i.e., Reconstruction) by the acceptance of this assignment, that so long as the New Haven Company shall not be in default in respect of said loans, the New Haven Company may collect, receive and retain all moneys due and to become due to it under said agreements." The New York Central and the obligor assented in writing to the foregoing assignment.

Thereafter the debtor and subsequently the trustees appointed upon its estate collected and received moneys due it from the obligor under the agreements aforesaid, using the same to its and their own purposes with the knowledge of Reconstruction, but without asking or receiving its approval or consent, until March 12, 1936, when Reconstruction notified the obligor and the New York Central of their liability for any further payments made on account of principal or interest on the assigned advances. Since that time all payments due from the obligor have been withheld pending the termination of this controversy.

Discussion

On the foregoing facts several groups of creditors and mortgage trustees who have pleaded to the petition herein contend that the assignment of December, 1934, is wholly void and ineffective under the doctrine of *Benedict v. Ratner*, 268 U.S. 353, 45 S.Ct. 566, 69 L.Ed. 991. It is not disputed, however, that under the facts the applicable law is that of the State of New York. Nor is it disputed that the right assigned under the instrument of December 22, 1934 was in part conditional and in part absolute and wholly arose out of valid and enforceable contracts then in existence.

The right involved, i.e., the right to be reimbursed for the advances theretofore made, was conditional in that it depended in part upon the accrual of income to the obligor in excess of certain stated carrying charges. The right was also a future right in the sense that it was expected to mature in the future under a contract already in existence. But the right was not incapable of effective assignment because it was a future right or a conditional right. A.L.I. Restatement of the Law

of Contracts, (hereinafter referred to as the "restatement") Secs. 150, 154 and 155; *Field v. Mayor of New York*, 6 N.Y. 179, 57 Am.Dec. 435; *Hinkle Iron Co. v. Kohn*, 229 N.Y. 179, 128 N.E. 113. And no one seems to question the validity of the assignment on this ground.

The assignment, as distinguished from the right assigned, was also conditional; indeed, it was subject to two independent conditions. In the first place, it was intended to have effect only as security for the principal indebtedness. But the presence of such a condition does not destroy the effectiveness of the assignment. Restatement, Sec. 150. Indeed, no one contends that the assignment here involved was invalid because designed for security only. See *Niles v. Mathusa*, 162 N.Y. 546, 57 N.E. 184.

But here the assignment is subject to a second condition, viz., the event of default upon the underlying principal obligation from the New Haven (the assignor) to Reconstruction (the assignee). For by the terms of the assignment, only in the event of such a default is the assignee entitled to collect from the obligor.

However, "an assignment is not ineffective because it is conditional." Restatement, Sec. 150. Indeed, normally in the assignment of an executory or bilateral contract the obligation of the obligor is conditioned upon the performance originally promised by the assignor. Yet the inherent presence of such a condition does not destroy the effectiveness of the assignment (Restatement, Sec. 161) in cases not falling within the exceptions noted in the Restatement, Sec. 160. Nor is the law of New York at variance with these broad principles. *Duffield v. Johnson*, 96 N.Y. 369; *Prindle v. Caruthers*, 15 N.Y. 425; *Hooker v. Eagle Bank*, 30 N.Y. 83, 86 Am.Dec. 351; *Everson v. Gere*, 122 N.Y. 290, 25 N.E. 492; *Devlin v. Mayor*, 63 N.Y. 8; *Rochester Lantern Co. v. Stiles & Parker Press Co.*, 135 N.Y. 209, 31 N.E. 1018; *Rosenthal P. Co. v. National Folding Box & Paper Co.*, 226 N.Y. 313, 123 N.E. 766; *Grossi v. Rialto Security Corp.*, 273 N.Y. 403, 7 N.E.2d 836.

To be sure, most of the cases above cited happen not to frame a contest between an assignee and a bankrupt estate. But since, in the absence of actual fraud, an absolute assignment of an unilateral obligation (see *Coates v. First National Bank*, 91 N.Y. 20) and the assignment of an executory bilateral obligation with its inherent conditions are good as against creditors and trustees in bankruptcy, one can only conclude that under the common law the conditional assignment of an unilateral obligation is equally effective, assuming of course the happening of the condition. See *Matter of Title & Mortgage Guaranty Company*, 275 N.Y. 347, 9 N.E.2d 957, 115 A.L.R. 35. Thus testing the transaction by the fundamentals of the law, it appears that the instrument of December, 1934 was wholly valid and effective notwithstanding the institution of these proceedings some ten months later.

The facts involved in the *Benedict v. Ratner* Case must be distinguished. There as Justice Brandeis pointed out, irrespective of default upon the principal of the loan the assignee was entitled to enforce the assignment, but until he did so the assignor was entitled to collect from the obligor without obligation to account to the assignee. Thus the assignment was not subject to a definitely stated condition. Moreover, there the assignment was "secret," from which I infer that the obligors there involved were without notice of the assignment. Obviously, such an assignment was neither "a fractional part of a single and entire right against an obligor" nor "of a stated amount from such right" so as to constitute an operative partial assignment within the purview of the Restatement. See Sec. 156. Indeed, its terms were scarcely such as to manifest an "intention to transfer, without further action or manifestation of intention, the right" there involved. Thus viewed, perhaps the *Ratner* Case meant only that the transaction there under consideration was not an "assignment" at all within the true meaning of that term. Restatement, Sec. 149. Indeed, in *Re Prudence Co.*, 2 Cir., 88 F.2d 420, it was said of this case that [page 422] "In effect nothing certain had been given or had passed to the pledgee."

Certainly it is extending the *Benedict v. Ratner* rule to apply it to a case such as this where the transaction was approved in advance by a public authority, was consented to by the obligor and, most important of all, limited the rights reserved to the assignor to those maturing before the happening of a definitely stated event.

It is urged upon me that the case of *Guinzburg v. D. A. Schulte, Inc.*, 2 Cir., 91 F.2d 733, is conclusive upon the facts existing here. But in that case, so far as appears, the assignment was neither assented to or even known by the obligors (subtenants). Under such circumstances, the payment by the obligors to the assignor (the debtor sublessor) might have discharged their obligation. Restatement, Sec. 170. However, since failure to notify an obligor of an assignment seems not to destroy the right of an assignee, it may be doubted that the absence of such notice is important here. *Williams v. Ingersoll*, 89 N.Y. 508. More important for purposes of distinction is the fact that in the *Guinzburg* Case the assignment related to a bilateral contract (a lease) and covered not merely the rent accruing on the sub-leases but rather extended to "any and all subleases" then or thereafter made. Such an assignment was doubtless interpreted to include not only the assignor's rights but also "a delegation of the performance of the assignor's duties." Restatement, Sec. 164(1). Under the circumstances of that case it well may have been that the court considered that *Guinzburg* (landlord under the main lease) never accepted the assignment so as to become bound to perform the assignor's duties thereunder. Restatement, Sec. 164(2). If so, when bankruptcy intervened *Guinzburg's* rights under the assignment were dependent upon the performance of his as-

signor's duties, and Guinzburg, though perhaps privileged to perform these duties, was under obligation to no one so to do. Restatement, Sec. 160. Thus Guinzburg, when he laid claim to the sub-rents accrued prior to bankruptcy, was in effect claiming an assigned right which was conditioned upon the performance of a correlative duty, without performing that duty.

Thus considered the Guinzburg Case may have application only to the assignee of a bilateral contract, executory at least in part. And so applied it may mean only that such an assignee, who fails to render the performance upon which the obligor's promise is conditioned, is in no position as against his assignor to enjoy the right assigned. To be sure, one cannot with assurance impute such a rationale to the Guinzburg decision. But on the other hand, that holding, carried as it is in a *per curiam* decision, contains no sure indication that it is applicable to a case such as this wherein the right assigned from the standpoint of the obligor is wholly unilateral—depending not in the least upon performance by any other party.

And so I conclude that neither the Ratner Case nor the Guinzburg Case shows that on the facts here involved the assignment falls within any exception to the general rule that an assignment of a right flowing from a unilateral contract is not invalid because subject to a definitely stated condition.

[Several other cases were here discussed. It was particularly necessary to analyze and discuss the Ratner and Guinzburg decisions, because they were rendered by the higher courts to which this case could have been taken on appeal.]

I hold, therefore, that under the law of New York as under the common law generally the assignment in question is valid and effective according to its terms.

QUESTIONS:

1. What was the right that the New Haven company assigned to R.F.C. as security for repayment of its loan?
2. What was the condition precedent to the duty of the "obligor" to reimburse the New Haven company for its advances made for purposes of amortization?
3. What was the condition precedent to the right of R.F.C. against the "obligor" that he should pay to it rather than to the New Haven company the reimbursement money referred to in Question 2?
4. How much "security" did R.F.C. get when it made its large loan to the New Haven company and received a conditional assignment of a conditional right? (Apparently, the Grand Central improvement enterprise was a profitable one).

NOTE

The able opinion rendered in this case shows the influence of *Restatement, Contracts*, Chapter 7, Assignment, and also the judge's capacity to make use of it to effectuate the purposes of business men when they make assignments of future income in the process of financing a going concern.

SECTION 4.—FORM AND EFFECT OF GIFT ASSIGNMENTS

CRONIN v. CHELSEA SAVINGS BANK et al.

Supreme Judicial Court of Massachusetts, 1909. 201 Mass. 146, 87 N.E. 484.

Action by James P. Cronin against the Chelsea Savings Bank; Jeremiah Cronin, administrator, being admitted as claimant. From a verdict for defendant, plaintiff brings exceptions. Exceptions sustained.

MORTON, J. This is an action of contract brought by the plaintiff to recover of the defendant bank the proceeds of a draft drawn on the National Bank, Limited, of Cahirciveen, Ireland, in favor of one Ellen Sullivan, now deceased. The draft was deposited by the said Ellen Sullivan with the defendant bank for collection on April 3, 1906, and the bank gave her the following receipt: "Chelsea, Mass., April 3, 1906. Received from Ellen Sullivan for collection draft #21,615 for £199 by Natl. Bank, Limited, of Cahirciveen, Ireland. Dated Oct. 24, 1904. Chelsea Savings Bank, per. R." The said Ellen Sullivan died a few days later on April 8th. On April 6th she was informed by the doctors and by the clergyman who attended her that her end was approaching. The last rites of the church were administered to her about 4 o'clock and about 7 o'clock she called the plaintiff to her and discussed with him the place where she wished to be buried and other matters relating to the burial. She told him that she wished him to have the money and handed the receipt to him, saying, "You better take this check," and he said, "All right." She told him to pay for her burial and a headstone and her bills and to keep the rest for himself. The plaintiff then said to her, "Aunt Nell, this [meaning the receipt] is no use to me unless you make it payable to me." Thereupon she indorsed it as follows: "Pay this to James P. Cronin. Ellen X Sullivan.

Witness to mark: Minnie A. Cronin"—and delivered it to him. She came to this country in November, 1904, and, with the exception of the week following her arrival, lived with the plaintiff till her death and was buried from his house in accordance with the instructions which

she had given him. She died on Sunday and before her death told the visiting clergyman that she had given her money to the plaintiff.

Demand was duly made by the plaintiff on the defendant bank for the proceeds of the draft after the same had been collected by it and it refused to pay over the same to the plaintiff. Thereupon this action was brought. The administrator was admitted as a claimant and at the close of the plaintiff's evidence the presiding justice ruled that the plaintiff was not entitled to the money and ordered a verdict for the defendant. The case is here on exceptions by the plaintiff to this ruling and direction.

We think that there was evidence warranting a finding of a *donatio causa mortis*, and that the case should have been submitted to the jury. There can be no doubt, we think, that if there was evidence warranting the finding of a valid delivery all of the other things necessary to constitute a *donatio causa mortis* could have been found to be present—expected and impending death, and intention to pass the title then and there, and no revocation of the gift before death. We think that there was evidence, which if believed, warranted a finding that there was a sufficient delivery. The deceased did not have the draft itself, and she could not, therefore, deliver that. The only voucher for and evidence of title to the draft and its proceeds which she had was the receipt which had been given to her by the savings bank. This represented or at least could have been found to represent the draft and its proceeds when collected, and to have been so intended by the parties, even though it did not contain the words “to be accounted for when collected” or words of similar import. Not only was manual possession of the receipt given to the plaintiff by the deceased but it was assigned to him by an indorsement on the back for the purpose as it could have been found of transferring to him the property which it represented. Unless, therefore, the interest was one incapable of delivery and consequently one which could not be made the subject of a *donatio causa mortis* there would seem to have been ample evidence of a *donatio causa mortis*. We do not think that the interest was incapable of delivery any more than the interest represented by a deposit in a savings bank which a delivery of the book, without an assignment, if done with the intention to convey the title, is sufficient to pass. *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am.Rep. 371. The delivery was the best possible one under the circumstances. The case is not one of a gift of the donor's own check. The indorsement on the receipt was or could have been found to be simply for the purpose of perfecting the gift of the draft and its proceeds. See *Moore v. Darton*, 4 De G. & S. 517; *In re Dillon* [1890] 44 Ch.Div. 76.

Exceptions sustained.

QUESTIONS:

1. Was the document that was indorsed and delivered by Ellen Sullivan such as to make the gift assignment irrevocable under the rules stated in *Restatement Contracts*, § 158?
2. Is there any difference between a gift assignment *inter vivos* and an assignment by gift *causa mortis*, in respect of the formalities required to make it effective?
3. How does the effect of the donor's subsequent death differ in the two cases?

NOTE

A savings bank account can be assigned as a gift by a delivery of the deposit book (on presentation of which the money is payable), with or without a written order. *Pierce v. Five Cents Sav. Bank*, 129 Mass. 425, 37 Am.Rep. 371 (1880).

The same is true of a certificate of stock, a promissory note, and an insurance policy. *Herbert v. Simson*, 220 Mass. 480, 108 N.E. 65, L.R.A. 1915D, 733 (1915), citing many cases as to stock; *State Bank of Crosswell v. Johnson*, 151 Mich. 538, 115 N.W. 464 (1908), certificate of deposit; *First Nat. Bank of Cumberland v. Thomas*, 151 Md. 241, 134 A. 210, 47 A.L.R. 730 (1926), insurance policy.

Where the owner of bonds has pledged them as security and holds the pledgee's receipt for them, he can make a gift of the bonds by a delivery of the receipt. *Lipson v. Evans*, 133 Md. 370, 105 A. 312 (1918).

CHASE NAT. BANK OF NEW YORK et al. v. SAYLES et al.

Circuit Court of Appeals of the United States, 1926. 11 F.2d 948.

Action by the Chase National Bank of New York and another against Mary D. A. Sayles and others. From a decree dismissing bill [6 F.2d 403], plaintiffs appeal. Reversed and remanded.

Frank Sayles died leaving a will under which his wife, Mary, became entitled to the payment of a legacy amounting to \$4,000,000. She executed and delivered to F. K. Rupprecht an instrument under seal, whereby she assigned to him an interest in the legacy to the extent of \$1,500,000. The executors of the will had notice of this. Rupprecht assigned his claim, for value, to the Chase National Bank. Mary Sayles notified both Rupprecht and the bank that she repudiated her assignment; and the executors refused to pay. This suit is a bill in equity by the bank, joining all parties interested, to prevent the executors from distributing the assets of the estate and to compel payment of the \$1,500,000 to the bank. The defendants filed a motion to dismiss the bill. [This statement is by the editor of the casebook.]

After hearing the motion, the District Judge filed a written opinion, in which he expressed the view that a total assignment of a pecuniary

legacy by way of gift was enforceable in equity, but a partial assignment was not, unless made upon consideration, and entered a decree dismissing the bill, from which this appeal is prosecuted.

BINGHAM, Circuit Judge. * * * In support of the fifth and sixth grounds stated in the motion to dismiss, the defendants contend that, inasmuch as it appears in the bill of complaint that the executors did not promise to pay the assignee, Rupprecht, or his assignee, the bank, there was no novation, and, as no consideration was paid for the assignment, and the assignment was not of the whole, but a part, of the legacy, this proceeding cannot be maintained. The reason asserted for this contention is that the right of a pecuniary legatee is not an equitable chose in action or an equitable right in property, but is a legal chose and a right of the same nature as that of a creditor against his debtor; that the legal title to such a chose cannot be parted with, and no equitable right or interest in or to it passes by assignment without consideration, whether the assignment purports to be total or partial. In other words, their position is that the possessor of a legal title to property cannot part with an equitable title therein, except by way of a declaration of trust, or create therein an interest in the nature of an equitable lien, except by contract based upon consideration; that in this case there was no declaration of trust, so no equitable property interest passed to the assignee, and that, no consideration having been paid, no equitable lien arose; that, had the assignment purported to have been of a total interest, the law would imply a power to sue in the name of the assignor and, if for consideration, the power would be irrevocable although no interest in the subject-matter passed; and that, if the assignment was partial and for consideration, although in such case no authority at law would be implied to sue in the name of the assignor, equity would afford relief because of the consideration paid, but would not aid a volunteer. In its final analysis their contention amounts to this: That the interest of a pecuniary legatee is a legal chose in action; that it cannot be the subject of a gift by way of a total assignment, because no present interest in the subject-matter would pass and the power to sue would be revocable; that, if the gift was a partial assignment, no present interest in the subject-matter would pass, and, being without consideration, equity would not lend its aid.

The plaintiffs' contention is that the interest of a pecuniary legatee is an equitable interest in property; that the executors stand as trustees of the decedent's estate, at least as to the personalty, (1) to pay debts; (2) to carry out the specific legacies; (3) to pay the pecuniary legacies; and (4) to distribute the balance of the estate, if any, among the residuary legatees; or, if the relationship between an executor and a pecuniary legatee is not strictly that of trustee and cestui que trust, nevertheless the right is not a legal chose such as exists between

debtor and creditor, but an equitable chose, which the legatee may part with, and that in either case he can pass a present equitable title or interest in the whole or in part of such legacy by gift or by sale; that, inasmuch as the legatee may part with a present equitable interest, whether that interest be in property or in an equitable chose, if it is by way of gift, and the transaction is executed so far as the nature of the subject-matter permits, as it was by assignment under seal in this case, the gift cannot be revoked, any more than it could have been, had the subject of the gift been a mere chattel; that to establish a completed gift by way of assignment of a pecuniary legacy, whether of the whole or of a part, it is only necessary to show an intention on the part of the legatee to give the whole or a partial interest, and an execution of that intent by such delivery as the nature of the subject-matter permits; that as the delivery of a deed of gift by the owner of chattels in the possession of a third party under a lease would be an adequate delivery in execution of the donor's intention to make a completed gift (*Corning v. Records*, 69 N.H. 390, 46 A. 462, 76 Am.St.Rep. 178), so here a delivery of a deed of assignment would be an adequate execution of the donor's intent to constitute a completed gift of a part of the legatee's interest in the legacy; that the essential feature of a gift is that its subject-matter be such that a present interest, legal or equitable, may be parted with by actual or symbolical delivery to the donee in execution of the donor's intent to give; and that equity is not hampered as to remedy, as is the law, in the enforcement of a gift of a part any more than of a gift of the whole.

After an extended examination of the questions involved, we have reached the conclusion that the contention of the plaintiffs, as above stated, is correct. Without stating the early conception of the law as to the relationship of an executor to creditors and legatees, or wherein it differed from that of a strict trustee, we regard it now settled that it is substantially that of a trustee; that, while his powers in the management and disposition of the property of the estate in some respects, perhaps, may be broader than those of an ordinary trustee, and a person dealing with him in the disposition of its assets may safely assume that he is acting in the line of his duty, unless upon the face of the transaction the contrary appears or he has knowledge of the executor's purpose to be guilty of a breach of trust, nevertheless, in the main, the relationship is that of a trustee and cestui que trust, and the legatee has such an equitable interest in the property of the estate that he may transfer it.

It has long been recognized that equitable interests in property may be assigned by way of gift, that the assignment may be of the whole or a part of the assignor's interest, and that the only material question is whether the circumstances show a completed transaction—an intention to pass a present interest and such delivery of the subject-matter

as its nature permits, and that, if they do, the gift is irrevocable.
• • •

While we are of the opinion that a legatee's right is an equitable interest in property, nevertheless, if it be assumed, as the defendants contend, that his right is a legal chose in action, we are further of the opinion that, according to the weight of authority, he may make a valid and irrevocable gift of his right or interest, which equity will uphold. • • •

In substantially all the cases involving the assignment of a legal chose in action in the nature of a debt or deposit, whether by way of gift, sale, or as security, the assignment has been held to vest in the donee, purchaser, or creditor the equitable title in the fund or debt, when the transaction is completed by such delivery as the nature of the subject-matter permits. It has been so held when the debt or fund was evidenced by a note payable to A. or order, unindorsed (*Jones v. Witter*, 13 Mass. 304, 305, 307; *Grover, Adm'r, v. Grover*, 24 Pick. [Mass.] 261, 35 Am.Dec. 319; *Wright v. Wright*, 1 Cow. [N.Y.] 598; *Stone v. Hubbard*, 7 Cush. [Mass.] 595; *Hopkins v. Manchester*, 16 R.I. 663, 19 A. 243, 7 L.R.A. 387), by shares of stock (*Stone v. Hackett*, 12 Gray [Mass.] 227), by a savings bank book or certificate of deposit (*Foss, Adm'r, v. Lowell Savings Bank*, 111 Mass. 285; *Westerlo v. De Witt*, 36 N.Y. 340, 93 Am.Dec. 517; *Hill v. Stevenson*, 63 Me. 364, 18 Am.Rep. 231; *Camp's Appeal*, 36 Conn. 88, 4 Am.Rep. 39; *Tillinghast v. Bradford*, 5 R.I. 205; *Pierce v. Boston Savings Bank*, 129 Mass. 425, 432, 37 Am.Rep. 371), by an insurance policy (*Gledhill v. McCoombs*, 110 Me. 341, 86 A. 247, 45 L.R.A., N.S., 26, Ann. Cas. 1914D, 294; *Clark v. Allen*, 11 R.I. 439, 23 Am.Rep. 496); by an I. O. U. or due bill (*Emley v. Perrine*, 58 N.J.L. 472, 33 A. 951; *Phillips v. Wilson*, 25 Ill.App. 427), or by a book account or claim (*Curtis v. Walpole Tire & Rubber Co.*, 218 F. 145, 148, 134 C.C.A. 140; *Gray v. Barton*, 55 N.Y. 68, 72-74, 140 Am.Rep. 181; *Gerrish v. Sweetser*, 4 Pick. [Mass.] 374, 376; *Weed v. Jewett*, 2 Metc. [Mass.] 608, 609, 37 Am.Dec. 115). And, the transaction being completely executed, the assignment or transfer has been held to be irrevocable, whether by way of gift, sale or as security.

The theory upon which the decisions have proceeded is that the assignment, on being completed, vests in the assignee an equitable interest in the debt or deposit with a power to sue and collect the same; **that the power to sue and collect, being coupled with an equitable interest in the debt or deposit, cannot be revoked by the assignor in his lifetime, and is not revoked by his death.** The theory of these decisions—that the assignment vests in the assignee an equitable interest in the debt or fund—whether anomalous or not, is unquestionably the one upon which the decisions proceed, and is the only theory upon which many of them can be sustained, whether the assignment is by

way of gift or of sale. For instance, it has been held that the assignee of a nonnegotiable note, or one payable to order unindorsed, whether the assignment be for value or not, might maintain an action after the death of the assignor in the name of the executor or administrator of the assignor and collect the claim. If this can be done, it must be upon the theory that an equitable interest in the debt passed to the assignee, and rendered the implied power to sue and collect in the name of the assignor irrevocable; for, if no interest passes by the assignment and the assignor dies, a consideration will not render the power irrevocable. His death will revoke it. * * *

The cases previously cited relating to voluntary assignments or gifts of choses in action could not be sustained on the defendant's theory that no interest in the debt or fund passed by the assignment, for the transaction would be incomplete; nor could the numerous cases where consideration was paid and the assignor died, for, as above stated, the power would be revoked by his death, and, such being the situation, it is "safer to travel the path which the law has trodden, instead of discovering another one, * * * unless it is very certain that the new path will enable us to reach, not only most of the results which have been reached by the old one, but all, or at least all which ought to be reached."

Equity is not hampered, as is the law, in the enforcement of an assignment of a part of a debt or demand. Such an assignment may be enforced in equity against the debtor, whether he accepts and assents to it or not, and by joining the assignor the interests of all parties can be determined in a single suit. This being so, the division of the debt or demand does not subject the debtor to burdens which his contract does not require him to bear. * * *

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellants.

NOTE

The analysis and language of the above opinion are those of writers of 50 years ago rather than of the American Law Institute; but the result reached is in accord with the Restatement.

There are many cases holding that the fact that the assignee gave no consideration for the assignment is no defense to the obligor. Such a case is *Richardson v. Mead*, 27 Barb. (N.Y.) 178 (1858). A review of the literature of the subject will show that this was not always true in those cases where the assignee had to resort to equity for aid in collection. It was a general maxim that equity would not aid a "volunteer." The difficulties that grew out of this and the cases involving it cannot here be considered in detail. See *In re Westerton*, [1919] 2 Ch. 104. The prevailing rule is stated in A.L.I. Contracts, §§ 157, 158. The real problem

now is not the necessity of consideration, as against the obligor, but as to what constitutes such an executed gift as to make the assignment irrevocable by the assignor's notice of revocation or by his death. There seems to be no doubt that a gift made by a mere oral statement to the assignee, with no delivery of anything representing or evidencing the right, is revoked by death or notice before collection. *Adams v. Merced Stone Co.*, 176 Cal. 415, 178 P. 498, 3 A.L.R. 928 (1917).

SECTION 5.—ASSIGNMENT OF PART OF A CLAIM.

ANDREWS ELECTRIC CO., Inc., v. ST. ALPHONSE CATHOLIC TOTAL ABSTINENCE SOC. et. al.

Supreme Judicial Court of Massachusetts, 1919. 233 Mass. 20, 123 N.E. 103.

Action by the Andrews Electric Company, Incorporated, against the St. Alphonse Catholic Total Abstinence Society and others. On report to the Supreme Judicial Court. Decree directed for plaintiff.

PIERCE, J. The plaintiff in 1915 was employed as a subcontractor on a building erected for the defendant St. Alphonse Catholic Total Abstinence Society. The contractor was the defendant James Shields. The defendant Ovide V. Fortier is the trustee in bankruptcy of the estate of Shields. At the completion of the work of the plaintiff, Shields owed it \$223. It requested Shields to make payment of the debt due, and he thereupon delivered to it the following order upon the society:

"St. Alphonse Total Abstinence Society, Gentlemen: Kindly pay to Andrews Electric, Inc., the sum of \$223 out of the amount coming to me on my contract with the society, same being the balance due them on wiring contract. James Shields."

Before March 9, 1916, the plaintiff delivered this order to one Barlow, an architect employed by the society and the architect on the building in question. On March 9, 1916, the plaintiff wrote to the treasurer of the society a letter wherein it was stated that "he [Shields] has given us an order on his account with you for the balance, thus releasing any claim he may have on so much of the balance due on the building due him as will satisfy our bill, namely, \$223. This order has been handed to Mr. Barlow."

When the order was delivered through Barlow to the society it claimed certain deductions from the balance of the contract price for the work done by Shields, because of defective work, and it was therefore uncertain what amount if any was due Shields. The order was

never in fact accepted. Upon an adjustment of the account in March, 1918, under authority of the bankruptcy court it was agreed that the society owed Shields \$419 when the order was given to the plaintiff.

The order was a good assignment between the parties. *Richardson v. White*, 167 Mass. 58, 44 N.E. 1072. It was given in consideration of a pre-existing debt, was drawn upon a specific fund identified by the order itself, was delivered to the payee and notice thereof was given to the debtor. *Putnam v. Story*, 132 Mass. 205, 212; *Holbrook v. Payne*, 151 Mass. 383, 24 N.E. 210, 21 Am.St.Rep. 456.

Shields was adjudicated a voluntary bankrupt on January 25, 1917. There is nothing in the agreed statement of facts to show Shields had any other creditor than the plaintiff when the order was given it, and the existence of creditors on March 9, 1916, cannot be inferred from the fact that Shields was bankrupt on January 25, 1917. The assignment appears to have been made in good faith, it did not affect the rights of creditors and was made more than four months before the commencement of bankruptcy proceedings. An assignment of the whole fund made under these circumstances is good between the parties and against the trustee in bankruptcy of the assignor. *Bridge v. Kedon*, 163 Cal. 493, 126 P. 149, 43 L.R.A.,N.S., 404; *Stewart v. Platt*, 101 U.S. 731, 25 L.Ed. 816; *Sawyer v. Turpin*, 91 U.S. 114, 23 L.Ed. 235.

An assignment of part of the fund against the consent of the drawee is void at law because the partial assignee is not an attorney with power to sue in the assignor's name and because "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of several persons, when his contract was one and entire." *Gibson v. Cooke*, 20 Pick. 15, 32 Am.Dec. 194; *Palmer v. Merrill*, 6 Cush. 282, 52 Am.Dec. 782; *Papineau v. Naumkeag*, 126 Mass. 372; *Mandeville v. Welch*, 5 Wheat. (U.S.) 277, 286, 5 L.Ed. 87. In equity, however, the objections to a partial assignment disappear. All persons in interest can be brought before the court in a single suit and a decree can be entered which will protect the rights of all parties concerned. *National Exchange Bank v. McLoon*, 73 Me. 498, 40 Am.Rep. 388.

The question at issue has never been directly decided in this commonwealth, but inferentially the decisions are in accord with the very great weight of authority in England and the United States in the support of the legal statement that such an assignment is valid in equity without the assent of the debtor, trustee or stakeholder; and we are of opinion that such is the true rule and should be followed in this commonwealth. * * *

The assignment being valid in equity and not void as in fraud of creditors or as contravening the Bankruptcy Act (11 U.S.C.A. § 1 et seq.) the trustee took subject to it. * * *

It follows that a decree should be entered that the St. Alphonse Catholic Total Abstinence Society pay the plaintiff from said fund of \$419 the sum of \$223, with interest thereon from the filing of the bill, and the balance of the fund to the trustee in bankruptcy.

Decree accordingly.

NOTE

At common law, the assignee of an entire claim was not allowed to sue in his own name; but he could maintain suit in the name of the assignor, even against the latter's objection. This a partial assignee could not do. It is too much, however, to say that a partial assignment was "void at law." Even at common law it gave to the obligor the power to discharge his debt *pro tanto* by honoring the assignment and paying the partial assignee the amount assigned.

The equitable rule adopted in this case has been stated in Restatement, Contracts, § 156, as the prevailing law of the land, making no distinction based upon the old division of courts into common law and equity. There are few courts of importance in the United States in which the equitable procedure as to joinder of parties is not available to a debtor.

Also in accord: *Chase Nat. Bank v. Sayles*, ante; *Field v. Mayor*, etc., of City of New York, 6 N.Y. 179, 57 Am.Dec. 435 (1852). If all the claimants join as plaintiffs, the debtor cannot object to a partial assignment.

SCHWARTZ v. HOROWITZ.

Circuit Court of Appeals of the United States, Second Circuit, 1942.

131 F.2d 506.

A corporation, now in bankruptcy, had large claims against two other companies, the Peerless Casualty Co. and the Plymouth Agency. It assigned a part of these claims to Horowitz, as security for money advanced as a loan. Horowitz brought suit in the New York courts against Peerless and Plymouth to collect the part assigned to him. They made no objection to these suits, even though Horowitz is only a "partial" assignee.

Later a petition in bankruptcy was filed against the assignor, the bankrupt corporation; and Schwartz was appointed trustee. As such trustee, he brought the present action against Peerless and Plymouth to collect the amounts owed by them to the bankrupt. In this action he has joined Horowitz; and he asks an injunction to prevent him from continuing his separate New York suits. Schwartz does not attack the validity of the partial assignment to Horowitz; but he asserts that the "control" of the claims (the "choses in action") remained in the assignor and that it is now in himself as the assignor's successor and trustee. Peerless and Plymouth have made no

objection to this procedure by the trustees; but Horowitz objects to being brought into this action and to the issuance of the injunction.

The Circuit Court of Appeals held that Horowitz was properly joined but refused the injunction. It is only the obligors, Peerless and Plymouth, that can properly object to separate suits by partial assignees. The following is from the opinion of the court:

L. HAND, Circuit Judge. * * *

The partial assignee of a chose in action can never collect of the obligor more than his share unless the assignor intends to transfer the entire chose of action and to rely upon the assignee to account to him for all but the part assigned. In no case can the obligor be called upon to pay twice, or to divide payment into two parts, or to suffer two suits; each of these would vary the agreed performance. Williston on Contracts §§ 443, 444. If the obligor objects that the assignor is a necessary party, it was formerly necessary to get him before the court unless the assignment is construed as we have just suggested. Originally the assignee had to do this by bill in equity joining the assignor, but under modern procedure he need not make the assignor a party, but may leave it to the obligor to raise the objection, though he must then join the assignor on peril of suffering dismissal. That is the present rule in New York. *Dickinson v. Tyson*, 125 App.Div. 735, 110 N.Y.S. 269; *Carvill v. Mirror Films, Inc.*, 178 App.Div. 644, 165 N.Y.S. 676, affirmed 226 N.Y. 683, 123 N.E. 858. If the obligor fails to raise the objection he abandons it. N.Y. Civil Practice Act, § 278(1) (e).

For these reasons we think that Horowitz had "control" over the choses of action. He had advised the obligors before petition filed by bringing suit, and he could collect unless they objected that the bankrupt and the other partial assignees were necessary parties defendant, which apparently they have not done. If they had, he could have made the bankrupt and the other partial assignees parties and gone ahead. On the other hand, the bankrupt, and the trustee as its successor, also had precisely the same "control" of the choses in action and for the same reasons; either one could sue the obligors without Horowitz and the other partial assignees; and if the obligors objected, could mend his hold. It is true that the bankrupt's partial assignments had more than exhausted the sums which the Peerless Company and the Agency admit to be due, but the trustee claims a substantial surplus over all assignments, which gives him a standing. Thus both the action at law and the bankruptcy suit well lay.

This is not inconsistent with anything we have said in earlier cases. It is true that when an assignee of even the whole chose in action has agreed not to give notice to the obligors and to allow the assignor to

collect, the trustee may proceed summarily in bankruptcy as a "possessor" of the chose in action. In *re Borok*, 2 Cir., 50 F.2d 75; In *re Prince*, 2 Cir., 89 F.2d 681. But an out and out assignment under which the assignee is permitted to give notice and to collect, puts the chose in action into the assignee's "control," certainly after notice to the obligor (*Copeland v. Martin*, 5 Cir., 182 F. 805), and at times even before notice. In *re I. Greenbaum & Sons Co., Inc.*, D.C., 6 F.Supp. 245, Patterson, J. The only sense in which the concept of "possession" can be applied and which must govern the jurisdiction of the bankruptcy court, is the completeness of the "control," and the assignor and the partial assignee each has complete "control," as we have just shown. Therefore, since the obligors in the case at bar have consented, the partial assignees had no valid objection to being brought into the bankruptcy suit. Had there been property for the state court to seize, that court would have had exclusive jurisdiction, for the state action came first. *Isaacs v. Hobbs Tie & Timber Co.*, 282 U.S. 734, 51 S.Ct. 270, 75 L.Ed. 645; *Gross v. Irving Trust Co.*, 289 U.S. 342, 53 S.Ct. 605, 77 L.Ed. 1243, 90 A.L.R. 1215. But as this was not the case—Horowitz's action being altogether in personam—the bankruptcy court need not yield. The order, so far as it joined Horowitz as a party, was therefore valid.

On the other hand, we can find no basis for enjoining the state action. If the two suits had been in rem, clearly there would have been none, for, as we have just said, Horowitz sued first. There remain only two possible grounds for an injunction: (1) that the action is against the bankrupt and can be enjoined under § 11 sub. a Bankr.Act, 11 U.S.C.A. § 29 sub. a; (2) that, there being two actions pending, the second must abate till the first is concluded. As to the first ground, Horowitz did not sue the bankrupt and need not sue it now; indeed it would not now be even a proper party, for all its rights have passed to the trustee. Moreover, § 11 sub. a is intended to protect bankrupts against liabilities from which they will be discharged. As to the second ground, the plea *lis alibi pendens*, in the first place Horowitz's action was the earlier, and in the second the plea is not good as between a state and a federal court anyway. *Kline v. Burke Construction Company*, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226, 24 A.L.R. 1077; *Southern Railway Co. v. Painter*, 314 U.S. 155, 62 S.Ct. 154, 86 L.Ed. 116. Both actions may therefore proceed side by side; if Horowitz succeeds in getting judgment before the bankruptcy suit goes to judgment, he may plead his judgment in the suit with whatever effect as an estoppel it should have. On that we do not pass. Similarly, if the bankruptcy suit goes to judgment before Horowitz's action does, the Agency and the Peerless Company may make such use of it as an estoppel as the state court will allow, or the

trustee may do so, if the state court will let him intervene. In so far as the order enjoined the prosecution of the state court it will therefore be reversed; in other respects it will be affirmed.

SECTION 6.—ASSIGNEE'S RIGHT SUBJECT TO DEFENSES OF THE OBLIGOR—PROVISIONS AGAINST ASSIGNMENT.

INTRODUCTORY NOTE

The payee of a "negotiable instrument" has power to create in a transferee a better right than his own, a right that is not subject to defenses that would be good against himself. To have such an effect, the transfer must be before maturity, for value, and to one who has no notice of the defenses. The owner of an ordinary contract right, not represented by such an instrument, has no such power.

One of the requirements in order that an instrument may be "negotiable" is that it shall be on its face an unconditional promise or order for the payment of a definite sum of money. This does not prevent the right of the original payee of a negotiable promissory note from being subject to express or constructive conditions in accordance with the facts of the contract transaction of which it forms a part, or from being subject to such defenses as fraud and mistake. The transferee of such a note is in no better position than was his transferor if he receives it after maturity, or gives no value, or has notice of the obligor's defenses.

The assignee of a right that is not represented by a negotiable instrument is in no case in a better position than was his assignor. If the assignor's right against the obligor was subject to a condition, express or constructive, so also is the right of the assignee. If the right of the assignor had been in any manner discharged, in part or in full, the discharge is operative against the assignee. If the claim of the assignor was void or voidable for illegality, fraud, mistake, or otherwise, the assignee's claim is likewise void or voidable. If the assignor's claim was subject to reduction by a set-off or counterclaim in favor of the obligor, so also is the claim of the assignee. Moreover, any of these defenses, partial or complete, are effective against an assignee even though they accrued subsequently to the assignment if they have become effective in the obligor's favor before he has notice of the assignment. See Restatement, Contracts, § 167.

The obligor may, by his own conduct, cause the assignee to be in better position than was the assignor. He may make a new agreement; or his conduct may be such as to create an estoppel. In such cases, the assignee's better position is caused by the obligor, not by the assignment.

AMERICAN BRIDGE CO. OF NEW YORK et al. v.
CITY OF BOSTON.

Supreme Judicial Court of Massachusetts, 1909. 202 Mass. 374, 88 N.E. 1089.

Action by the American Bridge Company of New York and others against the City of Boston. Verdict for plaintiffs, and defendant excepts. Exceptions sustained.

HAMMOND, J. This is an action of contract brought by the plaintiffs as assignees of all "the moneys now due or which may hereafter become due" to one Coburn, the assignor under two certain building contracts between him and the defendant, dated respectively July 16, 1901, and August 27, 1901. It is brought to recover the amount of two architect's certificates, one for \$2,210 and the other for \$3,085.50, each dated November 10, 1902. The case was heard upon the auditor's report (which was for the defendant) and certain exhibits, by a justice of the superior court, sitting without a jury, who found for the plaintiffs for the full amount claimed; and it is before us upon exceptions taken by the defendant.

These exceptions raise the general question whether in this action the defendant may recoup for the damages sustained by the default of the assignor, which occurred after the defendant had notice of the assignment.

It is contended by the plaintiffs that these sums were due and payable at the time the defendant received notice thereof, that the plaintiffs' rights were fixed at the time of notice and could not be changed by the act of the assignor or of the defendant after notice, and consequently that the damages caused to the defendant by the default of the assignor in leaving his contract unperformed, although without any fault or collusion on the part of the defendant, cannot be recouped in this action. It is contended that the only remedy open to the defendant is by way of an action against the assignor.

Even if it be conceded in favor of the plaintiffs that the sums were due and payable at the time of the notice, and that the rights of the plaintiffs were fixed at that time, still the conclusion which the plaintiffs seek to draw by no means necessarily follows.

We are dealing, not with the right of set-off, but with that of recoupment—an entirely different right. The one is a creation of stat-

ute; the other exists at common law and not by statute. The one is applicable even where there are different contracts; the other arises only out of the same contract as that under which the claim of the plaintiffs arises. Confusion sometimes has been caused by a neglect to note the distinction between these two rights. The principles applicable to a case of set-off are in many respects different from those applicable to a case of recoupment, and some care is required not to be misled by apparent analogies.

The assignment of a chose in action conveys, as between the assignor and assignee, merely the right which the assignor then possesses to that thing; but as between the assignee and the debtor it does not become operative until the time of notice to the latter, and does not change the rights of the debtor against the assignor as they exist at the time of the notice.

It becomes necessary to consider the exact relation between the defendant and Coburn, the assignor, at the time of the notice. The auditor has found that written notice of the assignments was given to the defendant on November 14, 1902, before the service of any trustee process. At that time there does not seem to have been any default on the part of Coburn. At the time of the notice what were the rights between him and the defendant, so far as respects this contract? He was entitled to receive these sums, but he was also under an obligation to complete his contract. This right of the defendant to claim damages for the nonperformance of the contract existed at the making of the contract and at the time of assignment and of notice, and the assignees knew it, and they also knew that it would become available to the defendant the moment the assignor should commit a breach. Under these circumstances it must be held that the assignees took subject to that right. Coburn, the assignor, abandoned the work in a few days after the notice. This action was not brought until October 30, 1906, nearly four years after the breach.

Even if the sums were due and payable in November, 1902, at the time of the notice, still if this action had been brought by the assignor after the default, there can be no doubt that the defendant would have had the right to recoup the damages suffered by his default. And the assignees who seek to enforce this claim can stand in no better position in this respect than the assignor. The defendant is simply trying to enforce a right existing under the contract at the time of the notice, a right of which the assignees had knowledge, and since they have delayed suit for these sums, until after default, the defendant may recoup against them as it could have recouped against the assignor. It cannot without its own fault or consent be deprived of rights under the contract. Any other conclusion would make the contract different from that into which the defendant entered. The case is very similar to *Rockwell v. Daniels*, 4 Wis. 432, in the reasoning of which we

fully concur. See, also, *Government of Newfoundland v. Newfoundland Ry.*, 13 App.Cas. 199. We see nothing in *First National Bank v. Perris Irrigation District*, 107 Cal. 55, 40 P. 45, or *Wilkinson v. Clements*, 42 L.J.Ch. (N.S.) 38, cited by the plaintiffs, which changes our view. They seem to proceed upon the principle of separate contracts.

Exceptions sustained.

QUESTIONS:

1. Did Coburn have a right to immediate payment at the time of the assignment?
2. Was that right, if any, subject to be defeated by a condition subsequent or otherwise? See Restatement, Contracts, § 277.

NOTE

An assignee gets no better right than the assignor had, and defenses that would have been good against the assignor are good against the assignee. *Rice v. Friend Bros. Co.*, 179 Iowa 355, 161 N.W. 310 (1917), counterclaims for breach of warranty; *Brunswick v. Farmers' Grain, Fuel & Live Stock Co.*, 100 Kan. 261, 164 P. 154 (1917), previous modifications in the contract; *Graham v. Johnson*, 8 Eq. 36 (1869), fraud; *Steltzer v. C. M. & Ct. P. R. Co.*, 156 Iowa 1, 134 N.W. 573 (1912), employer expressly reserved power to apply wages to board bills.

In some states he takes subject to whatever equities exist in favor of third persons against the assignor. *Owen v. Evans*, 134 N.Y. 514, 31 N.E. 999 (1892); *Kernohan v. Durham*, 48 Ohio St. 1, 26 N.E. 982, 12 L.R.A. 41 (1891); *Green v. Consolidated Wagon & Machine Co.*, 30 Idaho, 359, 164 P. 1016 (1917), assignor's contract provided for payment to specified previous creditors. Restatement, Contracts, § 174, adopts the contrary rule in favor of an assignee for value and without notice.

HOMER v. SHAW.

Supreme Judicial Court of Massachusetts, 1912. 212 Mass. 113, 98 N.E. 697.

Action by Horace S. Homer against Frederick E. Shaw. There was a finding for defendant, and plaintiff excepts. Exceptions overruled.

Plaintiff's assignor entered into a contract with defendant to transport, erect, and paint the steel work of a section of subway at \$6 per ton, to be paid monthly for all work completed.

BRALEY, J. The defendant's liability upon acceptance of the assignment depended upon the assignor's performance of his contract to transport, erect, and paint the steel work required for a section of a

subway which the defendant was building in accordance with the plans and specifications of the transit commissioners. If not fully performed, the entire contract price, although payable in monthly installments, never became due, or if before completion the assignor, by reason of his inability to go on, voluntarily abandoned the work, he could not recover for work and labor already performed and furnished. *Homer v. Shaw*, 177 Mass. 1, 58 N.E. 160; *Burke v. Coyne*, 188 Mass. 401, 404, 74 N.E. 942; *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 420, 89 N.E. 138. A few days only elapsed after the assignor entered upon the performance of the contract when he informed the defendant that, owing to the failure of the plaintiff to advance money, which apparently he had agreed to furnish, he would be unable to complete the work, as his workmen had not been paid, and if their wages remained in arrears they would leave his employment. The evidence, if no further action had been taken by the parties, and performance of the work had ceased, would have warranted a finding that, the assignor having repudiated or abandoned his contract before the first installment of the contract price became payable, the defendant would not have been indebted to the plaintiff. *Homer v. Shaw*, 177 Mass. 1, 58 N.E. 160; *Bowen v. Kimbell*, 203 Mass. 364, 370, 371, 89 N.E. 542, 133 Am.St.Rep. 302; *Barrie v. Quinby*, 206 Mass. 259, 267, 92 N.E. 451.

But without any ostensible change the assignor remained in charge of the work until completion, and the plaintiff contends under the substituted declaration, that the money thereafter received should be considered as earned under the original contract. The assignor needed immediate financial assistance, and if the defendant might have advanced the money which the evidence shows he furnished to enable him to pay his employees, yet if he had done so the plaintiff's assignment would have been given priority over the loan. *Buttrick Lumber Co. v. Collins*, 202 Mass. 413, 89 N.E. 138.

The parties, while they could not modify to his prejudice the terms of the contract assigned, without the plaintiff's consent, or by a secret fraudulent arrangement deprive him of the benefit of the assignment, were not precluded from entering into a new agreement if performance by the assignor had become impossible from unforeseen circumstances. *Eaton v. Mellus*, 7 Gray, 566, 572; *Linnehan v. Matthews*, 149 Mass. 29, 20 N.E. 453. It consequently was a question of fact upon all the evidence for the presiding judge before whom the case was tried without jury to decide whether upon facing the exigencies of changed conditions the parties mutually agreed to a cancellation, and thereupon in good faith an independent contract was substituted, by the terms of which the defendant undertook to furnish sufficient funds to pay the workmen the wages then due, and their future wages as they accrued, while the assignor was to receive a weekly salary for his personal services of supervision. The refusal to comply with the

plaintiff's requests for findings, and the general finding for the defendant manifestly show his conclusion to have been that the first contract was treated as having been rescinded, and the plaintiff had no enforceable claim against the defendant under the assignment. *Earnshaw v. Whittemore*, 194 Mass. 187, 192, 80 N.E. 520; *Glidden v. Massachusetts Hospital Life Ins. Co.*, 187 Mass. 538, 541, 73 N.E. 538. The plaintiff's requests for rulings in so far as they were not given were rightly refused, and the exceptions must be overruled.

So ordered.

QUESTIONS:

1. Were the plaintiff's rights as assignee of the contractor's claim to money payable under the first contract terminated by the making of the second contract?
2. Was the right of the plaintiff assignee conditional on a performance that was never rendered?

CRANE ICE CREAM CO. v. TERMINAL FREEZING & HEATING CO.

Court of Appeals of Maryland, 1925. 147 Md. 588, 128 A. 280, 39 A.L.R. 1184.

Action by the Crane Ice Cream Company against the Terminal Freezing & Heating Company. Demurrer to the declaration was sustained, and from the judgment entered thereon against plaintiff, it appeals. Judgment affirmed.

PARKE, J. The appellee and one W. C. Frederick entered into a contract for the delivery of ice by the appellee to Frederick, and before the expiration of the contract, Frederick executed an assignment of the contract to the appellant; and on the refusal of the appellee to deliver ice to the assignee it brought an action on the contract against the appellee to recover damages for the alleged breach. * * * At the execution of the contract the Terminal Freezing & Heating Company, appellee, was a corporation engaged in the manufacture and sale of ice at wholesale within the state of Maryland, and William C. Frederick made and sold ice cream in Baltimore, where his plant was located. * * *

The contract imposed upon the appellee the liability [duty] to sell and deliver to Frederick such quantities of ice as he might use in his business as an ice cream manufacturer to the extent of 250 tons per week, at and for the price of \$3.25 a ton of 2,000 pounds on the loading platform of Frederick. The contractual rights of the appellee were (a) to be paid on every Tuesday during the continuation of the contract, for all ice purchased by Frederick during the week ending at

midnight upon the next preceding Saturday; (b) to require Frederick not to buy or accept any ice from any other source than the appellee, except in excess of the weekly maximum of 250 tons. * * * The contract did not expressly permit or inhibit an assignment, but neither did it contain any word, such as assigns, to indicate that the parties contemplated an assignment by either.

Before the first year of the second term of the contract had expired Frederick, without the consent or knowledge of the appellee, executed and delivered to the appellant, for a valuable consideration, a written assignment dated February 15, 1921, of the modified agreement between him and the appellee. The attempted transfer of the contract was a part of the transaction between Frederick and the appellant whereby the appellant acquired by purchase the plant, equipment, rights, and credits, choses in action, "good will, trade, custom, patronage, rights, contracts," and other assets of Frederick's ice cream business, which had been established and conducted by him in Baltimore. The purchaser took full possession and continued the former business carried on by Frederick. It was then and is now a corporation "engaged in the ice cream business upon a large and extensive scale in the city of Philadelphia, as well as in the city of Baltimore, and state of Maryland," and had a large capitalization, ample resources, and credit to meet any of its obligations "and all and singular the terms and provisions" of the contract; and it was prepared to pay cash for all ice deliverable under the contract.

As soon as the appellee learned of this purported assignment and the absorption of the business of Frederick by the appellant, it notified Frederick that the contract was at an end, and declined to deliver any ice to the appellant. Until the day of the assignment the obligations of both original parties had been fully performed and discharged.
* * *

The basic facts upon which the question for solution depends must be sought in the effect of the attempted assignment of this executory bilateral contract on both the rights and the liabilities of the contracting parties, as every bilateral contract includes both rights and duties on each side while both sides remain executory. Williston on Contracts, § 407. If the assignment of rights and the assignment of duties by Frederick are separated, they fall into these two divisions: (1) The rights of the assignor were (a) [privilege] to take no ice, if the assignor used none in his business, but, if he did (b) [right] to require the appellee to deliver, on the loading platform of the assignor, all the ice he might need in his business to the extent of 250 tons a week, and (c) [privilege] to buy any ice he might need in excess of the weekly 250 tons from any other person; and (2) the liabilities [duties] of the assignor were (a) to pay the appellee on every Tuesday during the

continuance of the contract the stipulated price for all ice purchased and weighed by the assignor during the week ending at midnight upon the next preceding Saturday, and (b) not directly or indirectly, during the existence of this agreement, to buy or accept any ice from any other person, firm, or corporation than the said the Terminal Freezing & Heating Company, except such amounts as might be in excess of the weekly limit of 250 tons.

Whether the attempted assignment of these rights, or the attempted delegation of these duties must fail because the rights or duties are of too personal a character, is a question of construction to be resolved from the nature of the contract and the express or presumed intention of the parties. Williston on Contracts, § 431.

The contract was made by a corporation with an individual, William C. Frederick, an ice cream manufacturer, with whom the corporation had dealt for 3 years, before it executed a renewal contract for a second like period. The character, credit, and resources of Frederick had been tried and tested by the appellee before it renewed the contract. Not only had his ability to pay as agreed been established, but his fidelity to his obligation not to buy or accept any ice from any other source up to 250 tons a week had been ascertained. In addition, the appellee had not asked in the beginning, nor on entering into the second period of the contract, for Frederick to undertake to buy a specific quantity of ice or even to take any. Frederick simply engaged himself during a definite term to accept and pay for such quantities of ice as he might use in his business to the extent of 250 tons a week. If he used no ice in his business, he was under no obligation to pay for a pound. In any week, the quantity could vary from zero to 250 tons, and its weekly fluctuation, throughout the life of the contract, could irregularly range between these limits. The weekly payment might be nothing or as much as \$812.50; and for every week a credit was extended to the eighth day from the beginning of every week's delivery. From the time of the beginning of every weekly delivery of the ice to the date of the payment therefor the title to the ice was in the purchaser, and the seller had no security for its payment except in the integrity and solvency of Frederick. The performances, therefore, were not concurrent, but the performance of the nonassigning party to the contract was to precede the payments by the assignor.

When it is also considered that the ice was to be supplied and paid for, according to its weight on the loading platform of Frederick, at an unvarying price without any reference either to the quantity used, or to the fluctuations in the cost of production or to market changes in the selling price, throughout 3 years, the conclusion is inevitable that the inducement for the appellee to enter into the original contract and into the renewal lay outside the bare terms of the contract, but was implicit in them, and was the appellee's reliance upon its knowledge of

an average quantity of ice consumed, and probably to be needed, in the usual course of Frederick's business, at all times throughout the year, and its confidence in the stability of his enterprise, in his competency in commercial affairs, in his probity, personal judgment, and in his continuing financial responsibility. The contract itself emphasized the personal equation by specifying that the ice was to be bought for "use in his business as an ice cream manufacturer," and was to be paid for according to its weight "on the loading platform of the said W. C. Frederick."

When Frederick went out of business as an ice cream manufacturer, and turned over his plant and everything constituting his business to the appellant, it was no longer his business, or his loading platform, or subject to his care, control, or maintenance, but it was the business of a stranger, whose skill, competency, and requirements of ice were altogether different from those of Frederick. The assignor had his simple plant in Baltimore. The assignee, in its purchase, simply added another unit to its ice cream business which it had been, and is now, carrying on "upon a large and extensive scale in the city of Philadelphia and state of Pennsylvania, as well as in the city of Baltimore and state of Maryland." The appellee knew that Frederick could not carry on his business without ice wherewith to manufacture ice cream at his plant for his trade. It also was familiar with the quantities of ice he would require, from time to time, in his business at his plant in Baltimore, and it consequently could make its other commitments for ice with this knowledge as a basis.

The appellant, on the other hand, might wholly supply its increased trade acquired in the purchase of Frederick's business with its ice cream produced upon a large and extensive scale by its manufactory in Philadelphia, which would result in no ice being bought by the assignee of the appellee, and so the appellee would be deprived of the benefit of its contract by the introduction of a different personal relation or element which was never contemplated by the original contracting parties. Again, should the price of ice be relatively high in Philadelphia in comparison with the stipulated price, the assignee could run its business in Baltimore and furnish its patrons, or a portion of them, in Philadelphia with its product from the weekly maximum consumption of 250 tons of ice throughout the year. There can be no denial that the uniform delivery of the maximum quantity of 250 tons a week would be a consequence not within the normal scope of the contract, and would impose a greater liability on the appellee than was anticipated. 7 Halsbury's Laws of England, § 1015, p. 501.

Moreover, the contract here to supply ice was undefined except as indicated from time to time by the personal requirements of Frederick in his specified business. The quantities of ice to be supplied to Frederick to answer his weekly requirements must be very different from,

and would not be the measure of the quantities needed by his assignee, and, manifestly, to impose on the seller the obligation to obey the demands of the substituted assignee is to set up a new measure of ice to be supplied, and so a new term in the agreement that the appellee never bound itself to perform. Up to 250 tons of ice a week Frederick engaged not to buy or accept any ice from any other party than the appellee. After Frederick had sold away his business, this covenant could not bind the assignee of his business, and, even if it continued to bind Frederick, his refraining from buying ice elsewhere was not a contemplated consideration for selling ice to any one except Frederick himself. *Kemp v. Baerselman*, [1906] 2 K.B. 604, 608, 609. It was argued that Frederick was entitled to the weekly maximum of 250 tons, and that he might have expanded his business so as to require this weekly limit of ice, and that therefore the burdens of the contract might have been as onerous to the appellee, if Frederick had continued in business, as they could become under the purporting assignment by reason of the increased requirements of the larger business of the assignee. The unsoundness of this argument is that the law accords to every man freedom of choice in the party with whom he deals and the terms of his dealing. He cannot be forced to do a thing which he did not agree to do because it is like and no more burdensome than something which he did contract to do.

Under all the circumstances of the case, it is clear that the rights and duties of the contract under consideration were of so personal a character that the rights of Frederick cannot be assigned nor his duties be delegated without defeating the intention of the parties to the original contract. When Frederick went out of the business of making ice cream, he made it impossible for him to complete his performance of the contract, and his personal action and qualifications upon which the appellee relied were eliminated from a contract which presupposed their continuance. Frederick not only attempted an assignment, but his course is a repudiation of the obligations of the contract. He is not even alleged to be ready to pay for any ice which might be delivered after the date of the purporting assignment, but the allegations of the declaration simply aver that the assignee alone had undertaken to perform the further contractual obligations of the assignor. Frederick, however, cannot be heard to say that he has not repudiated a contract, whose contemplated performance his own act has made it impossible for him to fulfill. *Eastern Advertising Co. v. McGaw*, 89 Md. 86, 88, 42 A. 923.

While a party to a contract may as a general rule assign all his beneficial rights, except where a personal relation is involved, his liability [duty] under the contract is not assignable *inter vivos*, because any one who is bound to any performance whatever or who owes money cannot by any act of his own, or by any act in agreement with any other

person than his creditor or the one to whom his performance is due, cast off his own liability and substitute another's liability. If this were not true, obligors could free themselves of their obligations by the simple expedient of assigning them. A further ground for the rule is that, not only is a party entitled to know to whom he must look for the satisfaction of his rights under the contract, but in the familiar words of Lord Denman in *Humble v. Hunter*, 12 Q.B. 317, "you have a right to the benefit you contemplate from the character, credit, and substance of the person with whom you contract." For these reasons it has been uniformly held that a man cannot assign his liabilities [duties] under a contract, but one who is bound so as to bear an unescapable liability may delegate the performance of his obligation to another, if the liability be of such a nature that its performance by another will be substantially the same thing as performance by the promisor himself. In such circumstances the performance of the third party is the act of the promisor, who remains liable under the contract and answerable in damages if the performance be not in strict fulfillment of the contract. *British Waggon Co. v. Lea*, 5 Q.B.D. 149; *Robson & Sharpe v. Drummond*, 2 B. & Ad. 303; *Anson on Contracts*, 218, 219 (4th Am.Ed) pp. 377-380; 7 *Halsbury's Laws of England*, p. 495; *Eastern Advertising Co. v. McGaw*, 89 Md. 86-88, 42 A. 923; *Tarr v. Veazey*, 125 Md. 199, 93 A. 428; 1 *Williston on Contracts*, §§ 411, 412, 418, 421, 420, note 48, at pages 784, 785; *Arkansas Valley Smelting Co. v. Belden Mining Co.*, 127 U.S. 379, 8 S.Ct. 1308, 32 L.Ed. 246; *Edison v. Babka*, 111 Mich. 235, 69 N.W. 499; *Shultz v. Johnson*, 5 B.Mon. (Ky.) 497; *Lansden v. McCarthy*, 45 Mo. 106; *Hardy, etc., Co. v. South Bend Co.*, 129 Mo. 222, 31 S.W. 599; *Paige v. Faure*, 229 N.Y. 114, 127 N.E. 898, 10 A.L.R. 649.

However, the analysis of the facts on this appeal leaves no room for doubt that the case at bar falls into the category of those assignments where an attempt is made both to transfer the rights and to delegate the duties of the assignor under an executory bilateral contract whose terms and the circumstances make plain that the personal qualification and action of the assignor, with respect to both his benefits and burdens under the contract, were essential inducements in the formation of the contract, and, further, that the assignment was a repudiation of any future liability of the assignor. The attempted assignment before us altered the conditions and obligations of the undertaking. The appellee would here be obliged not only to perform the subsequent stipulations of the contract for the benefit of a stranger and in conformity with his will, but also to accept the performance of the stranger in place of that of the assignor with whom it contracted, and upon whose personal integrity, capacity, and management in the course of a particular business he must be assumed

to have relied by reason of the very nature of the provisions of the contract and of the circumstances of the contracting parties. • • •

Judgment affirmed.

QUESTIONS:

1. Did Frederick by his assignment attempt to change the performance that had been promised by the defendant?
2. How did Frederick repudiate his own duty, if at all?
3. Were any of Frederick's duties of so personal a character that he could not delegate their performance?
4. Could Crane have acquired by assignment the right that Terminal should supply Frederick with ice, the latter continuing his business as before?

NOTE

The court discussed *Kemp v. Baerselman*, [1906] 2 K.B. 604, and *Tolhurst v. Associated Portland Cement Mfrs.*, [1903] A.C. 414, practically disapproving the latter case.

In connection with this case, study Restatement, Contracts, §§ 151, 160, 161, 164.

CONCRETE FORM CO. v. GRANGE CONSTRUCTION CO.

Supreme Court of Pennsylvania, 1935. 320 Pa. 205, 181 A. 589.

Justice MAXEY: Defendant had been engaged as the general contractor for a large apartment building to be erected in the City of Pittsburgh. The Concrete Form Company, Inc., was subsequently employed by defendant as a subcontractor for the performance of certain work in connection with the construction. The contract was in the total sum of \$64,400, and provided that the subcontractor would not "sublet any portion of the work of this contract or • • • hypothecate, pledge or assign any payments thereunder except by and in accordance with the consent of [the] contractor." The contract had been substantially performed when the subcontractor executed an assignment in the sum of \$4,000 to the Blairsville Savings and Trust Company. At the time of the assignment the subcontractor's claims against defendant exceeded the amount of the assignment. The bank gave prompt notice of the assignment to defendant and requested an "acknowledgment of this letter." Defendant replied as follows: "This will acknowledge receipt of your letter dated February 9, 1929, concerning an assignment to you by Concrete Form Company of \$4,000 claimed to be due from us in connection with the Morewood Gardens Apartment contract. The owners of this building have not approved all of the charges nor all of the work of Concrete Form

Company and therefore we are not prepared to state to you that there will be \$4,000 due them when all open questions have been settled."

The letter of acknowledgment was dated February 14, 1929. In the following May defendant made final settlement with the subcontractor, payment of \$2,775.04 being made directly to the latter. Subsequently the subcontractor became insolvent and the present suit was brought in its name for the use of the bank. It is the contention of the latter that notwithstanding the provision against assignment and regardless of the nature of the assignment, defendant's letter of February 14, 1929, constituted a consent thereto and that defendant's subsequent payment to the assignor without notice to the assignee was at its own risk. Defendant contends that it never gave the consent necessary to the validity of the assignment in question. The court below directed a verdict for plaintiff. Defendant has appealed from the overruling of its motions for a new trial and for judgment *n. o. v.*

Defendant cannot be held liable to the bank unless it consented to the subcontractor's assignment, irrespective of whether the assignment was total or partial. In the case of a partial assignment we have repeatedly held that notice alone is not enough and that the debtor is not bound thereby unless he gives his consent: *Gordon v. Hartford Sterling Co.*, 319 Pa. 174, 179 A. 234, and cases therein cited. If the assignment is to be regarded as a complete transfer of the assignor's interest, which we think it was not, it still does not follow that notice to defendant was enough and that its assent was unnecessary. The contract between defendant and the assignor prohibited an assignment by the latter without the consent of the former. A right may not be the subject of an effective assignment when the assignment is prohibited by the contract creating the right: see *Restatement, Contracts*, section 151(c). Since this prohibition was binding upon the assignee it must be obvious that defendant's consent was an essential prerequisite to its liability to any party other than its subcontractor.

The issue is therefore a very narrow one: Did defendant consent to the assignment? The bank's contention that defendant did so consent is founded solely upon the letter of February 14, 1929, in which it acknowledged receipt of the assignee's letter informing it of the assignment and further stated that the amount of its indebtedness to the assignor had not been determined. This letter did not constitute an unequivocal assent to the assignment. The assignee's letter had requested an acknowledgment of the notice of the assignment therein contained and defendant's letter was in response to that request. The assignee was also informed that a complete accounting had not yet been had and that the amount of the indebtedness had not been finally determined. Beyond that the letter did not go. There was no ex-

press consent; nor is there sufficient warrant for any implication of the necessary assent. The original contract expressly forbade assignment. By that provision defendant undoubtedly sought to provide against the introduction of one or more third parties. It was for the benefit of the obligor: see Restatement, Contracts, section 176. Defendant wished to deal with its subcontractor and with it alone. Any waiver of that provision or consent to its violation would have to be clear, distinct and unequivocal. Such is not the present case. The court below should have ruled as a matter of law that defendant did not consent to the assignment and could not, therefore, be held liable.

The judgment of the court below is reversed and judgment is herein entered for defendant.

NOTE

OMAHA *v.* STANDARD OIL Co., 55 Neb. 337, 75 N.W. 859 (1898). A Lighting company contracted with the city of Omaha to supply street lighting, payment to be in monthly instalments. The Standard Oil Co. made loans to the Lighting company, receiving as security an assignment of the right to one of the instalments. Notice was given to the city. Nevertheless, the city paid the instalment to other parties. The contract between the Lighting company and the city expressly prohibited the "assignment of the contract." The court held that this invalidated the assignment to the Oil Co., in spite of an argument that the prohibition was directed only against substitution of a new party to perform the duties of the Lighting company. It recognized that "contract" is a complex term, involving both rights and duties in the Lighting company; but it thought that the express words used might have been chosen for the purpose of protecting the city against the difficulty of dealing with rival claimants to the money due. To restrict the prohibition to the delegation of performance of duties was thought to be a "perversion of the terms" of the contract. Probably not many would agree with this. See *Butler v. San Francisco Gas & E. Co.*, 168 Cal. 32, 141 P. 818 (1914).

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO *v.* WELLES et al.

Supreme Court of the United States, 1916.
242 U.S. 7, 37 S.Ct. 3, 61 L.Ed. 116, Ann.Cas.1918D, 643.

Mr. Justice HOLMES delivered the opinion of the court:

This is a suit brought by the appellee Welles to establish a lien upon a debt of \$6,830.85, due under a construction contract from the city of San Francisco, represented by the appellee Boyle, to the bankrupt, Metropolis Construction Company. The district court approved the report of the referee against the claim and in favor of the appellant, but this decree was reversed by the circuit court of appeals. 211 F.

561, 128 C.C.A. 161; 215 F. 81, 131 C.C.A. 389. The subject-matter is the fourth progress payment, which, on December 5, 1910, had been authorized by the board of public works of the city. On that day the Construction Company applied to the appellant bank for a loan of \$30,000, secured by an order on the auditor of the city, authorizing the bank to draw from the city for the above and other amounts not in controversy here. The bank declined until the order should be accepted by the auditor, whereupon, on the next day, the order was presented to the auditor's office and stamped as received on December 6. The order was intended and taken as an assignment, and, after it had been stamped, was accepted by the bank as security, and the money was advanced. The next day \$5,000 more was advanced on the same security, notes being given for each sum. The appellee Welles was a subcontractor, and on December 12 and 16 served notice on the city to withhold payment, as permitted by § 1184 of the Code of Civil Procedure of the state of California. It is admitted by Welles that if the assignment was valid, his rights are subordinate to it (*Newport Wharf & Lumber Co. v. Drew*, 125 Cal. 585, 58 P. 187); and the only question argued on his behalf is whether the terms of the contract between the bankrupt and the city made the assignment void.

The contract provided that the contractor should keep the work under his personal control, and should not assign or sublet the whole or any part thereof without the consent of the board of public works. It further declared that no subcontract should relieve the contractor of any of his obligations, and that he should not, "either legally or equitably, assign any of the moneys payable under the contract or his claim thereto unless with the like consent." The city has made no objection to the assignment to the bank, and the money now awaits the decision of this court as between the claimant of the lien and the prior assignee.

There is a logical difficulty in putting another man into the relation of the covenantee to the covenantor, because the facts that give rise to the obligation are true only of the covenantee,—a difficulty that has been met by the fiction of identity of person and in other ways not material here. Of course, a covenantor is not to be held beyond his undertaking, and he may make that as narrow as he likes. *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U.S. 379, 8 Sup.Ct. Rep. 1308, 32 L.Ed. 246. But when he has incurred a debt, which is property in the hands of the creditor, it is a different thing to say that, as between the creditor and a third person, the debtor can restrain his alienation of that, although he could not forbid the sale or pledge of other chattels. When a man sells a horse, what he does, from the point of view of the law, is to transfer a right, and a right being regarded by the law as a thing, even though a *res incorporalis*, it is not illogical to apply the same rule to a debt that would be applied to a

horse. It is not illogical to say that the debt is as liable to sale as it is to the acquisition of a lien. To be sure, the lien is allowed by a statute subject to which the contract was made, but the contract was made subject also to the common law, and if the common law applies the principle recognized by the statute of California that a debt is to be regarded as a thing, and therefore subjects it to the ordinary rules in determining the relative rights of an assignee and the claimant of a lien, it does nothing of which the debtor can complain. See further, Cal.Civ.Code, §§ 954, 711. The debtor does not complain, but stands indifferent, willing that the common law should take its course.

* * *

The assignability of a debt incurred under a contract like the present sometimes is sustained on the ground that the provision against assignment is inserted only for the benefit of the city. Whether that form of expression is accurate or merely is an indirect recognition of the principle that we have stated hardly is material here. It is enough to say that we are of opinion that, upon the facts stated, the assignment was not absolutely void, that therefore the bank got a title prior to that of Welles, and consequently that the decree must be reversed. See *Hobbs v. McLean*, 117 U.S. 567, 6 S.Ct. 870, 29 L.Ed. 940; *Burnett v. Jersey City*, 31 N.J.Eq. 341; *Fortunato v. Patten*, 147 N.Y. 277, 41 N.E. 572.

Decree reversed.

Mr. Justice McKENNA dissents for the reasons stated by the circuit court of appeals.

NOTE

A provision in a fire insurance policy that it shall be void if assigned before loss is valid. Since its purpose is to protect the insurer against possible increase in its risk by a change in the character of the insured, it may be held not to invalidate an assignment made after the loss has occurred and its amount has become payable.

Large employers of labor sometimes provide against assignment of wages by their employees. The chief purpose may be protection against the nuisance of having to keep track of great numbers of assignment notifications and the possibility of having to pay twice. A second purpose may be to protect needy employees against loan sharks. One unintended effect is to prevent the obtaining of a much needed loan. Legislatures have experimented to some extent with statutes regulating wage assignments. See *State St. Furniture Co. v. Armour & Co.*, 345 Ill. 160, 177 N.E. 702 (1931).

SECTION 7.—DELEGATION OF PERFORMANCE OF DUTIES AND CONDITIONS

INTRODUCTORY NOTE

A party who is under a contractual duty to another can not discharge himself therefrom by a mere act of assignment to a substitute or by delegating the required performance to such a substitute. This is true, however competent the substitute may be.

It is quite a different question whether a party can perform his duty vicariously—whether performance by a substitute will be effective as a discharge of his duty. The answer to this question is No if the performance that was promised was to be rendered by the contractor in his own proper person. There is a border-line along which it may be difficult to determine whether or not the performance promised is of this character. It is determined by the process of Interpretation of the expressions of the parties, in the light of the practices and understanding of men in like cases.

As has been seen in preceding Chapters, there are innumerable cases in which the rendition of a performance that is promised by one party is an express or constructive Condition of the legal duty of the other party to render the return performance. In such a case, the question arises whether the first party can perform this Condition vicariously. Can the first party delegate the performance to a substitute, so that the substitute's performance satisfies the requirement and the other party must pay the agreed price? The answer to this question is determined in just the same way as in the case just discussed above.

Very often neither the contracting parties nor the courts make a clear distinction between performance of a legal duty by a promisor and performance of a condition of the legal duty of another party. They may not even distinguish clearly between a contractor's Rights to performance by the other party and the Duties and Conditions to be performed by himself. In many cases a contractor makes an assignment of "the contract," perhaps intending thereby that the assignee shall not only have the right to payment, but also that the assignee shall in the assignor's place render the performances that were expected of the latter. Courts and writers will be found saying that "the contract" can or can not be assigned. Also, they sometimes have said that "Rights arising out of a contract can not be assigned if they are coupled with liabilities," seeming to indicate that no assignment can be effective as long as a contract is bilateral in its obligation. In some cases such statements lead to a bad decision; in other cases they merely constitute a confusing reason for a good decision.

On the subject of this Note, see Restatement, Contracts, §§ 160-165.

DEVLIN v. MAYOR, ETC., OF CITY OF NEW YORK et al.

Court of Appeals of New York, 1875. 63 N.Y. 8.

This action was brought by plaintiff, as assignee of an interest in a contract, made between the corporation of the city of New York and one Andrew J. Hackley, under the act (chap. 309, Laws of 1860) for cleaning the streets of said city. The other defendants, it was alleged, claimed interest in the contract, but refused to join as plaintiffs.

By the contract, which was made February 26th, 1861, the contractor agreed to sweep all the paved streets, avenues, lanes, alleys, etc., in said city at least once a week, Broadway once every twenty-four hours, and some other streets specified twice a week for the term of five years, and to immediately remove the sweepings. * * *

ALLEN, J. The referee has found the making of the contract as alleged, the performance thereof by Hackley, from the making thereof in February, 1861, until May, 1863, an ability, readiness and offer by him to perform the contract for the unexpired term thereof, and that he was, in May, 1863, without cause, ejected by the respondents from the work, and by them prevented from proceeding in the performance of the agreement. He has also found the amount due and unpaid for work actually done at the time of the interference by the respondents, and the damages sustained by the parties in interest by reason of the breach of the contract by the respondents. * * *

Upon the adjudged facts the plaintiff and the defendants, appellants, the assignees of Hackley were entitled to recover unless there is some legal impediment, and were entitled to retain the judgment given by the referee, unless for some reason no action at law could be maintained for the work actually performed, or upon the agreement for a breach thereof, or some material error was committed by the referee upon the trial to the prejudice of the respondents.

But two objections to the recovery against the city, the present defendant, were considered by the court below in the opinion annexed to the record before us, and they being regarded as insuperable and fatal to the action, the judgment of the referee was reversed and judgment absolute given for the city. These objections were: First, that the contract between the city and Hackley was not assignable, and that the assignment by the original contractor, of itself, terminated the contract and justified the action of the city authorities in refusing longer to be bound by it. * * *

The question, however, whether the assignment by the original contractor terminated the contract, or authorized the refusal of the city longer to be bound by it, still remains to be considered, as the waiver has not been found by the referee. An assignment by the contractor

of the amounts which would have become due from the city from time to time, made before the doing of the work or the performance of the conditions upon which the payments depended, would, under the liberal rule permitting the assignment of choses in action now prevailing, be valid. Expectancies, as well as existing rights of action, may be assigned, and the rights of the assignees will be protected and enforced at law. *Field v. Mayor, etc.*, 6 N.Y. 179, 57 Am.Dec. 435; *Hall v. Buffalo*, 2 Abb.Dec. 301. An assignment may include all contingent and incidental benefits or results of an executory contract, as well as the direct fruits or earnings under it, and thus entitle the assignee to the damages resulting from a violation of its terms. The right of action for a breach of the contract, resulting in pecuniary loss to the contractor, would survive to the personal representatives of the aggrieved party, and that is one test of the assignability of contracts and choses in action. *Byxbie v. Wood*, 24 N.Y. 607; *McKee v. Judd*, 12 N.Y. 622, 64 Am.Dec. 515; *Zabriskie v. Smith*, 13 N.Y. 322, 64 Am.Dec. 551. In principle it would not impair the rights of the assignee, or destroy the assignable quality of the contract or claim, that the assignee, as between himself and the assignor, has assumed some duty in performing the conditions precedent to a perfected cause of action, or is made the agent or substitute of the assignor in the performance of the contract. If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only with due regard to the intent of the parties, and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of, or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor. *Hackley*, the original contractor, was at no time discharged from his obligations to the city, nor was he disqualified for the performance of the contract, but was at all times in a position to perform his part of this agreement, facts which distinguish this case from *Stevens v. Benning*, 6 De G., M. & G. 223, and *Robson v. Drummond*, 2 Barn. & Ad. 303.

Stevens v. Benning is distinguished from the present by the additional circumstances that the contract in the case cited was in its nature personal, and was made in reference to the character and facilities of the contracting firm as a publishing house, and was in the nature of a partnership in so far as it provided for a division of the profits of the work to be published. In *Robson v. Drummond* the defendant had agreed to pay annually in advance for the use of the carriage to be

furnished by Sharpe, a coachmaker, and was not bound, after notice of his withdrawal from and assignment of the contract to Robson, to trust to the ability or integrity of the assignee; and the court also held that the contract was one for the personal service of Sharpe, and that the defendant was entitled to his judgment and taste to the end of the contract. It is not disputed that in all cases when the executor or administrator would succeed to the rights and liabilities of a deceased party to a contract, the contract is assignable by the act of the parties, the personal representatives of a decedent being regarded but the legal assignee upon whom the law devolves the rights and obligations of their testator or intestate. In one case in which the executory obligations of deceased parties have been sought to be enforced against their personal representative, the question has been said to be one of construction depending upon the intention of the parties, and that we are without any well-defined rule on the subject. *Dickinson v. Calahan's Admrs.*, 19 Pa. 227. In some cases in which executors and administrators have assumed the contracts of their testators or intestate, and after performance sought to recover the stipulated compensation, the question has been one of pleading rather than of principle. *Edwards v. Grace*, 2 M. & W. 190.¹

The assignability of a contract must depend upon the nature of the contract and the character of the obligations assumed rather than the supposed intent of the parties, except as that intent is expressed in the agreement. Parties may, in terms, prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations. But when this has not been declared expressly or by implication, contracts other than such as are personal in their character, as promises to marry or engagements for personal services requiring skill, science or peculiar qualifications, may be assigned, and by them the personal representatives will be bound. In *Hyde v. Windsor*, Cro. Eliz. 552, it was said that executors are bound by all covenants of their testator, whether named or not, "unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform." If the contract be personal and the performance of the party himself be the essence thereof, it neither devolves upon his representatives, nor can it be assigned. *White's Ex'rs v. Commonwealth*, 39 Pa. 167. When the contract is executory in its nature, and an assignee or personal representative can fairly and sufficiently execute all that

¹To say that a contract right is assignable or the performance of a duty is delegable by a contractor if the contract "would survive to his personal representatives" is much like begging the question. Such "survival" is equally

dependent on whether an assignment or delegation by the contractor during his life would be effective. Nevertheless, the analysis found in the court's opinion in this case is one of the best to be found anywhere.

the original contractor could have done, the assignee or representative may do so and have the benefit of the contract. *Quick v. Ludbaum*, 3 Bulst. 30, adjudged a contract to build a house binding upon the executors. This case has been criticised, and sometimes its authority questioned, but the modern cases in England and the decisions of the courts of this State are in harmony with it. It is cited with approval in *Siboni v. Kirkman*, 1 M. & W. 417, and in many other cases. * * *

Within the principle of the adjudications in this State this contract was assignable. The executor of the contractor would have been bound to perform it to entitle him to recover what had been earned, and to prevent an action for non-performance. It was a contract not capable of being performed in person by Hackley. At most, he could only employ workmen and appoint agents and overseers of the work. The work did not require or call for the exercise of any peculiar skill, science or experience. It was by law all to be done under the directions of the city inspector, who may be supposed to have been in possession of all the local knowledge and experience essential to the general direction of the work. It was merely the servile labor of sweeping and cleaning the streets, and removing the garbage as specified in the agreement and under the general supervision of the city inspector, that the contractor engaged for.

Work upon the canals of this State, either in their repair or construction, calls for more of skill and scientific knowledge, as well as of experience, than this work could call for, and yet contracts for that class of work have been recognized as assignable by the legislature and by the courts, and the rights of assignees protected and enforced. *Munsell v. Lewis*, 2 Denio, 224. So contracts for the labor of convicts in the State prisons have been expressly held assignable, and on the ground that notwithstanding the intimate personal relations that must exist between the contractor and the convict laborers, and their presence at all times within the prison walls, and their opportunities of interfering with the discipline of the prison, the contract is not personal in its character. There the general discipline and government of the prison and the prisoners was with the warden and other officers, while here, so far as any judgment or discretion is to be exercised, it was with the city inspector. The circumstance that by the statute in this case the contract was to be awarded as the common council should deem for the best interests of the city, does not distinguish this case from those referred to. This provision did not refer to the person of the contractor, but to the terms of the contract. It was not intended to enable the common council to be a respecter of persons and to give the contract to favorites, but to give them a discretion to choose between different proposals, relieving the authorities from the necessity of awarding the contract to the lowest bidder irrespective of the terms of the contract, the security offered, or the fairness or sufficiency of the

compensation to insure performance with reasonable certainty. This statutory provision does not change the character of the work or import into the contract any unusual terms or destroy its assignability. The assignment of the contract and the interest of the contractor under it did not terminate the agreement or authorize its rescission or abandonment by the city. * * *

All concur.

Judgment accordingly

QUESTION:

Under what circumstances is an assignment of "the contract" operative as a breach of the contract by repudiation of duty?

NOTE

The fact that a contract is bilateral and has not yet been performed by the assignor does not make his rights thereunder nonassignable. See Restatement, Contracts, § 161. After assignment, as before, the rights assigned are subject to the same defenses and conditions, express or constructive. Restatement, Contracts, § 167.

A party to a contract cannot escape his duties by assignment. Restatement, Contracts, §§ 160, 161. This is true even if the debtor is notified and assents to the assignment, so long as it appears to be only an assignment of rights and not to involve a discharge of the assignor from his duties by a novation.

An assignee of the assignor's rights under a bilateral contract may or may not contract with the assignor to perform the latter's duties also. If he does so contract, the other party is a creditor beneficiary thereof; but his assent to such an assumption by the assignee is not in itself an assent to discharge the assignor from legal duty. Whether the assignee does in fact contract to perform the assignor's duties is matter of interpretation; the presumption is that he does, according to Restatement, Contracts, § 164 [contra in New York: *Langel v. Betz*, 250 N.Y. 159, 164 N.E. 890 (1928)]. The court found that there was no such assumption of the assignor's duty in *Meyer v. Droegemueller*, 165 Minn. 245, 206 N.W. 391 (1925). There was such an assumption in *Imperial Refining Co. v. Kanotex Refining Co.*, 29 F.2d 193 (1928).

As to when performance of a duty or of a condition can be delegated and performed vicariously, see Restatement, Contracts, § 160. The delegation does not itself discharge the party so delegating from his legal duty, even though performance by the delegate will do so. See article on Assignment by Corbin, 74 U. of Pa.L.Rev. 207, 220 (1926).

There are many cases holding that personal performance by the assignor was not a condition precedent, and performance by the assignee made the assigned right enforceable by him.

BRITISH WAGON CO. et al. v. LEA & CO.

In the Queen's Bench Division, 1880. 5 Q.B.Div. 149.

COCKBURN, C. J. This was an action brought by the plaintiffs to recover rent for the hire of certain railway wagons, alleged to be payable by the defendants to the plaintiffs, or one of them, under the following circumstances:

By an agreement in writing of February 10th, 1874, the Parkgate Wagon Company let to the defendants, who are coal merchants, fifty railway wagons for a term of seven years, at a yearly rent of £600 a year, payable by equal quarterly payments. By a second agreement of June 13th, 1874, the company in like manner let to the defendants fifty other wagons, at a yearly rent of £625, payable quarterly like the former.

Each of these agreements contained the following clause: "The owners, their executors, or administrators, will at all times during the said term, except as herein provided, keep the said wagons in good and substantial repair and working order, and, on receiving notice from the tenant of any want of repairs, and the number or numbers of the wagons requiring to be repaired, and the place or places where it or they then is or are, will, with all reasonable despatch, cause the same to be repaired and put into good working order."

On October 24th, 1874, the Parkgate Company passed a resolution, under the 129th section of the Companies Act, 1862, for the voluntary winding up of the company. Liquidators were appointed and by an order of the Chancery Division of the High Court of Justice, it was ordered that the winding up of the company should be continued under the supervision of the Court.

By an indenture of April 1st, 1878, the Parkgate Company assigned and transferred, and the liquidators confirmed to the British Company and their assigns, among other things, all sums of money, whether payable by way of rent, hire, interest, penalty, or damage, then due, or thereafter to become due, to the Parkgate Company, by virtue of the two contracts with the defendants, together with the benefit of the two contracts, and all the interest of the Parkgate Company and the said liquidators therein; the British Company, on the other hand covenanting with the Parkgate Company "to observe and perform such of the stipulations, conditions, provisions, and agreements contained in the said contracts as, according to the terms thereof were stipulated to be observed and performed by the Parkgate Company." On the execution of this assignment the British Company took over from the Parkgate Company the repairing stations, which had previously been used by the Parkgate Company for the repair of the wagons let to the defendants, and also the staff of workmen employed by the latter company in exe-

cuting such repairs. It was expressly found that the British Company have ever since been ready and willing to execute, and have, with all due diligence, executed all necessary repairs to the said wagons. This, however, they have done under a special agreement come to between the parties since the present dispute has arisen, without prejudice to their respective rights.

In this state of things the defendants asserted their right to treat the contract as at an end, on the ground that the Parkgate Company had incapacitated themselves from performing the contract, first, by going into voluntary liquidation; secondly, by assigning the contracts, and giving up the repairing stations to the British Company, between whom and the defendants there was no privity of contract, and whose services, in substitution for those to be performed by the Parkgate Company under the contract, they the defendants were not bound to accept. The Parkgate Company not acquiescing in this view, it was agreed that the facts should be stated in a special case for the opinion of this Court, the use of the wagons by the defendants being in the meanwhile continued at a rate agreed on between the parties, without prejudice to either, with reference to their respective rights.

The first ground taken by the defendants is in our opinion altogether untenable in the present state of things, whatever it may be when the affairs of the company shall have been wound up, and the company itself shall have been dissolved under the 111th section of the Act. Pending the winding-up, the company is by the effect of §§ 95 and 131 kept alive, the liquidator having power to carry on the business, "so far as may be necessary for the beneficial winding-up of the company," which the continued letting of these wagons, and the receipt of the rent payable in respect of them, would, we presume, be.

What would be the position of the parties on the dissolution of the company it is unnecessary for the present purpose to consider.

The main contention on the part of the defendants, however, was that, as the Parkgate Company had, by assigning the contracts, and by making over their repairing stations to the British Company, incapacitated themselves to fulfil their obligation to keep the wagons in repair, that company had no right, as between themselves and the defendants, to substitute a third party to do the work they had engaged to perform, nor were the defendants bound to accept the party so substituted as the one to whom they were to look for performance of the contract; the contract was therefore at an end.

The authority principally relied on in support of this contention was the case of *Robson v. Drummond* (2 B. & Ad. 303), approved of by this Court in *Humble v. Hunter* (12 Q.B. 310). In *Robson v. Drummond* a carriage having been hired by the defendant of one Sharp, a coachmaker, for five years, at a yearly rent, payable in advance each

year, the carriage to be kept in repair and painted once a year by the maker—Robson being then a partner in the business, but unknown to the defendant—on Sharp retiring from the business after three years had expired, and making over all interest in the business and property in the goods to Robson, it was held, that the defendant could not be sued on the contract—by Lord Tenterden on the ground that “the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in Sharp, and therefore might have agreed to pay money in advance, for which reason the defendant had a right to object to its being performed by any other person”; and by Littledale and Parke, JJ., on the additional ground that the defendant had a right to the personal services of Sharp, and to the benefit of his judgment and taste, to the end of the contract.

In like manner, where goods are ordered of a particular manufacturer, another, who has succeeded to his business, cannot execute the order, so as to bind the customer, who has not been made aware of the transfer of the business, to accept the goods. The latter is entitled to refuse to deal with any other than the manufacturer whose goods he intended to buy. For this *Boulton v. Jones* (2 H. & N. 564) is a sufficient authority. The case of *Robson v. Drummond* comes nearer to the present case, but is, we think, distinguishable from it. We entirely concur in the principle on which the decision in *Robson v. Drummond* rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract, which, consequently, cannot in its absence be enforced against an unwilling party. But this principle appears to us inapplicable in the present instance, inasmuch as we cannot suppose that in stipulating for the repair of these wagons by the company—a rough description of work which ordinary workmen conversant with the business would be perfectly able to execute—the defendants attached any importance to whether the repairs were done by the company, or by any one with whom the company might enter into a subsidiary contract to do the work. All that the hirers, the defendants, cared for in this stipulation was that the wagons should be kept in repair; it was indifferent to them by whom the repairs should be done. Thus if, without going into liquidation, or assigning these contracts, the company had entered into a contract with any competent party to do the repairs,

and so had procured them to be done, we cannot think that this would have been a departure from the terms of the contract to keep the wagons in repair. While fully acquiescing in the general principle just referred to, we must take care not to push it beyond reasonable limits. And we cannot but think that, in applying the principle, the Court of Queen's Bench in *Robson v. Drummond* went to the utmost length to which it can be carried, as it is difficult to see how in repairing a carriage when necessary, or painting it once a year, preference would be given to one coachmaker over another. Much work is contracted for, which it is known can only be executed by means of subcontracts; much is contracted for as to which it is indifferent to the party for whom it is to be done, whether it is done by the immediate party to the contract, or by some one on his behalf. In all these cases the maxim "*Qui facit per alium facit per se*" applies.

In the view we take of the case, therefore, the repair of the wagons, undertaken and done by the British Company under their contract with the Parkgate Company, is a sufficient performance by the latter of their engagement to repair under their contract with the defendants. Consequently, so long as the Parkgate Company continues to exist, and, through the British Company, continues to fulfil its obligation to keep the wagons in repair, the defendants cannot, in our opinion, be heard to say that the former company is not entitled to the performance of the contract by them, on the ground that the company have incapacitated themselves from performing their obligations under it, or that, by transferring the performance thereof to others, they have absolved the defendants from further performance on their part.

That a debt accruing due under a contract can, since the passing of the Judicature Acts, be assigned at law as well as equity, cannot since the decision in *Brice v. Bannister* (3 Q.B.D. 569) be disputed.

We are therefore of opinion that our judgment must be for the plaintiffs for the amount claimed.

ARKANSAS VALLEY SMELTING CO. v. BELDEN MIN. CO.

Supreme Court of the United States, 1888.
127 U.S. 379, 8 S.Ct. 1308, 32 L.Ed. 246.

This was an action brought by a smelting company, incorporated by the laws of Missouri, against a mining company, incorporated by the laws of Maine, and both doing business in Colorado by virtue of a compliance with its laws, to recover damages for the breach of a contract to deliver ore, made by the defendant with Billing & Eilers, and assigned to the plaintiff. The material allegations of the complaint were as follows:

On July 12, 1881, a contract in writing was made between the defendant of the first part and Billing & Eilers of the second part, by which it was agreed that the defendant should sell and deliver to Billing & Eilers, at their smelting works in Leadville, 10,000 tons of carbonate lead ore from its mines at Red Cliff, at the rate of at least 50 tons a day, beginning upon the completion of a railroad from Leadville to Red Cliff, and continuing until the whole should have been delivered, and that "all ore so delivered shall at once, upon the delivery thereof, become the property of the second party"; and it was further agreed as follows: "The value of said ore and the price to be paid therefor shall be fixed in lots of about one hundred tons each; that is to say, as soon as such a lot of ore shall have been delivered to said second party, it shall be sampled at the works of said second party, and the sample assayed by either or both of the parties hereto, and the value of such lots of ore shall be fixed by such assay; in case the parties hereto cannot agree as to such assay, they shall agree upon some third disinterested and competent party, whose assay shall be final. The price to be paid by said second party for such lot of ore shall be fixed on the basis hereinafter agreed upon by the closing New York quotations for silver and common lead, on the day of the delivery of sample bottle, and so on until all of said ore shall have been delivered. Said second party shall pay said first party at said Leadville for each such lot of ore at once, upon the determination of its assay value, at the following prices"; specifying, by reference to the New York quotations, the price to be paid per pound for the lead contained in the ore, and the price to be paid for the silver contained in each ton of ore, varying according to the proportions of silica and of iron in the ore.

The complaint further alleged that the railroad was completed on November 30, 1881, and thereupon the defendant, under and in compliance with the contract, began to deliver ore to Billing & Eilers at their smelting works, and delivered 167 tons between that date and January 1, 1882, when "the said firm of Billing and Eilers was dissolved, and the said contract and the business of said firm, and the smelting works at which said ores were to be delivered, were sold, assigned, and transferred to G. Billing, whereof the defendant had due notice"; that after such transfer and assignment the defendant continued to deliver ore under the contract, and between January 1 and April 21, 1882, delivered to Billing at said smelting works 894 tons; that on May 1, 1882, the contract, together with the smelting works, was sold and conveyed by Billing to the plaintiff, whereof the defendant had due notice; that the defendant then ceased to deliver ore under the contract, and afterwards refused to perform the contract, and gave notice to the plaintiff that it considered the contract canceled and annulled; that all the ore so delivered under the contract was paid for according to its terms; that "the plaintiff and its said

assignors were at all times during their respective ownerships ready, able, and willing to pay on the like terms for each lot as delivered, when and as the defendant should deliver the same, according to the terms of said contract, and the time of payment was fixed on the day of delivery of the 'sample bottle,' by which expression was, by the custom of the trade, intended the completion of the assay or test by which the value of the ore was definitely fixed"; and that "the said Billing and Eilers, and the said G. Billing, their successor and assignee, at all times since the delivery of said contract, and during the respective periods when it was held by them respectively, were able, ready, and willing to and did comply with and perform all the terms of the same, so far as they were by said contract required; and the said plaintiff has been at all times able, ready, and willing to perform and comply with the terms thereof, and has from time to time, since the said contract was assigned to it, so notified the defendant."

The defendant demurred to the complaint for various reasons, one of which was that the contract therein set forth could not be assigned, but was personal in its nature, and could not, by the pretended assignment thereof to the plaintiff, vest the plaintiff with any power to sue the defendant for the alleged breach of contract. The circuit court sustained the demurrer, and gave judgment for the defendant; and the plaintiff sued out this writ of error.

Mr. Justice GRAY after stating the facts as above, delivered the opinion of the court.

If the assignment to the plaintiff of the contract sued on was valid, the plaintiff is the real party in interest, and as such entitled, under the practice in Colorado, to maintain this action in its own name. Rev. St. § 914 (28 USCA § 724); Code Civ.Proc.Colo. § 3; *Steel Co. v. Lundberg*, 121 U.S. 451, 7 S.Ct. 958, 30 L.Ed. 982. The vital question in the case, therefore, is whether the contract between the defendant and Billing & Eilers was assignable by the latter, under the circumstances stated in the complaint. At the present day, no doubt, an agreement to pay money, or to deliver goods, may be assigned by the person to whom the money is to be paid or the goods are to be delivered, if there is nothing in the terms of the contract, whether by requiring something to be afterwards done by him, or by some other stipulation, which manifests the intention of the parties that it shall not be assignable. But every one has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. In the familiar phrase of Lord Denman, "You have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract." *Humble v. Hunter*, 12 Q.B. 310, 317; *Winchester v. Howard*, 97 Mass. 303, 305, 93 Am.Dec. 93; *Ice Co. v. Potter*, 123 Mass. 28, 25 Am.Rep.

9; *King v. Batterson*, 13 R.I. 117, 120, 43 Am.Dec. 13; *Lansden v. McCarthy*, 45 Mo. 106.

The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise: "Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided." *Pol.Cont.* (4th Ed.) 425. The contract here sued on was one by which the defendant agreed to deliver 10,000 tons of lead ore from its mines to Billing & Eilers at their smelting works. The ore was to be delivered at the rate of 50 tons a day, and it was expressly agreed that it should become the property of Billing & Eilers as soon as delivered. The price was not fixed by the contract, or payable upon the delivery of the ore. But, as often as a hundred tons of ore had been delivered, the ore was to be assayed by the parties or one of them, and, if they could not agree, by an umpire; and it was only after all this had been done, and according to the result of the assay, and the proportions of lead, silver, silica, and iron thereby proved to be in the ore, that the price was to be ascertained and paid. During the time that must elapse between the delivery of the ore and the ascertainment and payment of the price the defendant had no security for its payment, except in the character and solvency of Billing & Eilers. The defendant, therefore, could not be compelled to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted.

* * *

The cause of action set forth in the complaint is not for any failure to deliver ore to Billing before his assignment to the plaintiff (which might perhaps be an assignable chose in action), but it is for a refusal to deliver ore to the plaintiff since this assignment. Performance and readiness to perform by the plaintiff and its assignors, during the periods for which they respectively held the contract, is all that is alleged; there is no allegation that Billing is ready to pay for any ore delivered to the plaintiff. In short, the plaintiff undertakes to step into the shoes of Billing, and to substitute its liability for his. The defendant had a perfect right to decline to assent to this, and to refuse to recognize a party, with whom it had never contracted, as entitled to demand further deliveries of ore.

The cases cited in the careful brief of the plaintiff's counsel, as tending to support this action, are distinguishable from the case at bar, and the principal ones may be classified as follows:

First. Cases of agreements to sell and deliver goods for a fixed price, payable in cash on delivery, in which the owner would receive the price at the time of parting with his property, nothing further would remain to be done by the purchaser, and the rights of the seller

could not be affected by the question whether the price was paid by the person with whom he originally contracted or by an assignee. *Sears v. Conover*, *42 N.Y. (3 Keyes) 113, 4 Abb.Dec. 179; *Tyler v. Barrows*, 29 N.Y.Super.Ct. 104.

Second. Cases upon the question how far executors succeed to rights and liabilities under a contract of their testator. *Hambly v. Trott*, Cowp. 371, 375; *Wentworth v. Cock*, 10 Adol. & E. 42, 2 Perry & D. 251; 3 *Williams, Ex'rs* (7th Ed.) 1723-1725. Assignment by operation of law, as in the case of an executor, is quite different from assignment by act of the party; and the one might be held to have been in the contemplation of the parties to this contract, although the other was not. A lease, for instance, even if containing an express covenant against assignment by the lessee, passes to his executor. And it is by no means clear that an executor would be bound to perform, or would be entitled to the benefit of, such a contract as that now in question. *Dickinson v. Calahan*, 19 Pa.St. 227.

Third. Cases of assignments by contractors for public works, in which the contracts, and the statutes under which they were made, were held to permit all persons to bid for the contracts, and to execute them through third persons. *Taylor v. Palmer*, 31 Cal. 240, 247; *St. Louis v. Clemens*, 42 Mo. 69; *Philadelphia v. Lockhardt*, 73 Pa. 211; *Devlin v. New York*, 63 N.Y. 8.

Fourth. Other cases of contracts assigned by the party who was to do certain work, not by the party who was to pay for it, and in which the question was whether the work was of such a nature that it was intended to be performed by the original contractor only. *Robson v. Drummond*, 2 Barn. & Adol. 303; *Waggon Co. v. Lea*, 5 Q.B.Div. 149; *Parsons v. Woodward*, 22 N.J.L. 196.

Without considering whether all the cases cited were well decided, it is sufficient to say that none of them can control the decision of the present case. - Judgment affirmed.

QUESTIONS:

1. Did the fact that Billing was under a duty to pay for the ore deprive him of the power to assign his right to the delivery of the ore?
2. Did Billing by his assignment to the smelting company attempt to extinguish his own duty to pay?
3. Was the mining company's duty to deliver the ore conditional upon any performance by Billing in person?
4. To what extent is it true that a party to a contract "cannot have another person thrust upon him without his consent"?
5. Did the mining company acquire a new and additional security by Billing's assignment to the smelting company?

6. In *Devlin v. New York*, was Hackley's power to delegate performance to Devlin (and thus to perform vicariously) conferred upon him by statute?
7. What is the matter with the quotation from Pollock on Contracts? See *Restatement, Contracts*, § 161.
8. Is the decision sustained by the rules in *Restatement, Contracts*, § 160?

NOTE

Cases are very numerous in which it has been held that a required performance was so "personal" in character that it could not be delegated, and that on tender of such performance by an assignee in place of the assignor the other party to the contract was justified in refusing to accept it and also in refusing to proceed with his own performance. Even though one party contracts with the other party "and his assigns," this is more likely to be held to be an assent to an assignment of rights than to an assent that the return performance may be rendered by a substitute. The interpretation will depend upon additional factors.

In *American Smelting & Ref. Co. v. Bunker Hill & S. Mining & Con. Co.*, 248 F. 172 (1918, D.C.), the contract was similar to that in the *Belden Mining* case above; but it contained a provision that it should be "binding upon and inure to the benefit of successors and assigns." At suit of the assignee the contract was specifically enforced. It should not be so held unless the assignor remained ready and willing to bear the responsibility for nonperformance by the assignee.

Personal performance was held to be a condition of the defendant's contractual duty in the following cases: *Standard Chautauqua System v. Gift*, 120 Kan. 101, 242 P. 145 (1926), contract to conduct a "Chautauqua assembly" with lecturers and entertainers; *Griffith v. Tower Pub. Co.*, [1897] 1 Ch. 21, contract by defendant to publish plaintiff's book and to pay royalty; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.*, 180 N.Y. 280, 73 N.E. 8 (1905), contract to sell presses and to pay over money received; *New England Cabinet Works v. Morris*, 226 Mass. 246, 115 N.E. 315 (1917), contract to design and install furniture; *Paige v. Faure*, 229 N.Y. 114, 127 N.E. 898 (1920), in spite of an express provision for the benefit of "assigns".

In sales on credit, where the assignor was to give his personal note, a tender of the assignee's note is not sufficient. *Hambleton v. Jameson*, 162 Iowa, 186, 203, 143 N.W. 1010 (1913); *Wood v. Blanchard*, 212 Mass. 53, 55, 98 N.E. 616 (1912). But where mere book credit was to be given the seller must deliver to the buyer's assignee on tender of the cash by the latter. *Koehler & Hinrichs Mercantile Co. v. Illinois Glass Co.*, 143 Minn. 344, 173 N.W. 703 (1919).

An assignment of contract rights is not invalid, even though it purports to provide for a substitution of the assignee in the matter of duty and liability as well as of right; the assignee may enforce the assigned right in case the conditions precedent thereto in the way of performance by the assignor have been fulfilled. *American Lithographic Co. v. Ziegler*, 216 Mass. 287, 103 N.E. 909 (1914).

Where the assignee clearly assumes to perform the contractual duties of the assignor, this is no novation, and the assignor remains bound as before; but the other party to the original contract now has an additional security and can sue the assignee for breach in jurisdictions recognizing the rights of a creditor-beneficiary.

SECTION 8.—SUCCESSIVE ASSIGNEES OF THE SAME RIGHT

SALEM TRUST CO. v. MANUFACTURERS' FINANCE CO. et al.

Supreme Court of the United States, 1924.

264 U.S. 182, 44 S.Ct. 266, 68 L.Ed. 628, 31 A.L.R. 867.

Bill by the Salem Trust Company against the Manufacturers' Finance Company and others. Decree of dismissal was affirmed by the Circuit Court of Appeals (280 F. 803), and plaintiff brings certiorari. Reversed.

The Nelson Blower & Furnace Co. had a contract to construct engines for the Murray Corp. On May 16, 1919, the Nelson Co. for a valuable consideration assigned to the Salem Trust Co. its claim against the Murray Corp. to the amount of \$45,000, then due or to become due. On July 15, 1919, the Nelson Co. for a valuable consideration, assigned the same claim to the Manufacturers' Finance Co. to the amount of \$50,000. In September, 1919, the latter company gave notice of its assignment to the debtor, having made no earlier inquiry of the debtor as to the amount due. At the time of this notice, neither the Manufacturers' Finance Co. nor the Murray Corp. had any knowledge of the earlier assignment to the Salem Trust Co. The Nelson Co., the assignor, went into the hands of a receiver. The receiver completed work on the engines; and the balance due from the Murray Corp., being about \$8,000, was deposited in a bank to await decision as to which one of the two assignees was entitled to it. The Salem Trust Co. brought a bill in equity for determination of the question. [Statement is condensed.]

Mr. Justice BUTLER delivered the opinion of the court. • • •

As between successive assignees of the same account receivable, does prior notice to the debtor of the later assignment, without more, subordinate the rights of the earlier to those of the later assignee?

There is a conflict of authority on the question. Under decisions of the Supreme Judicial Court of Massachusetts, which are in harmony with the decisions of the highest courts in a number of the states, the

earlier assignee would prevail. The court below held the question to be one of general jurisprudence, declined to be bound by the Massachusetts decisions, and followed what they understood the rule to be, as applied by this and other federal courts, and in a number of the states, and decided that the later assignee, the first to give notice to the debtor is entitled to the money.

The question is one of general law, not based on any legislation of the state or local law or usage, and the lower court rightly decided that it was not bound by the rule applied in the decisions of the highest court of Massachusetts. * * *

If a debtor pays, or becomes bound to pay, a later assignee, he is not liable to an earlier assignee who failed to give him notice of his assignment. And if, without notice of any assignment, he pays the assignor he cannot be held by the assignee. To safeguard against such things, it is necessary for an assignee to give the debtor notice of his assignment. But it does not follow that mere priority of notice of the later assignee, who took nothing by his assignment, will subordinate the rights of an earlier assignee. * * *

The doctrine that mere priority of notice to trustee or debtor gives priority of right to a later assignee over an earlier assignee of a chose in action is generally referred to *Dearle v. Hall* and *Loveridge v. Cooper*, 3 Russell, 1, decided at the same time and upon the same principle. The leading case is *Dearle v. Hall*. In that case, there was much more in favor of the second assignee than mere priority of notice. Brown, cestui que trust under his father's will, made three assignments of income payable to him during his life by the executors. The two earlier assignments were made to *Dearle* and *Sherring*, respectively. Each was for a part of the annual income. By the terms of the assignments the assignor was permitted to continue to collect, and for years he did collect, the income assigned. No notice of the earlier assignments was given to the executors. Before he purchased, Hall, the latest assignee, diligently inquired of the trustees as to Brown's title and the amount of income paid him. The trustees knew of no assignments, and without any suspicion of prior incumbrance, Hall in good faith purchased the entire claim. He gave immediate notice of his assignment to the trustees and received assurance that the income would be paid to him. When it became due, an instalment was paid to him. Thereafter, the earlier assignees gave notice and demanded payment under their respective assignments. The trustees withheld all payments. Suit was brought by *Dearle* and *Sherring* against Hall to establish priority of their assignments over his. In the lower court, Sir Thomas Plumer, M. R., gave judgment in favor of Hall, and it was affirmed by Lord Lyndhurst, L. C. Two grounds of the decision may be gathered from the opinions: (1) That the negligence of the prior assignees in failing to give notice to the trustees re-

sulted in Hall being induced to purchase without knowledge of the prior assignments. (2) That notice to the trustees was necessary to perfect title—as, “the act of giving the trustee notice is in a certain degree taking possession of the fund.” See *Ward v. Duncombe*, L.R. 3 A.C. (1893) 369, 387. These cases did not decide that notice by a subsequent assignee after his purchase, without any inquiry in advance of his purchase, will subordinate the title of the prior assignor to that of the later. No such questions were involved. But later, in the case of *Foster v. Cockerell*, in the House of Lords, 3 Cl. & F. 456, that question was decided in favor of the subsequent assignee, and it appears to have become the settled rule in England. However, it has been the subject of much discussion and explanation by the English courts.

* * *

There is no decision of this court which sustains the contention that, as between successive assignees of the same chose in action, mere priority of notice gives priority of right. It seems to us that the better reasons are against such a rule. By the first assignment, the rights of the assignor pass to the assignee. The creditor has a right to dispose of his own property as he chooses and to require the debt to be paid as he directs without the assent of the debtor. See *Story, Equity Jurisprudence* (11th Ed.) § 1057. Notice of the assignment to the debtor adds nothing to the right or title transferred. A subsequent assignee takes nothing by his assignment, because the assignor has nothing to give. See *Judson v. Corcoran*, *supra*, 17 How. 614, 15 L.Ed. 231. If, after assignment, the assignor receives payment from the debtor, he is liable to the assignee. Failure of the first assignee to give notice does not divest him of any title or right or vest any claim in a subsequent purchaser. It cannot injuriously affect an intending purchaser who makes no inquiry of the debtor concerning the assignor's title. The debtor is not bound to answer inquiries concerning the assignor's title, and there can be no assurance that an intending purchaser can ascertain the incumbrance by inquiry of the debtor having notice of the earlier assignment. *Low v. Bouverie*, [1891] L.R. 3 Ch. 82, 99. Compare *Ward v. Duncombe*, *supra*, 393. It is impossible to eliminate all risk from such a transaction. If the second assignee elects to rely on the representations of the vendor as to his title, and is deceived, he cannot shift his loss to the first assignee, unless some act or omission of the latter was proximate to the deception.

Facts and circumstances may create an equitable estoppel against the first assignee. *Herman v. Mutual Life Insurance Co.*, 218 Mass. 181, 105 N.E. 450, Ann.Cas.1916A, 822; *Rabinowitz v. People's National Bank*, 235 Mass. 102, 126 N.E. 289. It would be unconscionable to permit him to prevail over a later assignee whom he had misled or deceived in respect of the assignor's title at the time of purchase by the latter. But, assuming a duty on the first purchaser to protect a subse-

quent assignee against deception and fraud by the assignor, there is no ground for subordinating his claim, unless his failure was an element in or contributed to the deception. In the absence of inquiry by the subsequent purchaser, the failure of the first to give notice is immaterial.

In a case where, as here, the later assignee has made no inquiry, of the debtor in advance of taking his assignment, there is no analogy between the giving of notice by the first assignee to the debtor and the taking of possession of tangible personal property by a purchaser. It is impossible in any real sense to transfer possession of accounts receivable or the like, and, as to them, an assignee does not become clothed with the indicia of ownership as does one taking possession of tangible things. It is not accurate to say that notice is necessary to perfect title in the assignee of a chose in action. While failure to give notice may become an important element in a situation from which equitable estoppel may arise against the first assignee, it cannot be said to be necessary to or an element in acquisition of title.

The result will be the same if it be assumed that each bona fide purchaser takes merely an equity in the chose in action assigned. If equities are equal, the first in time is best in right. Otherwise the stronger equity will prevail. While there are contingencies which entitle the second to prevail over the first assignee, we hold that mere priority of notice to the debtor by a second assignee, who lent his money to the assignor without making any inquiry of the debtor, is not sufficient to subordinate the first assignment to the second. The petitioner is entitled to the fund.

Decree reversed.

Mr. Justice HOLMES and Mr. Justice BRANDEIS concur on the ground that the rights of the parties are governed by the law of Massachusetts.

NOTE

The court cited many cases in support of each of the two opposing rules. See, in accord with the present decision, *Muir v. Schenck & Robinson*, 3 Hill (N.Y.) 228, 38 Am.Dec. 633 (1842); *Niles v. Mathusa*, 162 N.Y. 546, 552, 57 N.E. 184 (1900); *Thayer v. Daniels*, 113 Mass. 129 (1873); *Sutherland v. Reeve*, 151 Ill. 384, 38 N.E. 130 (1894); *Summers v. Hutson*, 48 Ind. 228 (1874).

Supporting the English rule of *Dearle v. Hall*, 3 Russ. 1 (1823), see *Adamson v. Paonessa*, 180 Cal. 157, 179 P. 880 (1919); *Jenkinson v. New York Finance Co.*, 79 N.J.Eq. 247, 82 A. 36 (1911); *Peters v. Goetz*, 136 Tenn. 257, 188 S.W. 1144 (1916); *Fraley's Appeal*, 76 Pa. 42 (1874).

The rule adopted by the Supreme Court, above, is accepted by *Restatement, Contracts*, § 173, where certain exceptions to the rule are also stated. This case is discussed in 33 *Yale L.Jour.* 767; 24 *Col.L.Rev.* 501.

Attaching Creditors.—An assignee, who has given no notice to the debtor, is generally preferred over a subsequent attaching creditor; the latter not being in as strong a position as a subsequent innocent assignee for value. *Restatement, Contracts*, § 172; *McDowell, Pyle & Co. v. Hopfield*, 148 Md. 84, 128 A. 742, 52 A.L.R. 105 (1925).

Since the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487 (1938), overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 10 L.Ed. 865 (1842), the decision in the *Salem Trust case*, *supra*, is to be sustained on the ground accepted by Justices Holmes and Brandeis, that the case was governed by the law of Massachusetts and not by any general federal rule of law. Nevertheless, the decision may be influential in causing the courts of any State to adopt and apply the rule that the majority of the court laid down.

After a petition in bankruptcy has been filed against a debtor, the distribution of his assets is determined in accordance with the National Bankruptcy Act. In such a distribution, the claims of the general creditors are often in conflict with those of particular creditors to whom the debtor has assigned "accounts receivable" as security. The Bankruptcy Act contains provisions by virtue of which such assignments can be set aside as "preferences," on behalf of the general creditors not so secured. Under these provisions, if an assignee of an account has given no notice to the account obligor, and if by the law of the particular State that is held to be applicable to the assignment in question it is still possible for a subsequent assignee to obtain a right superior to that of the first assignee who gave no notice, the general creditors can have the assignment set aside as a "preference." The effectiveness of assignments of accounts as security for financing loans is much affected by these provisions as to "preferences;" and in any bankruptcy proceeding difficult questions in the Conflict of Laws among the several States may arise. See *Corn Exchange N. Bank & T. Co. v. Klauder*, 318 U.S. 434, 63 S.Ct. 679, 87 L.Ed. 884, 144 A.L.R. 1189 (1943); *In re Vardaman Shoe Co.*, 52 F.Supp. 562 (1943, D.C.).

The holder of a seat on the N. Y. Stock Exchange borrowed money of a Trust Company, giving as security an assignment of the "seat" and of its proceeds in case of sale thereafter. Later, a claim for taxes accrued to the United States against the borrower; this was a "preferred claim" as against the claims of ordinary creditors. Still later, the "seat" was sold and a right to the proceeds in the hands of the Stock Exchange was created. The court denied the claim of the Trust Company that, because its assignment was earlier in time, its right to the proceeds was superior to that of the Government. At the time of the assignment there had been no sale and there was no right to "proceeds" against anybody. The purported assignment was effective only as a promise to assign when a right to such proceeds should arise in future. *N. Y. Trust Co. v. U. S.*, 295 N.Y. 510, 68 N.E.2d 514 (1946).

HERMAN v. CONNECTICUT MUT. LIFE INS. CO. et al.

Supreme Judicial Court of Massachusetts, 1914.
218 Mass. 181, 105 N.E. 450, Ann.Cas.1916A, 822.

Bill of Joseph Herman against the Connecticut Mutual Life Insurance Company and others. Reported by a single justice for the determination of the full court. Bill dismissed, unless plaintiff desires a decree for partial relief.

The bill was brought by plaintiff, claiming to be an assignee of a life policy of life insurance in the defendant company, against the company and other defendants, of whom defendant Harry R. Stanley, as executor, claimed to hold the policy under an assignment subsequent in time to that of plaintiff, to establish plaintiff's rights in and to the policy under his assignment. When the assignment to plaintiff was made, the business was transacted by George E. Williams, agent of the insurance company, as agent for insured. Williams sent plaintiff the assignment, but did not deliver the policy, and, upon inquiry being made, told plaintiff that the company held it as collateral for a premium loan. The suit was brought in insured's lifetime.

SHELDON, J. * * *

2. The plaintiff by his assignment from Sommer acquired as against the latter a valid title to the policy of insurance which here is in question. As between the plaintiff and Sommer it is immaterial that the assignment was not written upon or attached to the policy, that no reference to the assignment was written or noted on the policy, or that no notice of it was given to the insurance company, either in the manner required by the fifth clause of the policy or otherwise. * * * The English rule, as stated in *Dearle v. Hall*, 3 Russ. 1, though adopted in many other jurisdictions, is not the law of this commonwealth. *Thayer v. Daniels*, 113 Mass. 129, 131; *Putnam v. Story*, 132 Mass. 205, 211.

It is true also, as the plaintiff has contended, that the owner of a chattel does not, by merely intrusting to a third person the custody or even the possession thereof, hold him out as its owner, and will not by that fact alone be estopped from setting up his title against even a bona fide purchaser from his bailee. *Rogers v. Dutton*, 182 Mass. 187, 189, 65 N.E. 56, and cases there cited. But we have here to do, not with a chattel, but with a nonnegotiable chose in action, the right to receive in the future a certain sum of money upon the happening of certain contingencies. The policy of insurance merely shows the existence, nature and extent of the right. As has been correctly stated by counsel for Stanley: "It is the tangible evidence which the owner of the right possesses in order to show title to the right."

The court must apply here the rule stated by the Chief Justice in *Baker v. Davie*, 211 Mass. 429, 440, 97 N.E. 1094, 1097, 37 L.R.A., N.S., 944: "That when an owner has so acted as to mislead a third person into the honest belief that the one dealing with the property had a right to do so, he is estopped from showing the truth." • • •

But this estoppel of a rightful owner to set up his title against a bona fide purchaser for value from one who had not the right to sell rests upon the conduct of the rightful owner. It arises against him when by his own conduct he has so clothed the wrongdoer with the indicia of ownership as to justify third persons in regarding the wrongdoer as either the rightful owner or as having authority from that owner. The estoppel arises only from the owner's voluntary action tending to produce and in fact producing that result. If the policy had been delivered to the plaintiff and then had been obtained from him by Sommer or Williams by means of a common-law larceny, there would have been no foundation for an estoppel against the plaintiff, because, whatever third persons might have thought or even might have been justified in thinking, the possession and apparent ownership would not have been put into Sommer or into Williams as Sommer's agent by any voluntary action of the plaintiff. • • •

The plaintiff took his assignment by an instrument separate and apart from the policy itself. He allowed the possession of the policy to remain unaltered. It is true that he did this on the false representation that it was held by the insurance company as security for a premium loan; but the fact remains that it was his voluntary act. He took no other precaution either by giving notice to the company or otherwise. He testified that he did not even tell Sommer that the policy had not been delivered to him. He trusted everything to Williams; and his own testimony was that he did this by reason of his "full confidence in Williams." He knowingly allowed the circumstances to be such as to indicate that Sommer retained the full ownership of the policy, and such that no inquiry of the company would disclose anything to the contrary or throw any doubt upon Sommer's title. For this reason, such cases as *Mente v. Townsend*, 68 Ark. 391, 59 S.W. 41, are not applicable here. The case is a stronger one than *Bridge v. Connecticut Mut. Life Ins. Co.*, 152 Mass. 343, 25 N.E. 612, and the reasoning of that opinion is decisive against the plaintiff. There are no circumstances upon which any distinction can be made in his favor.

But the assignment to Stanley was not in reality, but only in form, an absolute one. It was given to secure an indebtedness of Sommer to Stanley. The plaintiff has a right to redeem from Stanley. This makes it necessary to determine the amount for which Stanley can hold the policy against the plaintiff.

This policy was assigned to Stanley on February 2, 1910, to secure a note for \$3,000. Afterwards Stanley loaned to Sommer the further sum of \$1,000, and took from him a note for that amount, dated February 2, 1911, and signed by Sommer. Above Sommer's signature, Williams, without Sommer's knowledge or consent, wrote the words: "Conn. Mut. policy 215356 as security." Those words described this policy.

We need not consider whether this interpolation by Williams in the note before its delivery to Stanley destroyed the validity of the note. R.L. c. 73, §§ 141, 142; *Stoddard v. Penniman*, 108 Mass. 366, 11 Am.Rep. 363; *Draper v. Wood*, 112 Mass. 315, 17 Am.Rep. 92; *Citizens Nat. Bank v. Richmond*, 121 Mass. 110; *Greenfield Savs. Bank v. Stowell*, 123 Mass. 196, 25 Am.Rep. 67. But we are clearly of opinion that it does not give to Stanley the right to hold the policy as security for the payment of this latter note. The assignment to him was to secure the payment of the note for \$3,000, not what further amounts might become due to him from Sommer. Sommer has never made or undertaken to make further assignment to Stanley, or given or undertaken to give to Stanley any greater rights in the policy.

The other questions raised are disposed of by the findings of fact made in the superior court.

The plaintiff, if he so desires, may have a decree allowing him to redeem the policy upon payment of the amount due on Sommer's note for \$3,000, with interest and costs, within such time and upon such terms as may be determined by a judge of the superior court. If he shall not so redeem, his bill must be dismissed with costs.

So ordered.

NOTE

See Restatement, Contracts, § 173.

RABINOWITZ v. PEOPLE'S NAT. BANK.

Supreme Judicial Court of Massachusetts, 1920. 235 Mass. 102, 126 N.E. 289.

Action by Jacob Rabinowitz against the People's National Bank. Verdict was directed for defendant, and plaintiff excepts. Exceptions overruled.

CARROLL, J. On September 13, 1917, one Cohen assigned certain accounts which were then due him for goods sold, to the plaintiff as security for a loan of \$1,000, of which \$573 has been paid. No notice was given the debtors of this assignment. On October 4, 1917, Cohen assigned the same accounts to the defendant, as security for a loan which he then obtained; the defendant collected \$600 on the accounts.

This action is for money had and received, to recover \$427. In the superior court there was a directed verdict for the defendant, and the plaintiff excepted.

Although the assignment to the plaintiff was earlier in time than the one to the defendant, plaintiff cannot recover for money had and received. There was a valid consideration for the later assignment. It does not appear that the defendant knew of the one to the plaintiff and there is no suggestion of bad faith; it did not receive the money as the plaintiff's agent or in his behalf; it was received in its own right as the assignee of the chose in action. An action for money had and received lies to recover money which should not in justice be retained by the defendant and which in equity and good conscience should be returned to the plaintiff. The right to recover does not depend upon privity of contract, but on the obligation to restore that which the law implies should be returned, where one is unjustly enriched at another's expense. *Clafin v. Godfrey*, 21 Pick. 1, 6; *Farmer v. Arundel*, 2 Wm.Bl. 824.

As the money was received from the debtors by the defendant as its own, in good faith, without notice of the prior assignment, under an instrument duly executed and for a good consideration purporting to assign the accounts receivable, the plaintiff cannot recover in this action. *Cole v. Bates*, 186 Mass. 584, 72 N.E. 333; *Lawrence v. Batcheller*, 131 Mass. 504; *Rand v. Smallidge*, 130 Mass. 337; *Moore v. Moore*, 127 Mass. 22.

We therefore do not consider it necessary to discuss the question whether the plaintiff comes within the rule established in this commonwealth that, as between competing assignees assignments of a chose in action take precedence according to their dates and not according to the time when notice is given to the debtor; the earlier assignment being good against the subsequent one, though no notice is given the debtor (*Thayer v. Daniels*, 113 Mass. 129, 131, *Putnam v. Storey*, 132 Mass. 205), or within the exceptions to the rule where, by his own acts or conduct, the earlier assignee has been prevented from recovering. As bearing on this point, see *Bridge v. Connecticut Mutual Life Insurance Co.*, 152 Mass. 343, 25 N.E. 612. Nor is it necessary to decide what rights, if any, the plaintiff has against the debtors. See *Hellen v. Boston*, 194 Mass. 579, 80 N.E. 603.

Exceptions overruled.

NOTE

In accord: *Restatement, Contracts*, § 173; *Judson v. Corcoran*, 17 How. 612, 15 L.Ed. 231 (1854); *In re Hawley Down-Draft Furnace Co.* (D.C.) 233 F. 451 (1916).

CHAPTER 12

JOINT CONTRACTS

INTRODUCTORY NOTE

The present Chapter deals with those cases in which two or more persons promise the rendition of a single performance or in which a single performance is promised to two or more persons. When A, B, and C sign a note saying, "We promise to pay to the order of D \$1,000," there is only one payment to be made. The same would be true if the note reads, "We promise to pay to the order of D and E \$1,000." Instead of money, A, B, and C may promise to run a factory, to transport goods, to cause a building to be erected, or to transfer Blackacre owned by them in common. The early common law judges found these cases very difficult to analyze. This, along with the technicality of their forms of action and procedure, resulted in a system of complicated and often unjust rules from which we have not yet wholly escaped.

It is possible, on the other hand, for two or more persons to promise wholly separate performances, even though they make these promises in one contract and in exchange for an undivided consideration. In return for property transferred, A, B, and C may sign the following instrument, "The following sums of money are hereby promised to D, by A \$500, by B \$300, and by C \$200." Such cases as these are not within the present Chapter, except for the purpose of distinguishing them by interpretation, a process that is at times difficult.

When two or more persons promise a single performance, their relations with each other must be considered, as well as their relations with the promisee. The early law of "joint" contracts failed almost wholly to do this. In the note quoted above, which A, B, and C all signed, "We promise to pay to the order of D \$1,000", nothing is said as to the proportions in which each shall bear the burden. If A paid the whole amount, the common law treated him rather shabbily. The result was that he applied to the Chancellor for relief; and relief was granted. Thus was created the Equity law of Suretyship, supplementing and eventually in large part nullifying the earlier common law.

The common law also treated D shabbily. If after executing the above note one of the signers died, D had no rights against his executor but had to look to the two survivors only. If D innocently accepted one third of the debt from A and gave him a release, B and

C were likewise released though they had paid nothing. If D sued A alone and got a judgment that turned out to be uncollectible, no second suit against B and C would lie. Therefore, D also applied to the Chancellor for relief; and in some degree it was given.

From this history it appears that in the cases under consideration the jural relations of the parties are determined by two systems of law, the "common law" and "equity", or by the net result of their interaction on each other as affected by their amalgamation and variation by modern statutes. A lawyer may cause great losses to his client unless he knows these two systems and the aforesaid "net result." Since the joinder of the courts into a single system is not wholly complete, and since statutory changes are far from uniform, the lawyer's problem and the jural relations of his client will vary with the jurisdiction involved.

In this casebook, dealing with so massive a subject as the law of Contracts, it will not be possible to include enough cases to demonstrate the full effect of the impact of the law of Suretyship upon the common law of Joint Contracts, or to state the "net result" of statutory reforms. Enough must be given, however, to warn the student that ancient doctrines may be obsolete, even when they are repeated in a modern law book or court opinion. Most modern courts have the powers of a Chancellor as well as of a Judge; both the applicable "law" and the available "remedies" in the case before such a court are determined by a combination of common law, equity, law merchant, and much more as well—the sum total of our legal history. In determining the present-day law applicable to "joint" contractors, the statutes must never be overlooked; not only those great statutes that unite court systems into one, combine equity and common law, and empower courts to apply the equitable rules of Suretyship to "joint" contractors, but also the many special and limited statutes by which legislatures have tried to abolish ancient and unjust doctrines.

RIPLEY v. CROOKER et al.

Supreme Judicial Court of Maine, 1860. 47 Me. 370, 74 Am. Dec. 491.

On an agreed statement of facts.

Assumpsit on an account annexed, and for a balance alleged to be due jointly from the defendants to the plaintiff, for building five-eighths of the ship *Adrianna* in 1854-55, under the following contract:

"Memorandum of agreement made and concluded upon by Theodore Ripley, of Hallowell, Maine, on the one part, and William D. Crooker, Samuel Swanton, 2d, and David Crooker and Isaac Preble, all of Bath, on the other, to wit:

"The said Ripley agrees to build and complete a good ship of about eleven hundred tons, to be built at Hallowell, and to be commenced the next week and completed ready for sea as soon as possible, to be rigged at Bath; and it is binding on him to be particular to charge all the bills, which he pledges to do in good faith, to arrive at her cost; and for his services is to receive one dollar each register tonnage, with two hundred dollars for use of yard, steambox, and yard tools and shores, &c, and is to receive five thousand per month on eleven-sixteenths, commencing payment the first day of July next, and so on monthly, not to exceed five payments, and when completed the balance to be paid in five and ten months, reckoning interest on rigging bill, iron bill, and Kendall, Richardson & Co.'s bill, should these bills become due previous to the five and ten months payments, no interest to be calculated otherwise but at the bills. And the second parties agree to pay the said Ripley five thousand dollars per month, commencing the first of July, and so on monthly, not to exceed five payments, to the ship's completion ready for sea, when her cost by the bills is to be estimated, and the materials to be bought at the best advantage for cash, save the iron bill, and rigging, and Kendall, Richardson & Co.'s bills, which, if they become due previous to five and ten months after her completion, the interest on said bills are to be added to the balance to be paid in notes at five and ten months—all other interest not to be reckoned.

"Recapitulation: Payments, five thousand dollars per month to her completion ready for sea, say \$25,000 and the balance in notes at five and ten months; not to be more than five payments in cash monthly.

"Three-eighths,

William D. Crooker.

"One-eighth,

Samuel Swanton, 2d.

"One-eighth,

David Crooker.

"One-sixteenth,

Isaac Preble.

Theodore Ripley.

"Witness to all the signatures: Howard P. Wiggin.

"Bath, May 31, 1854." * * *

MAY, J. The contract set forth in the writ is of two parts. In its direct terms, it is between the plaintiff "on the one part," and the defendants "on the other." Its language is too unequivocal in its meaning to admit of any other construction than that of a joint undertaking, on the part of the defendants, to pay for the eleven-sixteenths of the ship built for them, at her cost, in the manner and at the times stipulated in the contract. The contract contains no words fairly indicative of a several liability by each of the defendants for particular parts of the ship; but, on the contrary, the defendants together agree to pay the entire price which was to be paid, for that portion of the ship which they together agreed to take, and which the plaintiff agreed to build for them.

The fact, that words indicative of the proportional part of the ship which each defendant was to take were set against the name of each, does not change the construction of the contract, nor in any way affect the joint liability of the defendants. Such words do not sufficiently show an intention to limit the liability of each defendant to his proportion of the ship, and cannot, therefore, control the general language used in the contract, so far as the plaintiff is concerned. They may, however, like the word surety or sureties appended to some of the signatures upon a note, serve to show the relations subsisting between the parties of the second part of the contract; but they cannot be permitted to subvert, or even modify the unambiguous terms of the contract, as made by the parties themselves.

It is contended, in defence, that the terms of the contract are modified by the proof in the case, tending to show the existence of a custom on the Kennebec river for persons engaged in the building of vessels each to be responsible only for his own share. In the case before us, the contract is in writing, and there is no proof that any of its words are by usage or custom understood to be used in any other than their ordinary sense. The custom which is attempted to be proved does not reach this case. To allow such a custom to modify the written contract of the parties would be to set it up against their express agreement and manifest intentions, which the law will not permit. See *Metcalf v. Weld & al.*, just decided in Massachusetts, and reported in the *Law Reporter*, vol. 23, No. 9, p. 551.

Again, it is said that both the plaintiff and the defendants have always treated this contract as several and not joint; and it fully appears from the evidence that payments have been made by the defendants severally, and receipts given by the plaintiff therefor, which clearly indicate that such payments were made by each defendant towards his particular share of the ship, and were so received. If the contract was doubtful in its construction, such facts might well aid the Court in determining the intention of the parties in making it; but, in a case like this, where there is no ambiguity in its terms, it is not perceived how the subsequent conduct of the parties can change the plain meaning of the contract, or take away the appropriate remedy thereon, unless such conduct amounts to a severance of the joint liability, or consists of acts which may fairly operate as a release from such liability. But, where several persons are jointly indebted, and one of them pays his specific share of the debt, and it is received and receipted for by the creditor as such, such payment will not exonerate the party paying from his liability for the residue of the debt. Such receipt, not being under seal, is neither a severance of the indebtedness, nor an effectual release; and notwithstanding such receipt, the parties to the contract will remain jointly bound, to the extent of what is unpaid, in the same

manner as if no such specific payment had been made. *McAllester et al. v. Sprague et al.*, 34 Me. 296. * * *

QUESTIONS:

1. Was this a bilateral contract, by Ripley to build the ship and by the other four to pay him eleven sixteenths of her actual cost plus a fixed fee?
2. Did Isaac Preble promise Ripley to pay the full eleven sixteenths and the fee or only one eleventh thereof?
3. Did the four signers with fractions opposite their names promise Ripley to render identically the same performance to him?
4. By whom were the notes for the balance of cost over the amount of the monthly cash payments to be signed?
5. Was Isaac Preble a principal debtor for one sixteenth and a surety for the other three signers as to ten sixteenths?

NOTE

The problem in this case is purely one of interpretation: Did each, along with the others, promise to pay the whole amount, or did each promise to pay his specified fraction of that amount and no more? If the latter, each is separately indebted for his separate amount, and the contract is neither "joint" nor "joint and several." If the former, the words are such as to make their obligation "joint" at common law, since there are no words of severance. There is no reference to any Maine statute similar to that in the Oklahoma case that follows.

Nevertheless, if the reasonable interpretation is that each promised payment of the whole amount, equity would declare each promisor to be a principal debtor for his fraction and a surety for the remainder. This does not deprive Ripley of any security; and he is positively benefited by the fact that equity would nullify the common law rule as to survivorship, and if one promisor died would hold his executor bound both to Ripley and to the other three promisors just as the deceased had been. In equity each promisor has a right to exoneration and indemnity against the other three promisors to the extent that he is their surety and not himself principal debtor.

RUTHERFORD v. HOLBERT.

Supreme Court of Oklahoma, 1914. 42 Okl. 735, 142 P. 1099.

Action by A. B. Holbert, on written instrument for purchase price of stallion, against C. N. Rutherford. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

THACKER, C. Plaintiff in error will be designated as defendant and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 15, 1911, plaintiff obtained a verdict and judgment against the defendant for \$300, with interest thereon at 6 per cent per annum from May 17, 1910, in an action upon an instrument in writing, which reads as follows:

"Tishomingo, Okla. May 17, 1910. Seeing it necessary to improve the breed of our horses, we, the undersigned subscribers, hereby purchase and agree to pay the sum of \$3,000.00 to A. B. Holbert for the English Hackney Stallion Ryedale Evolution. Payments to be made to A. B. Holbert by cash or joint note, drawing eight per cent interest from date, payable as follows: \$1,000.00 one year. \$1,000.00 two years. \$1,000.00 three years.

"If full amount is not subscribed, this is null and void."

A. B. Holbert	
M. J. Jester	\$ 300 00
C. N. Rutherford	300 00
Z. T. Burton	300 00
H. E. Fagan	450 00
J. A. Ray, Sr.	450 00
O. J. Davis	300 00
J. H. Duncan	450 00
R. C. Johnson	300 00
C. D. Bynum	150 00
	\$3,000 00

The petition alleged compliance with the foregoing on the part of plaintiff, and that defendant "without any cause refused to execute a joint note, and refused to pay the same." The overruling of defendant's demurrer to the petition is assigned as error; and this presents the question as to whether said instrument is a joint obligation requiring that the action must be brought against all the living joint obligors within the jurisdiction of the court. As between plaintiff and the purchasers of the stallion the instrument appears to be a joint obligation so as to bind all the obligors for said \$3,000. All the obligors join in a promise to pay him the whole amount to be paid. *Davis et al. v. Shafer et al.* (C.C.) 50 F. 764; *Davis & Rankin Bldg. & Mfg Co. v. Knoke*, 55 Minn. 368, 57 N.W. 62; *Field v. Runk*, 22 N.J.L. 525.

However, the last sentence of the instrument and the figures set opposite the names of the obligors, characterize the instrument as a species of subscription contract, when completely executed and delivered, in which as between the obligors, each should pay the amount set opposite his name as the amount of his individual subscription, so that as between them each is a principal debtor for such amount and a mere surety for his co-obligors in respect to the other portion of the joint

indebtedness. It thus appears that while the obligation to plaintiff is a joint one, the instrument discloses a somewhat qualifying state of facts and a special and equitable reason for permitting plaintiff, at his election, to treat it as several as against each obligor to the extent of his individual subscription, that is, it shows that he is a principal debtor as between the joint obligors, and that his co-obligors are his sureties to that extent, and this action deprives him of no right, and the plaintiff only demands of him an amount he is ultimately and in all events bound to pay.

A joint contract will be treated in equity as joint and several where there is a special and equitable reason for so treating it (9 Cyc. 654, and cases cited in notes); and, where a joint contract shows upon its face that as between the obligors one is ultimately bound as principal for a specified amount and ought to contribute that amount as his share of the indebtedness, he cannot be heard to complain if he is sued alone for only that amount. (*Id.*, and, among others, *Pickersgill v. Lahens*, 15 Wall. 140, 21 L.Ed. 119.)

The conclusion we have reached as to the several liability of each of the subscribers seems also to be in accord with and required by section 877, Stat. 1890 (section 969, Rev.Laws 1910), which reads as follows: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." See *Schowalter & Gerber v. Beard*, 10 Okl. 454, 63 P. 687. It thus appears that there was no error in overruling the demurrer to the petition.

The defendant answered by general denial and further by alleging in effect: * * * (3) that if defendant signed said instrument, he did not deliver it, except upon the condition precedent that the plaintiff should procure in all ten financially responsible and otherwise, to him and each to all the others, satisfactory subscribers, who would keep the stallion at Tishomingo; but that the plaintiff failed to procure the requisite satisfactory additional subscribers, and the contract was never consummated, nor any writing thereof unconditionally delivered. Although the answer is somewhat vague and uncertain in this respect, we think it appears therefrom that it is intended to allege a conditional, if any, delivery in substance and effect as stated. * * *

The court in effect instructed the jury: (1) That if they found that defendant was induced by fraud or trickery to sign the contract, if they found that he did sign it, their verdict should be for him, otherwise it should be for the plaintiff; (2) * * * (3) that if defendant signed the contract "he is bound by it, and he cannot escape liability, although he did not read it, and although he thought he was signing a blank paper, if it appears that by the use of reasonable diligence he could have ascertained what the contract was that he was

signing, as the law requires every man who can read and write and is in possession of his faculties to use ordinary and accessible means of informing himself of the contents of any instrument that he signs." These instructions eliminate from the issues triable to the jury the question as to whether the contract was completely executed and unconditionally delivered, and are erroneous at least in this respect.

The last sentence of the contract ("if full amount is not subscribed this is null and void") stated a condition precedent (and not a condition subsequent) to the complete execution and final delivery of the instrument sued on as the contract of the parties thereto, and we have thought it a serious question if such an expression in the writing itself does not exclude all other conditions precedent to its finality; but, although we deem it unnecessary to determine whether this expressed condition precedent would exclude others wholly repugnant thereto, we think it does not exclude the condition that the plaintiff should procure financially responsible and otherwise satisfactory subscribers who would keep the stallion at Tishomingo, nor any other condition precedent not wholly repugnant to that expressed in the writing. *Ware v. Allen et al.*, 128 U.S. 590, 9 S.Ct. 174, 32 L.Ed. 563; *Golden v. Meier*, 129 Wis. 14, 107 N.W. 27, 116 Am.St.Rep. 935; *Elastic Tip Co. v. Graham*, 174 Mass. 507, 55 N.E. 315; *Boston Woven Hose & Rubber Co. v. Same*, 185 Mass. 597, 71 N.E. 117; *Wilson v. Powers & Another*, 131 Mass. 539; *Reynolds v. Robinson*, 110 N.Y. 654, 18 N.E. 127. • • •

For the reasons stated, this case should be reversed and remanded for another trial.

NOTE

The Note to *Ripley v. Crooker* is applicable here also. Should the contract be interpreted as containing a promise by Rutherford to pay \$3,000 or only \$300? If the latter, he is not a surety for the others, and the contract is neither "joint" nor "joint and several". According to the court's interpretation, each subscriber promised to pay the whole \$3,000; and this seems reasonable, since payment was required to be by cash or "joint" note. Under the Oklahoma statute, therefore, Holbert could have sued Rutherford (or any other of the nine promisors) for the full amount of the purchase price in a separate action.

Even in the absence of statute, in equity Rutherford would be treated as a principal debtor for \$300 and as a surety for the remainder, as is stated in the court's opinion.

In the campaigns for subscriptions for educational and other charitable purposes, each subscriber makes a wholly separate promise of a separately specified sum of money. As to that sum he is principal debtor. He is surety for no one; and no one is surety for him. No two subscribers promise either "jointly" or "jointly and severally" to make one and the same payment.

In subscriptions for a business purpose, where all the subscribers bargain for the same consideration, it is more likely that each subscriber promises payment of the whole amount, as in the case above and in *Ripley v. Crooker*. It is quite possible, however, for them to make separate promises of separate amounts; all that is necessary is for them to use words clearly expressing such intention.

Suppose that C sells a motor car to A and B at the total price of \$1,500, receiving in return A's promise to pay \$500 on June 1 and B's promise to pay \$1,000 on October 1. A and B are separate principal debtors, neither being surety for the other. The law of "joint" and "joint and several" contracts has no application. If both had promised C to pay the full price and also gave the two separate notes as above, C could get separate judgments on the two notes as they fell due, or he could get judgment for \$1,500 against the two jointly after both notes fell due.

The oral testimony, offered to show that Rutherford's written promise was conditional on the obtaining of other "financially responsible" subscribers, was held admissible, in spite of the so-called "parol evidence rule." This is in accord with *Pym v. Campbell*, ante, p. 504, and *Atlas Petroleum Co. v. Cocklin*, ante, p. 501.

ALPAUGH v. WOOD

Court of Errors and Appeals of New Jersey, 1891. 53 N.J.L. 638, 23 A. 261.

The plaintiffs, Alpaugh & Magowan, brought suit in the supreme court against the defendants, Wood and Barlow, upon the following contract:

"Agreement made this seventh day of May, A. D. eighteen hundred and eighty-three, between Spencer M. Alpaugh and Frank A. Magowan, of the city of Trenton, New Jersey, party of the first part, and William Wood, of the township of Lawrence, and James Barlow, of the city of Trenton, in the county of Mercer and state of New Jersey, parties of the second part: Witnesseth, that whereas the said party of the first part own and operate a pottery manufactory in the city of Trenton, heretofore known as the pottery of Coxon and Company; and whereas they have agreed to employ and have employed the said parties of the second part, respectively, to superintend and manage the manufacturing part of the business of said pottery, including the decorating department, taking entire charge of the works, employment of hands, and selection of materials; therefore it is agreed between the said parties as follows: That said Alpaugh and Magowan have agreed, and by these presents do agree, to employ, and do hereby employ, the said William Wood and said James Barlow to take the entire charge of the manufacturing department of their said pottery, including the decorating department, for the term of three years and two months from the date of this agree-

ment. And the said parties of the second part do hereby agree to enter the employment of the said party of the first part as aforesaid, and to take the entire charge of the manufacturing department of said pottery, and to give their whole time, labor, and skill towards the proper management of said business during the term aforesaid. And the said party of the first part do agree that the said parties of the second part shall receive for their said services during the said period the salary of three thousand dollars a year each, payable in weekly payments, and do further agree that said Wood and Barlow shall also have and be entitled to ten per cent. of the net profits of said business during said period. And said party of the first part do guaranty that said profits shall bring in to said party of the second part a sum of at least two thousand dollars a year to each of them; and said salary and profits to begin on the twenty-first day of May, eighteen hundred and eighty-three. * It is further understood that James Barlow gives * his entire knowledge and services in modeling to Alpaugh & Magowan, and renders no service or knowledge to any one * else. * In witness whereof the said parties have hereunto set their hands and seals the day and year first above written.

SPENCER M. ALPAUGH. [L. s.]

F. A. MAGOWAN. [L. s.]

WILLIAM WOOD. [L. s.]

JAMES BARLOW. [L. s.]

"Signed, sealed, and delivered in the presence of (clauses between marks thus, *, inserted before signing) GEO. R. COOK. Trenton, N. J., May 7, '83."

The gravamen of the complaint is that the defendants did not exercise proper care and skill in the performance of their obligations, and that in consequence thereof losses were sustained by the plaintiffs. [The court here stated the disputed issues as to interpretation of the contract and as to the character of the performance rendered by the defendants.]

DIXON, J. * * * It is urged by the defendants that the obligations imposed upon them by this contract are not joint, but several only. Whenever an obligation is undertaken by two or more persons, it is the general presumption of the law that it is a joint obligation. Words of express joinder are not necessary for this purpose; but, on the other hand, there should be words of severance in order to create a several responsibility. 1 Pars.Cont. *11; Chitty, Cont. 128. This presumption is corroborated when the promisors have undertaken to accomplish together a single result; for in such cases the promisee evidently relies upon a joint performance. The inference of a joint obligation is not defeated by the fact that it appears, either in the terms of the contract or from the circumstances of the transaction, that each promisor is to contribute separately to the entire result

for which they bargain. *Byers v. Dobey*, 1 H.Bl. 236; *Muzzy v. Whitney*, 10 Johns. 226; *Field v. Runk*, 22 N.J.L. 525. Nor is the nature of the obligation, with respect to its being joint or several, to be determined by considering whether the remedies of the same parties under the contract would be joint or several; for their remedies depend largely, if not wholly, on the nature of their interest, from which, of course, their liability is entirely distinct. 1 Pars.Cont. *13. Under these principles, it is clear that the obligation of the defendants now in suit is joint. They are joined as the parties of the second part in the agreement; together they covenant to enter the employment of the party of the first part, to take the entire charge of the manufacturing department of the pottery, and to give their whole time, labor, and skill towards the proper management of the business. This covenant does not assign to each of the defendants his several duties, nor require from either the exercise of skill and diligence in any special department of the work, but binds both to the due management of the entire manufacturing business, leaving them to divide the charge between themselves according to their own discretion, and holding them responsible, not each for what he may arrange with his partner severally to assume, but both for the result to be jointly accomplished,—the skillful and careful management of the pottery. Even the last clause of the contract, which secures to the plaintiffs exclusively the knowledge and services of the defendant Barlow in modeling, is not cast in the form of a separate covenant by Barlow, but is expressed only as a part of the understanding agreed upon by the parties, viz., by the plaintiffs on the one part, and the defendants on the other. But even if this clause should be construed as Barlow's separate covenant, and as not involving Wood in responsibility for modeling, that would not affect the present question; for the plaintiffs' case does not rest upon defective modeling, or at least not upon that alone. The judgment of nonsuit should be reversed, and the record remitted for a venire de novo.

QUESTIONS:

1. Did Wood and Barlow promise to produce "a single result"?
2. In promising "to give their whole time, labor, and skill," did the defendants promise "by implication" to exercise any particular degree of "skill"?
3. If the jury should find that the losses in the business were caused solely by the insufficiency of Barlow's "knowledge and services in modeling," would it be proper to hold both Wood and Barlow legally responsible in damages therefor?
4. If Wood and Barlow had properly performed all their duties, could they have maintained separate actions for their unpaid salaries? A single action jointly? See Note on Joint Promisees, post, p. 1162.

5. Could Wood and Barlow be joint promisors without at the same time being joint promisees?
 6. Was each a surety for the other?
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WHELPDALE'S CASE.

In the King's Bench, 1605. 5 Coke, 119a.

In debt by Whelpdale against Whelpdale, which began Hil. 45 Eliz. Rot. 1303. The plaintiff declared on a bill obligatory made by the defendant to the plaintiff; the defendant pleaded, non est factum; and the jury found that the bill was a joint bill made by the defendant and another to the plaintiff; and if on the matter the bill mentioned in the declaration be the deed of the defendant, the jurors prayed the advice of the Court. And it was adjudged that the plaintiff should recover. And in this case four points were resolved:

1. When two men are jointly bound in a bond, although neither of them is bound by himself, yet neither of them can say, that the bond is not his deed, for he has sealed and delivered it, and each of them is bound in the whole. And therefore if they are both sued, and one appears, and the other makes default, and by process of law is outlawed, he who appears shall be charged with the whole, as appears in 40 E. 3. 36. 41 E. 3. 3. But in the case at bar, he might have pleaded in abatement of the writ, but cannot plead non est factum.

* * *

NOTE

Each one of two or more persons who have jointly promised the rendition of a single performance is legally bound for the whole, and if sued alone can not plead "the general issue" denying that he so promised. This was the early common law and it is modern law also. Failure to join any one of the joint promisors was ground for abatement of the action at common law, unless the one not joined was dead (or, by later decisions, beyond the jurisdiction). See Restatement, Contracts, §§ 117, 118.

If one of two or more "joint" promisors was sued separately and failed to plead in abatement, and judgment was entered against him, at common law that judgment was said to "merge" the obligee's cause of action and to operate as a discharge of any other joint promisor who could have been joined as a defendant. Restatement, Contracts, § 119.

If two or more persons promise "jointly and severally", each one is bound for the whole performance promised, just as in the case of a "joint" promise; but a separate action would lie at common law against each one and a judgment obtained against each one. The full payment of one judgment would discharge the others. Statutes now very generally provide that a contract in form "joint" shall be given effect as if it were "joint and several". Under modern rules of procedure, such a promisor

when sued alone is permitted to summon in other persons bound for the same performance in order that their rights inter se may be determined and enforced.

HANKINSON v. SANDILAUS.

In the King's Bench, 1612. Cro.Jac. 322.

Debt upon an obligation of forty pounds. Upon oyer of the condition thereof the case was, two persons bound "themselves, or any of them, their heirs, executors, or either of their heirs, &c."; and the action was here brought against one of the obligors only, the other then living; whereupon the defendant demurred in law.

The question was, whether this bond be joint and several, or only a joint bond, to be sued against them both?

It was urged for the defendant, that the obligation was sealed and delivered by both of them jointly, and was a joint bond, and the words subsequent, "or either of us" (in respect one of the obligors was to be discharged thereby, it being uncertain which of them), were therefore void: and it differed from the case in Dyer, 19, where three were bound in an obligation, "*obligamus nos et utrumque nostrum, &c.*"; the bond there is joint and several, all of them being so bound at the beginning; but it is not so here: for first, both of them are here bound, and afterwards follow these words, "or either of us"; and the obligee hath accepted it as a joint deed, and so ought to pursue the same.

But it was held by the Court, that the acceptance here is not material as to the election, but it still remains at the pleasure of the obligee to sue them jointly and severally: and the joint delivery of the bond shall not make it to be a joint bond, and not several, the same being by the law joint and several; and in this case "et" and "vel" are all one. And the Court thereupon over-ruled the demurrer; and judgment was given, and entered for the plaintiff.

QUESTIONS:

1. In this case did each of the two persons bind himself to pay the full amount of the bond or only a pro rata share?
2. Why was it proper for the plaintiff to sue the defendant alone without joining the other obligor?
3. If the defendant pays the judgment against him in full, is the other obligor discharged?
4. If the defendant pays in full, can he compel contribution by the other obligor?

NOTE

If a contract is so drawn that two persons promise "jointly and severally", the effect of adding the mystic words of severance, "and severally" or their equivalent in some other form, is not to divide the burden so that the promisee's right against each is limited to one half of the total. Instead, it protected the promisee against some of the technical rules that the common law judges had made in favor of "joint" promisors of a single performance. If two persons used these words, "We promise to pay forty pounds", the judges said that there was only one promise, jointly made, that only one judgment would be rendered for its enforcement, and that if one promisor died only the surviving promisor remained bound and subject to an action at law. These disagreeable results were avoided if the promissory words included words of severance, so that the judges could make themselves believe that the two promisors made each his separate promise, in addition to the "joint" one, each and all of them being for the rendition of one and the same performance. See Restatement, Contracts, §§ 16, 111-115. Many states have enacted a statute that any contract in form "joint" shall be interpreted and given effect as if it were expressly "joint and several."

PROCTOR v. BAUBY.

Supreme Court of Errors of Connecticut, 1916. 90 Conn. 251, 96 A. 935.

Action by Sanford Proctor against Peter Bauby to recover unpaid balance of a certain note, brought by appeal to the district court, and tried to the jury. Verdict and judgment for plaintiff for \$458.64, and appeal by defendant. Affirmed.

RORABACK, J. The plaintiff seeks to recover the amount of an unpaid balance of a note for the principal sum of \$2,800, upon which divers payments were made down to November 20, 1913. The note reads as follows:

"\$2,800.00.

Waterbury, Conn., Nov. 30, 1906.

"For value received, I promise to pay Sanford Proctor, of City of Waterbury, or order, twenty-eight hundred dollars, with interest at 5 per cent per annum, payable semiannually, together with all taxes and assessments of every nature when due that may be laid on said sum and on the property by which it is secured. Principal of note is to be paid in payments of \$600.00 every six months thereafter, and in default of any payments, said note shall become due and payable on demand.

Attilio Menichino.

"Peter Bauby." * * *

Several of the defendant's reasons of appeal are based upon the theory that the court should have instructed the jury, as requested, that,

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as a matter of law, it appears that the plaintiff should have brought his action upon a complaint alleging that the defendant was liable as an indorser of the note, and not that he was the maker. The language of the note "I promise to pay," etc., makes the contract of both signers joint as well as several. The pronoun "I" represents the signers collectively as well as severally.

General Statutes, § 4187, provides: "(7) Where an instrument containing the words, 'I promise to pay,' is signed by two or more persons, they are deemed to be jointly and severally liable thereon."
* * *

The jury were instructed that: "Where a note contains the words 'I promise to pay,' and is signed by two persons as makers, they are deemed to be and are jointly and severally liable thereon, and either of the makers is liable for the full amount of the note due and unpaid."

The charge upon this point was correct in law, adapted to the case as it was presented to the jury, and was sufficient for their guidance in reaching a verdict.

There is no error. The other judges concurred.

NOTE

The statutory rule applied in this case is merely declaratory of the rule of the common law. See Restatement, Contracts, § 115; *March v. Ward*, Peake's Cas. 130 (1792). In the above case the defendant, sued alone, did not deny that he was bound to pay the entire sum of money. He wished to be charged as "indorser" only so as to enjoy the benefit of rules applicable to indorsers who are not principal debtors. If in fact Bauby signed the note for the accommodation of Menichino, equity would give him the remedies of a surety against the latter as principal debtor.

DAVIS v. VAN BUREN.

Court of Appeals of New York, 1878. 72 N.Y. 587.

PER CURIAM. One Bixbee was arrested at the suit of the plaintiffs, in an action commenced against him by them in the New York Common Pleas, and to procure his discharge from such arrest, he, Benjamin G. Bloss and Jordan Mott, defendant's testator, executed an undertaking as required by section 187 of the old Code. There was default in the undertaking, and the plaintiffs then caused a summons to be issued in this action against Bloss and Mott, which was served on Bloss; before it could be served on Mott he died. Bloss was afterward discharged in bankruptcy, and the defendant, as executor of Mott, was substituted, and the action continued against him.

The undertaking is a joint obligation. It is so in terms, and we cannot interpolate into it words of severalty. It could have been made joint and several, but it was not. Bloss and Mott were sureties. They did not assume a principal obligation; they undertook for another; they had no interest except as sureties, and were entitled to all the rights of sureties. This case cannot therefore be distinguished from *Wood v. Fisk*, 63 N.Y. 245, 20 Am.Rep. 528, and the defendant, as the representative of Mott, cannot be held. It is a rule of the common law, too long settled to be disturbed, that if a joint obligor dying be a surety, not liable for the debt irrespective of the joint obligation, his estate is absolutely discharged, both at law and in equity, the survivor only being liable. *Towers v. Moore*, 2 Vern. 98; *Simpson v. Vaughan*, 2 Atk. 31; *Bradley v. Burwell*, 3 Denio, 61; *Richter v. Poppenhausen*, 42 N.Y. 393; *Pickersgill v. Lahens*, 15 Wall. 140, 21 L.Ed. 119; *Getty v. Binsse*, 49 N.Y. 388, 10 Am.Rep. 379; *Risley v. Brown*, 67 N.Y. 160.

However unjust this rule may be in its general operation we have no right to abrogate it. We must enforce it whenever it is applicable and leave to the law-making power any needed change.

The judgment must be affirmed. All concur.

Judgment affirmed.

NOTE

A similar rule appears in Restatement, Contracts, § 125. The rule is nullified by a statute declaring that "joint" contracts shall be "joint and several" in effect. This unjust rule was substantially nullified by courts of equity, enabling the obligee to get a decree against the executor of a deceased joint promisor, if the deceased had been a co-principal. Some courts, acting less timidly than in the above case, permitted the obligee to get a decree against the executor of a deceased co-surety. In all courts alike, any co-surety who has paid more than his just share can get a decree for contribution from the estate of a deceased co-surety.

FISHER v. CHADWICK et al.

Supreme Court of Wyoming, 1893. 4 Wyo. 379, 34 P. 899.

"The petition of plaintiff Hopkins, sets up a contract as made on or about October 15, 1884. It alleges that, as a consideration and inducement to him to purchase stock in the North Crow Land & Cattle Company, Charles F. Fisher and Jehu J. Chadwick did jointly and severally agree to and with said plaintiff that if he would purchase stock in said company, and pay cash therefor, if he became dissatisfied with such purchase, they would, at the end of three years from the purchase, take the stock back, at his option, and pay him his money invested therein, with 10 per cent. per annum interest from the time of invest-

ment. It is further alleged that on October 15, 1884, he received 150 shares of such stock, and paid to said Fisher and Chadwick \$12,000 therefor, and that thereafter, on or about September 15, 1885, he became dissatisfied with his purchase, and notified said Fisher and Chadwick that he would exercise his option of returning said stock to them, and receiving from them therefor the said sum of \$12,000, with interest thereon at the rate of 10 per cent. per annum from October 15, 1884."

[The foregoing is an excerpt from the court's opinion. The defendants, along with various denials, made allegations and introduced evidence to show that the contract was "joint" and not "joint and several."]

CONAWAY, J. * * * The petition of plaintiff, Hopkins, filed in the trial court, alleges a joint and several contract of Charles F. Fisher and Jehu J. Chadwick with himself. Before the commencement of this action, Jehu J. Chadwick died, and the action is against his administrators and Charles F. Fisher as joint defendants. The administrators of the estate of Jehu J. Chadwick, deceased, demurred to this petition on the ground that it does not state facts sufficient to constitute a cause of action against them, in not alleging the insolvency of Charles F. Fisher, the surviving joint contractor, and that there is an improper joinder of causes of action against Charles F. Fisher, individually, and against these administrators.

At common law, the rule was absolute that the estate of the deceased joint contractor was not liable to the obligee in the joint contract except in case of the insolvency of the surviving joint obligor. If the survivor was solvent there was a plain and adequate remedy by action at law against him. In such case the liability of the estate of the deceased joint obligor was to contribute to him after the debt was collected from or paid by him. In case of his insolvency the obligee in the joint contract could bring his action in equity against the administrators of the deceased joint obligor. But the petition alleges a joint and several contract. It is not claimed that these rules apply, or ever applied, to such a contract. But the same point is raised by an instruction to the jury requested by the defendant administrators, and refused by the trial court. This instruction is as follows: "The plaintiff cannot recover against the administrators of Jehu J. Chadwick, deceased, in this action, upon a joint agreement or contract jointly made by Charles F. Fisher and Jehu J. Chadwick." There is evidence in the record from which the jury might have found that the contract in question was joint, and not joint and several, as alleged, and there is no allegation in the petition of the insolvency of the survivor. Therefore, if the common-law rule prevails, the instruction should have been given, and the refusal to give it was error, which might have been very

prejudicial. The question is thus fairly presented whether, under our Code, the common-law rule prevails,—that the administrators or executors of a deceased co-obligor in a joint contract are liable to the obligee in an action on the contract only in case of the insolvency of the survivor. This is a question upon which our American courts are in direct and hopeless conflict. It is a question of first impression in this state, and it is our duty to endeavor to ascertain and adopt the view which is most in harmony with the provisions of our Code of Civil Procedure, and best adapted to carry out those provisions in their true meaning and intent.

The one sufficient reason for the rule of the common law that the surviving joint obligor and the representatives of the estate of the deceased could not be joined as defendants in an action at law was the inability of a court of law to render separate and different judgments in a single action,—against the survivor, to be satisfied *de bonis propriis*, and against the administrators of the estate of the deceased, to be satisfied from such estate in due course of administration. From the same reason it followed that the survivor alone was liable in an action at law, and that if he were solvent, and the action thus available for the collection of the debt, the plaintiff need go no further, and he was not permitted to do so. In the code states, this, the only reason for the rules of the common law upon this subject, has entirely disappeared. There is no longer any objection to joining causes of action which were formerly distinguished as legal and equitable. Our courts are no longer hampered as to the form of the judgments they may render in one single form of action, called a “civil action.” But sometimes a rule of law survives after the reason for it is gone. This may be the case where the reason for the rule has been abolished by legislation, unless concurrent legislation also furnish a new rule. With all due respect for the opinions of some eminent courts which seem to hold differently, we are of the opinion that codes such as ours, doing away with the reason of the common-law rule under consideration, as to joinder of parties defendant, also furnish, in terms sufficiently clear, a new rule to be followed in its stead. As to parties defendant, we have the following broad provision: “Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.” Rev.St § 2395.

The defendants in the case at bar all deny any liability on their part to the plaintiff in the action. The primary question to be determined is whether they are so liable. If it be determined that they are liable, the next question is the amount of such liability. In both these questions, the defendant administrators are interested in their representative capacity precisely to the same extent as their decedent would be interested, were he alive. It is just as necessary for them to defend

for the estate as it would be for him to defend for himself. If the action were against the survivor alone, they would still be interested. It does not change the extent of their liability, whether they are held to pay to the obligee in the joint contract, or to the surviving obligor, by way of contribution. To a complete determination or settlement of the questions involved, they are necessary parties. Their interest in the amount of the judgment, whether the action be against the survivor alone or not, is direct. It is also adverse to the plaintiff. If the action were against the survivor alone, their liability to contribute could be no more than their proportion of the judgment collected from him. If he succeeded in defeating the action, there would be no contribution. It seems evident that it is the true intent and meaning of this provision of the Code, and, indeed, authorized by its express language, that all of these parties should be joined as defendants, and that their rights and liabilities should be determined in a single action. The evident policy of the legislation is to avoid a multiplicity of suits, and to reach an end to litigation. The English courts no longer follow the old common-law rule, making the solvent surviving joint obligor alone liable to the obligee in the joint contract. They permit the action to be brought against the administrators in the first instance, whether the survivor be solvent or not. Several of the American states hold with the English courts. See *Pom. Rem. & Rem. Rights*, §§ 302-304; *Bliss*, Code Pl. §§ 105, 106; *Braxton v. State*, 25 Ind. 82; *Burgoyne v. Insurance Co.*, 5 Ohio St. 586; *Trimmier v. Thomson*, 10 S.C. 164. A number of code states hold differently, but we think not with the better reason. See *Voorhis v. Child*, 17 N.Y. 354; *Sherman v. Kreul*, 42 Wis. 33. We are of the opinion that the trial court did not err in overruling the demurrer, nor in refusing the instruction quoted. * * *

The form of the judgment, as to the administrators, is objectionable. It is against John M. Chadwick and Charles F. Fisher, administrators of the estate of Jehu J. Chadwick, deceased. This might be considered as a personal judgment against these administrators for waste, to be satisfied *de bonis propriis*. No such a cause of action, or any personal cause of action against the administrators as such, is alleged or proven. The cause of action against the administrators is the contract to which the decedent was a party. The judgment against the administrators should be reformed, and should be that the administrators pay, in due course of administration, the amount ascertained to be due.

HALE v. SPAULDING et al.

Supreme Judicial Court of Massachusetts, 1888.
145 Mass. 482, 14 N.E. 534, 1 Am.St.Rep. 475.

Contract upon an instrument under seal, dated May 23d, 1885, by the terms of which the defendants, six in number, agreed to pay to the plaintiff on demand, six sevenths of any loss to which he might be subjected as the endorser of a certain note for a corporation.

Aaron H. Saltmarsh alone defended. He filed an answer alleging that the plaintiff, since the execution of the contract declared on, had executed and delivered the following paper, under seal, to one of the joint obligors under the contract:

"Received of L. V. Spaulding \$1060.84, in full satisfaction for his liability on the document" signed, etc., and dated May 23d, 1885.

At the trial in the Superior Court, before Hammond, J., it appeared that on September 20th, 1886, the defendants, except Saltmarsh, settled with the plaintiff for their proportionate part of the amount alleged to be due under the agreement declared on, and the plaintiff executed the paper under seal, annexed to the answer, and delivered it to the defendant Spaulding. The plaintiff offered to prove facts showing that, in giving said sealed paper annexed to the answer, there was no intention of releasing the defendant Saltmarsh. The judge ruled that said offer was not material, and that said sealed paper released the defendant Saltmarsh, and ordered a verdict for the defendant.

The plaintiff alleged exceptions.

C. ALLEN, J. The words "in full satisfaction for his liability" import a release and discharge to Spaulding, and, the instrument being under seal, it amounts to a technical release. The plaintiff does not controvert the general rule that a release to one joint obligor releases all. *Wiggin v. Tudor*, 23 Pick. 434, 444; *Goodnow v. Smith*, 18 Pick. 414, 29 Am.Dec. 600; *Pond v. Williams*, 1 Gray, 630, 636. But this result is avoided when the instrument is so drawn as to show a contrary intention. 1 *Lindl.Part.* 433; 2 *Chit.Con.* (11th Am.Ed.) 1154 et seq. *Ex parte Good*, 5 Ch.D. 46, 55. The difficulty with the plaintiff's case is that there is nothing in the instrument before us to show such contrary intention. Usually a reservation of rights against other parties is inserted for that purpose, or the instrument is put in the form of a covenant not to sue. See *Kenworthy v. Sawyer*, 125 Mass. 28; *Willis v. De Castro*, 4 C.B.(N.S.) 216; *North v. Wakefield*, 13 Q.B. 536, 541. Parol evidence to show the actual intention is incompetent. *Tuckerman v. Newhall*, 17 Mass. 581, 585. The instrument given in this case was a mere receipt under seal of money from one of several joint obligors, in full satisfaction for his liability on the docu-

ment signed by himself and others. There is nothing to get hold of to show an intent to reserve rights against the others. He might already have discharged each of them by a similar release.

Exceptions overruled.

NOTE

It is unmitigated injustice to hold that Saltmarsh was discharged from legal duty by the sealed release of Spaulding, who had paid only his pro rata share of the whole amount due. The plaintiff's intent that the release should operate in favor of Spaulding only should be obvious, even though there was no express "reservation of rights" against the other obligors. Oral testimony that such was the intention of Hale and Spaulding should not be held excluded by the so-called "parol evidence rule", since the sealed release does not purport to be an "integration" affecting anybody's legal relations other than those between Hale and Spaulding. However, the contrary is laid down in Restatement, Contracts, sec. 122, accepting similar statements in court opinions.

Since the payment of Spaulding seems to have been no more than a part of a larger liquidated amount for which he (along with the others) was bound, the release by Hale would not have been operative in his favor (or in Saltmarsh's) except for the fact that it was under seal.

If Hale had merely covenanted under seal never to sue Spaulding, the court would have held that Saltmarsh was not discharged. This is true, even though such a covenant would have been effective at common law to prevent Hale from collecting another cent from Spaulding and has for many years been declared to operate as a discharge. See *Price v. Barker*, 4 El. & Bl. 760 (1855); Restatement, Contracts, §§ 121, 122, 124. This distinction between a covenant never to sue and a sealed release is explainable on the ground that the sealed release rule became highly distasteful and the courts restricted its operation as narrowly as possible. They would better have abandoned it long ago.

If Spaulding, Saltmarsh, and the others had promised "jointly and severally", there would be even less reason (if that is possible) for holding that a sealed release of Spaulding on payment of his pro-rata share would discharge Saltmarsh without his paying anything. The cases holding that Saltmarsh would be discharged are disregarded by Restatement, Contracts, § 123.

Any part payment or other part performance made by one promisor must be credited on the obligation, so that in no case can the other promisors be compelled to pay more than the balance thereof. If one promisor pays in full, or renders a substituted performance that is accepted by the obligee as an "accord and satisfaction" of the whole obligation, of course all the obligors are discharged. No obligee is entitled to double payment or more than one full satisfaction.

The effect of a release or covenant not to sue one of two or more persons who have promised a single performance should be determined by the equitable rules of Suretyship. By those rules, even two joint principal debtors are in part sureties. As between themselves each is the

principal debtor as to his half, or other agreed share, of the debt; as to the remainder he is a surety for the other obligor. Very often two persons make a joint promise, one being principal debtor for the whole and the other being a surety only. In so far as one is a surety, he has a right of exoneration and of indemnity against the other. It is inequitable for an obligee to do anything that increases the risk of a surety that he will not be exonerated and indemnified. For this reason, a release, a covenant not to sue, or a binding extension of time, given by the obligee to one of two obligors, whether they have promised "jointly" or "jointly and severally", discharges the other to the extent that he has a right to exoneration and indemnity by the first. If the first is principal debtor as to the whole and the other is a surety only, he is entirely discharged. If they are co-equal principals, the second remains bound to pay his half, and no more. The release of one who is a surety only has no effect on the obligation of his principal. This comparatively simple and equitable solution should be held to displace everything that still remains of the ancient common law rules as to the effect of release and covenant not to sue. The adoption of this solution is already authorized, and even required, by the statutes making equitable defenses operative in all actions and requiring that when common law and equity are in conflict the latter shall prevail. To hasten the result, every state should adopt the Uniform Joint Obligations Act. It is enacted in New York, Consol.Laws 1930, §§ 234, 235.

In the law of torts, joint tortfeasors can be sued either jointly or severally; but there is the same continuing morass of decisions as to the effect of a release and a covenant not to sue. The opinion of Rutledge, J., in *McKenna v. Austin*, 134 F.2d 659, 148 A.L.R. 1253 (1943, App.D.C.) is enlightening. Compare the dissenting opinion.

INTRODUCTORY NOTE ON JOINT PROMISEES

A promise to render a single performance may be made to two or more persons who may be described as joint promisees. A and B, doing business as partners, may make the following contracts with C: (1) For goods sold by them, C promises to pay A and B \$100. (2) For a price promised by them, C promises to deliver coal at their store. (3) C promises to serve as their bookkeeper for one year at the agreed salary of \$100 per week. In these cases, C promises a single performance and the two promisees A and B have a "joint" right that he shall render it. Instead of contracting in this manner, C could have contracted with each partner separately, promising each one that he would render the above performances—to pay them \$100, to deliver coal at their store, to serve as their bookkeeper. If C thus contracts, A and B are not "joint" promisees; each has a separate (or "several") right to one and the same performance, but under modern procedure there is no reason why they should not join as co-plaintiffs.

In the first set of cases above, only one promise has been made; in the second set just supposed, C made two separate promises. In either case one performance by C operates as a complete discharge and terminates the rights of A and B, whether they are regarded as "joint" or as "several." If C commits a breach, A and B can maintain separate actions against C in the second set of cases and get separate judgments; but the satisfaction of one will satisfy them both. In the first set of cases, if A sues C without joining B and alleges that C made a promise to A, C can plead the general issue, correctly denying that he made such a promise. *Jell v. Douglas*, 4 B. & Ald. 374 (1821).

Either one of the two "joint" promisees has power to release or otherwise discharge the promisor C, although the release would be voidable if done to defraud the other promisee with C's knowledge or collusion. Restatement, Contracts, §§ 130, 131. If one of the two "joint" promisees dies, at common law the right to performance by C survived to the living promisee alone. By appealing to equity, the executor of the deceased could get a decree for his just share; this is the present-day law, and probably everywhere the executor and the surviving promisee may join in suing C for breach. Cf. Restatement, Contracts, § 132. If C has made separate promises of a single performance, on the death of one promisee his executor succeeded to his right, even at common law.

In a number of cases it was declared that at common law it was impossible for C to bind himself "jointly and severally" to A and B. There seems to have been no good reason for this; and the contrary rule is given in Restatement, Contracts, § 128. Under modern procedure, even if C has promised A and B severally, if sued by one of them alone he can bring the other promisee into the action if he can get service of process.

A third type of case must now be distinguished, the distinction being much more important than that between the two sets of cases above. Instead of promising a single performance to A and B (whether "jointly", or "severally", or "jointly and severally"), C may promise to render two separate performances, one to A alone and the other to B. Of course, he may do this by two wholly separate transactions; but he can also do it by a single promissory expression and for a single undivided consideration. If C has thus promised two separate performances, instead of a single performance promised separately to two persons, the complete rendition of one performance has no effect upon his duty to render the other; nor would the release of one affect the other. Whether C has made such a promise of separate performances is wholly a matter of interpretation, according to the usual processes thereof. An important factor, not in itself

decisive, is the character of the consideration that is exchanged for C's promise.

The distinction discussed in the preceding paragraph is just as important today as it ever was, even if all the common law peculiarities of "joint" and "joint and several" contracts have been supplanted by equity or abolished by statute. See questions 4 and 5 under *Alpaugh v. Wood*, ante. The rules as to promisees in Restatement, Contracts, §§ 111, 128-132, are applicable exclusively to promisees to whom a single performance has been promised.

It seems probable that when judges once stated that two promisees might be entitled "jointly" or "severally", but could not be entitled "jointly and severally", they had in mind (perhaps dimly) the difference between a promise made to two persons requiring a single performance and a promise of a separate performance to each of two persons. A single promise cannot be both of these.

It is often said that whether A and B have separately enforceable rights depends on whether the "interest" of A is separate and distinct from that of B, or whether they have a "joint interest." Such a statement may be found in cases dealing with a promise of a single performance and in those dealing with a promise of separate performances. Thus, if C promises A and B that he will construct a levee that will protect their respective farms, it has been held that, even though the promise contains no word of severance and the performance promised is a single and indivisible dike, separate actions for damages can be maintained by A and B for injury to their respective farms caused by breach of C's promise. Such a holding as this goes far to nullify the rules of the common law as to "joint" promisees; for two promisees nearly always have separate interests in a promised performance. Even if A and B are partners, they have separate "interests" in partnership property and the partnership income. In addition, it is easy to understand and apply the statement as to "interests" so as to beg the question. We must know and carefully define what the "interests" of A and B are before deciding that they have separately enforceable rights. See Restatement, Contracts, § 128.

SWEIGART v. BERK et al.

Supreme Court of Pennsylvania, 1822. 8 Serg. & R. 308.

Action on a bond given by Sweigart to "the widow and heirs and personal representatives of Peter Berk, deceased," with condition to be void "if the said Sweigart should pay to the said widow and heirs and legal representatives £1,000 * * * at the death of Margaret Berk, or to the said deceased's heirs and representatives, in equal shares

alike, with lawful interest," etc. The plaintiffs' statement showed that the action was brought by seven of the ten living children of Peter Berk, each claiming £100.

TILGHMAN, C. J. It appears, by the plaintiff's own showing, that the bond was given to ten obligees jointly, all of whom are living, and the action is brought by only seven of them. I am at a loss to conceive, on what principle the action can be supported. It is well settled, that if a bond be given to several obligees, they must all join in the action, unless some be dead, in which case, that fact should be averred in the declaration. And if it appear on the face of the pleadings, that there are other obligees living, who have not joined in the action, it is fatal, on demurrer or in arrest of judgment. The authorities to this point are numerous, and will be found collected in 1 Saund. 291 f. The counsel for the plaintiffs has urged the inconvenience of this principle, when applied to the bond in suit, where it appears, by the condition, that ten persons have separate interests, and it may be, that some of them have received their shares before the commencement of this suit. There is very little weight in that argument. The acceptance of the bond was the voluntary act of the obligees, and if people will enter into contracts which are attended with difficulties, they have no right to expect that established principles of law are to be prostrated, for their accommodation. But in truth, there is very little difficulty in the case. The action may be brought on the penalty of the bond, in the name of all the obligees, and the judgment entered in such a manner as to secure the separate interest of each. The action may be supported, although some of the obligees have received their shares, because the bond is forfeited, unless they have all been paid.

It was objected, that those who had been paid might refuse to join in the action, or might release the obligor. But the court would permit those who were unpaid to make use of the names of the other obligees, against their consent; neither would their release be suffered to be set up in bar of the action. It may be resembled to the case of an assigned chose in action, where the action is brought in the name of the assignor, for the use of the assignee; there the release of the assignor would not be regarded. A release, in such case, would be a collusion between the assignor and assignee to defraud a third person, and therefore void. It is unnecessary to decide, whether each of the obligees in the present case, could have supported a separate action for his separate interest, appearing on the face of the condition. I will only say, that such an action would be hazardous. But this action has not been brought for the separate interest of any one. Seven of the obligees have joined in it. So that it is neither joint nor several. On no principle, therefore, can the action be supported. There were several other points discussed in the argument, in which the court will give no opin-

ion. The judgment of the Court of Common Pleas must be reversed, and restitution is awarded.

Judgment reversed and restitution awarded.

NOTE

If in a promise made to two or more promisees the language was thought to be "joint", without any ambiguity, the common law rule was that all the promisees must join as plaintiffs in an action on the promise. The fact that the "interests" of the promisees were separate was provable only as an aid in interpretation of ambiguous language. See *Anderson v. Martindale*, 1 East 497 (1801), where the defendant covenanted with A and B to pay a sum of money to B alone; *Lane v. Drinkwater*, 1 Cr.M. & R. 599 (1834), where the defendant promised A and B an annuity of £30, one moiety of £15 to A and the remaining moiety to B; *Philadelphia v. Reeves and Cabot*, 48 Pa. 472 (1865); *Angus v. Robinson*, 59 Vt. 585, 8 A. 497 (1887), where one promisee could not sue alone for his share even though the other did not join because he had been paid his share. See *Restatement, Contracts*, § 129.

The dicta in *Sweigart v. Berk*, *supra*, show that the court had some equitable notions. Under modern rules of procedure, if a joint promisee refuses to join as plaintiff he can be brought in as a defendant. See *Cullen v. Knowles* [1898] 2 Q.B. 380, where the court said: "if the co-promisees are entitled to some relief, I shall have no difficulty in giving judgment for both, although one is plaintiff and the other defendant." Codes and Rules of Procedure must always be considered in determining questions as to joinder of parties plaintiff as well as parties defendant.

DONNELL et al. v. MANSON et al.

Supreme Judicial Court of Massachusetts, 1872. 109 Mass. 576.

MORTON, J. This is an action upon a bond given to dissolve an attachment under the Gen.St. 1860, c. 151, § 15. After the bond was executed two of the obligees died, and the action is brought by the surviving obligees. The defendants object that the suit cannot be maintained without joining the executors or administrators of the deceased obligees. But the contract of the defendants is with the obligees jointly; the form of the contract is joint and the legal interest in the subject matter of the contract is vested in them jointly. When this is the case the survivors are the proper parties to sue. *Anderson v. Martindale*, 1 East, 497; *Rolls v. Yate*, Yelv. 177 (Am.Ed.) and notes; *Stowell v. Drake*, 23 N.J.L. 310; *Smith v. Franklin*, 1 Mass. 480. • • •

NOTE

In *Park v. Parker*, 216 Mass. 405, 103 N.E. 936 (1914), a joint note was given to three persons in return for a conveyance of property owned

by them jointly. All three having died, the debtor paid the money due to the executor of the last survivor (who, at common law had become the sole creditor). In the present action the estates of the other two were held to have a right to their shares of the money. The court said: "This is a proceeding in equity and is governed by equitable principles. Joint tenancy and its doctrine of survivorship are not in harmony with the genius of our institutions." A similar view was expressed by Lord Chancellor Hardwicke in *Rigden v. Vallier*, 2 Ves.Sr. 252, 258 (1751). Before the debtor paid the one executor, the other executors could have obtained a decree that payment should be into court for the benefit of all three.

BECKWITH v. TALBOT.

Supreme Court of the United States, 1887. 95 U.S. 289.

This was an action by Talbot against George C. Beckwith to recover damages for breach of the contract as printed below. Although not signed by the defendant, he had joined in making it.

"WET MOUNTAIN VALLEY, Oct. 7, 1870.

"This is to certify that the undersigned have taken two thousand two hundred and five head of cattle valued at \$36,681.60 on shares from George C. Beckwith; time to expire on the 5th day of December, 1872; then George C. Beckwith to sell the cattle and retain the amount the cattle are valued at above. Of the amount the cattle sell at over and above the said valuation, George C. Beckwith to retain one-half, and the other half to be equally divided between C. W. Talbot, and Elton T. Beckwith, and Edwin F. Beckwith.

(Signed)

"C. W. TALBOT,

"ELTON T. BECKWITH.

"EDWIN F. BECKWITH."

The declaration alleged that the plaintiff and the two persons who entered into the contract together with him (who were the sons of the defendant) performed their part of it, but that the defendant refused to sell the cattle, or to pay the plaintiff his share of their value above the said sum.

One of the defenses was that the contract was a joint contract on which Talbot could not maintain a separate action.

Mr. Justice BRADLEY: * * * The allegation that the plaintiff was interested jointly with the defendant's two sons, and, therefore, could not maintain a separate action for his equal share of the profits, is equally untenable. Their interests were separate. They were all employed and hired by the defendant to herd his cattle. The evidence shows that each supported himself, found his own assistance, and paid his own expenses. Each was to have as his compensation one-third of

half the increased value of the cattle at the end of the employment. Neither was interested in the compensation due to the other. Sergeant Williams, in his note to *Eccleston v. Clipsham*, 1 Saund. 154, says, "Though a man covenant with two or more jointly, yet if the interest and cause of action of the covenants be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damage, notwithstanding the words of the covenant are joint." In the present case, the cause of action was the service performed under the contract; and each performed his own distinct service, and was entitled to distinct and separate compensation therefor. The case is precisely within the category stated by the learned annotator. It is very similar also to that of *Servante and Others v. James*, 10 B. & C. 410, where the master of a vessel covenanted with the several part-owners to pay to them severally in certain proportions the moneys which he should receive from the government for carrying the mails; and it was held that the covenant inured to them severally and not jointly, because their interests were several. The case is also quite similar to that of an engagement with seamen for a whaling voyage, where each is to receive for his compensation a certain percentage of the profits of the voyage. Though they work together and in co-operation, they do not become partners, nor does either acquire any interest in the compensation of the others. The interest of each is separate. • • •

QUESTIONS:

1. Could Talbot and the two sons have maintained a joint action for damages against the defendant?
2. If the cattle had perished from the neglect of one of the sons, could George C. Beckwith have maintained an action for damages for breach of contract against Talbot and the two sons?
3. Did Talbot and the two sons each promise his own separate and distinct service?

NOTE

Courts have sometimes held that two or more promisees can maintain separate actions for breach even though the promise made to them contained no words of severance and the performance promised was single and indivisible. Where in a single contract a Railroad company promised A and B to build and maintain a station at a specified place, in return for which A and B conveyed separate tracts of land for the Railroad's right of way, it was held that A could maintain a separate action for breach of the promise. Although the promise was in form "joint", their "interests" were held to be separate, since they gave separate considerations for the promise and the breach caused them separate injury. *Atlanta & St. A. B. R. Co. v. Thomas*, 60 Fla. 412, 53 S. 510 (1910). In such a case the facts may speak louder than the mere form of words.

In *Spangenberg v. Spangenberg*, 19 Cal.App. 439, 126 P. 379 (1912), six children signed a contract to the effect that if their father should leave them unequal amounts by his will, whatever was received from his estate should be pooled and divided equally among them, share and share alike. The father left only one twentieth of his estate to the plaintiff and to each of four others, and left one fourth of it to the defendant. The court held that the plaintiff could maintain a separate action against the defendant for one fifth of the difference between their two legacies, without joining the other four either as plaintiffs or as defendants. Observe that all six were alike promisors and all six were alike promisees; and yet it cannot be that all six were jointly (or jointly and severally) promising a single performance to all six as joint promisees. The reasonable interpretation is that each one promised the other five that if he received more than his equal share he would pay each of them his agreed share of the excess. Each one made his own conditional promise, the others not joining with him either as principals or as his sureties; and the payment that each one thus conditionally promised was a payment to be made separately to each of the others. The law of "joint" or of "joint and several" contracts has no application. It is only by accident of the father's will that the defendant owes an identical amount to each of the others. A single action bringing in all six parties should now be sustained.

In *Montague Mfg. Co. v. Homes Corp.*, 142 Va. 301, 128 S.E. 447 (1925), several partners assigned their assets to A, who promised them "jointly and severally" to pay off their creditors. The defendant made a promise to the partners, also "jointly and severally", guaranteeing performance by A. In an action on this guaranty, the plaintiff, one of the creditors, was given judgment. The defendant's promise was in terms "joint and several;" but it was the partners who were joint and several promisees, not their creditors. Even had the defendant's guaranty been "joint" only, so that in a suit by the partners as promisees all would have to join, the interests and rights of their creditors would still have been wholly separate; and each creditor beneficiary could maintain an action against A or against the defendant guarantor or against both, without joining either the other creditors or the partners. There is sound reason, however, for allowing the partners to join with one or more creditors as co-plaintiffs in an action against both A and the guarantor. If one of the creditor beneficiaries had been a partnership, the rights of the partners therein would be "joint."

ANDERSON et al. v. NICHOLS.

Supreme Court of Vermont, 1919. 93 Vt. 262, 107 A. 116.

Action of contract by George Anderson and seven others against E. M. Nichols. Demurrer to declaration was sustained, declaration adjudged insufficient, and judgment for defendant, and plaintiffs bring exceptions. Judgment affirmed.

The declaration, in substance, alleges that on October 5, 1915, the defendant owned and maintained an electric light and power transmission line and the plaintiffs were the owners of certain farms in the towns of Glover and Albany, and desired the defendant to extend his electric power transmission line to their buildings so that they could secure "electric current for lighting and power purposes to be used upon their said farms"; that on said October 5, 1915, they entered into a contract with the defendant to extend his transmission line from one Grant White's for the purpose of furnishing them electric current, and they "then and there severally promised and agreed to and with the said defendant to pay to said defendant the sum of \$125 each when said transmission line should be constructed to a point opposite their buildings, and \$125 each when their buildings should be by said defendant properly wired and equipped for turning on said electric current"; that the defendant erected said transmission line and wired the buildings of the plaintiffs, and they each paid him the sum of \$250, amounting in the whole to the sum of \$2,000, "and all in accordance with the terms of said contract."

The declaration further alleges that in said contract the defendant promised and agreed to and with the plaintiffs "that if, during the life of said contract, any person living on said transmission line as constructed under said contract desired to obtain electric current of and from the said defendant, he, the said defendant, would charge said person \$250 for connecting said person's buildings with said transmission line, one half of which \$250 should be retained by the said defendant, and the other half equally divided by the said defendant between the plaintiffs and other persons whose buildings should thereafter be connected with said transmission line under said agreement"; that, since the construction of said transmission line under said contract the defendant has connected with said transmission line the store of W. R. Graham and E. J. Douglas in the village of South Albany and the buildings of Lynn Anderson in Glover, said persons then and there living on and adjacent to said transmission line; that "the said defendant, not regarding said promises, agreements, and undertakings to and with the plaintiffs, neglected and refused to pay these plaintiffs their said several shares of money accruing to them under the terms of said contract and by reason of the said defendant having connected

with said transmission line the buildings of the said Lynn Anderson and the store of the said Graham and Douglas.”

The ground of demurrer is that there is a misjoinder of plaintiffs, for that the contract declared upon is, as to them, several, and not joint.

POWERS, J. If you contract with two or more jointly, and their interests are several only, your engagement, in the absence of controlling language, will be taken to be several, and each promisee should sue separately for his damages. Note, Saund. 154; Beckwith v. Talbot, 95 U.S. 289, 24 L.Ed. 496; Emmeluth v. Home Benefit Ass'n, 122 N.Y. 130, 25 N.E. 234, 9 L.R.A. 704. This rule of the common law was, at an early day, approved and adopted as the law of this jurisdiction. In Geer v. School District, 6 Vt. 76, Judge Mattock says, in effect, that in all actions on contract suit must be brought in the name of the party who has the legal interest, though the form of the undertaking might require some one else to sue. And in Sharp v. Conkling, 16 Vt. 355, Judge Redfield, upon a consideration of the common-law authorities, asserts the fully established rule to be that, if the interest in the subject-matter secured by the contract is several, though the terms thereof are joint, the engagement will be taken to be several, unless such interpretation is excluded by the language used.

So it is that, when the promise is to pay a group of persons a stated sum to be divided among them in proportions named, the engagement, ordinarily, will be joint, and not several. 1 Parsons, *13; Lane v. Drinkwater, 1 C., M. & R. 599; Byrne v. Fitzhugh, 1 C., M. & R. 613.

On the other hand, when payment is to be made not to the group, but to its several members, each to receive from the promisor his own share, the engagement, ordinarily, will be several, and not joint. 1 Parsons, *19; Owings' Ex'rs v. Owings, 1 Har. & G. 484.

When tested by the above rule, the complaint before us breaks down. The interests of these plaintiffs are several. The consideration for the defendant's promise moved from them, not jointly, but severally; and this alone is enough to make that promise *prima facie* several. 2 Page, § 1142; Satler Lumber Co. v. Exler, 239 Pa. 135, 86 A. 793. Moreover, the contract set up in this complaint does not require the defendant to pay the sum specified to the plaintiffs, but binds him to divide it between them. So the defendant's promise, though joint in form, is several in essence. In legal consequence, it is a group of separate promises, and gives rise to separate actions in favor of the several promisees. • • •

Judgment affirmed.

QUESTIONS:

1. Did the defendant make one promise to the eight plaintiffs or a separate promise to each of them?
2. If the defendant paid to one of the plaintiffs the whole amount promised by him, would he thereby discharge his duty to the other seven?
3. Would not the "interests" of the eight plaintiffs be separate whether the preceding question is answered yes or no?
4. Assuming the propriety of letting each plaintiff sue separately, is it not antiquated procedure to throw them out for joining in a single action?

CHAPTER 13

ILLEGAL BARGAINS

INTRODUCTORY NOTE

The evolution of law proceeds by a constant struggle, between individuals or groups of individuals, for rights and privileges; that is, for the aid of the social organization against others and for its forbearance to interfere against ourselves, for protection and for liberty. Each one would like to have utter freedom of competition for himself—unlimited privileges of procuring the satisfaction of his own desires, and at the same time extensive limitations on the freedom of competition by others for the objects of desire. "Law" is the resultant of this struggle. Not even a despot has ever been able to attain unlimited privileges against others while they have none against him. We are compelled to barter away some privileges in order to gain some rights; and human action is thereby divided into the "lawful" and the "unlawful," the permitted and the forbidden.

It is in this setting that the concept of "liberty of contract" must be examined. Each one would like to be free to make such bargains as he pleases; but he must surrender a part of that freedom if he desires that others should surrender a part of theirs. Thus the making of certain bargains becomes unlawful—forbidden. Again, each one would like to have the aid of society in the enforcement of such bargains as he pleases to make; but he is not willing that others should have such aid in the enforcement of all of their bargains. Therefore he must be content that certain bargains shall give him no rights in order that others also shall have none. Thus certain bargains become unenforceable and inoperative.

In this process of making law by struggle and compromise, society regards some bargains as more inimical to the general welfare than others, and reacts more violently against them.

I. *Criminal Bargains*.—If two bargain for the killing of a third, not only is the bargain unenforceable by legal process, but the bargainers will be severely punished for making it. The making of the bargain is itself a "felony." The making of other bargains, somewhat less injurious, is a "misdemeanor," punishable criminally but less severely.

II. *Tortious Bargains*.—Still other bargains may not be criminal at all; but a third person who is harmed by them is given a civil action for damages, or possibly an injunction to prevent the harm. These bar-

gains may be described as "tortious"; they are forbidden and are civilly punishable, but are not criminal.

III. *Unenforceable Bargains*.—Further on in the category of bargains, there are those that are neither criminal nor tortious, but are nevertheless regarded as unworthy of enforcement by legal process. You may make these bargains, but the court and the sheriff will not aid you in enforcing them. Within this third class, also, there are varieties; for some such bargains may be given a limited legal operation while others are given none at all, and some may be partly and weakly enforced by indirection although denied the advantage of direct enforcement by the customary actions and legal process.

It appears, therefore, that "Illegality" has a variety of meanings, and that a lawyer has a complex problem in determining his client's "liberty of contract"—in determining whether his client is not privileged either to make or to perform the bargain and how severe the punishment will be, or whether he is merely without power to produce the usual juristic effects by making the bargain and how fully society will refuse its aid in enforcement.

Since the evolution of law is struggle and compromise, no system of law can ever be static or definitely knowable. The law is not "a brooding omnipresence in the sky." Therefore the lines that separate criminal bargains from those that are only tortious, as well as from those that are only unenforceable, and the lines separating the several varieties within classes, are always blurred and variable. The struggle is a continuing struggle; the compromise is constantly renewed. Legislatures as well as courts constantly take a hand in constructing new lines and distinctions. The practices of business, and even the fundamental mores that are the source of our notions of right and wrong, are in constant process of evolution. Our beliefs as to what general welfare and "public policy" require are confused and inharmonious.

In dealing with the problems of Illegality there is special reason for calling attention to the fact that there is variation in the laws of the several States. Of course, some such variation exists with respect to every branch of the law; but the degree of this variation is greater at this point than at most others. This is largely because regulations and prohibitions by statute are constantly changing by reason of economic and political pressure exerted by groups of persons with special interests and beliefs. Since State lines play very little part in limiting the transactions and movements of men, cases are very numerous in which the court must take into account the law of jurisdictions other than its own in determining the rules that it chooses to administer.

It cannot be supposed that the subject of Illegal Bargains can be presented thoroughly by a few cases in a single casebook. This book contains only a small number of typical cases to represent the prob-

lems. This is particularly true of such a subject as Restraint of Trade. The pendulum of economic thought and of legislative action swings from laissez faire to a strict regulation that approaches prohibition, and back again. The subject of Illegality is here retained, in order to show its relation to the law of contract; but its detailed study must be left to more specialized courses in which research in the changing mores, in economic doctrine, and in legislation can be carried on. For a compact statement of currently prevailing doctrines, the Restatement of Contract Law, c. 18, by the American Law Institute, is recommended.

SECTION 1.—RESTRAINT OF TRADE

INTRODUCTORY NOTE

The decisions of the courts of common law and equity with respect to bargains in restraint of trade can now be studied with little profit apart from the modern statutes and the court decisions in which they are interpreted and applied. This is true in spite of the fact that these statutes can not be interpreted and applied with justice without first studying their historical background at common law and in equity. The field has become so great, the variations so important, and the differences of opinion as to political and economic policy so fundamental, that an extended course on Trade Regulation is required for a presentation of the problems involved.

Many if not all of the States have enacted statutes with respect to Monopolies and Restraint of Trade. These local Anti-Trust Acts are not to be disregarded; but their importance has been greatly reduced by the recent expansion of federal legislation and by judicial decisions giving that legislation the very widest application. The first and still most important of the Acts of Congress in this field is the Sherman Anti-Trust Act of 1890. Some of the more recent Acts are the Clayton Act of 1914, the Act establishing the Federal Trade Commission, and the Robinson-Patman Act of 1936 dealing with price discrimination. By this legislation, as applied in the courts, the law of restraint of trade has become, in the main, federal law, differing in many important respects from the common law and from modern English law.

The Sherman Anti-Trust Act of 1890 condemns agreements, combinations, and conspiracies in restraint of interstate trade and commerce, and provides for their punishment as misdemeanors, for their abatement and prevention by injunction, and for the award of treble damages to persons who have suffered harm. Any bargain that falls within

this prohibition is an illegal bargain and is unenforceable by either party against another; but also, quite otherwise than at common law, the making of such a bargain is a crime and its performance to the injury of a third person is a tort.

Restraints on trade and commerce vary greatly in degree. Many of the bargains most commonly made in our everyday life operate as such a restraint. If two men agree to do business as partners, they thereby agree not to compete against each other in that business. Have they committed a crime? Is their partnership agreement illegal? The words of the Sherman Act are words of general prohibition, giving no hint of a line of discrimination based on the degree of the restraint and the extent of harm. Nevertheless, such a line had to be drawn or the statute could not survive. Congress left the drawing of this line to the courts; and the last word is necessarily that of the United States Supreme Court. The line so drawn makes the statute applicable only to bargains that are in "unreasonable restraint of trade."

The uncertainty involved in the application of this test has caused some severe criticism of both the statute and the Supreme Court, by lawyers, economists, and business men; but no one has as yet come forward with an effectively convincing argument for a different basis of discrimination. The line is the same as that already adopted by the courts in their building up of the common law. The difference now is that business organizations may be dissolved and ruined and that men may be jailed and fined for making a bargain that seemed "reasonable" to them and that the common law would at the worst have merely declared to be unenforceable.

It must not for an instant be supposed that the validity of a bargain can now be determined by a study of the common law decisions prior to the Sherman Act. The "reasonableness" of a bargain that in some degree restrains trade and commerce depends upon the circumstances and conditions of modern business life and also upon the prevailing economic and political notions of the time, just as was the case prior to the Sherman Act. In addition, the judicial decisions have been affected by the words and the penalties of that and other statutes. The law as to the validity of bargains in restraint of trade is still a "growing" law;¹ and the federal statutes have made this growth almost whol-

¹ Judge Learned Hand correctly admitted in *U. S. v. Associated Press*, 52 F.Supp. 362 (1943), that the court was forced to make new law, and he added: "Besides, even though we had more scruples than we do, we have here a legislative warrant, because Congress has incorporated into the Anti-Trust Acts

the changing standards of the common law, and by so doing has delegated to the courts the duty of fixing the standard in each case." A few of the Senators who were responsible for the passage of the Sherman Act appear to have been conscious that they were delegating this duty.

ly national in character. The law is again becoming a "common" law in the original usage of that term, a law that is common throughout the nation.

A very few cases on restraint of trade are included here, without reference to the statutes, merely as illustrations of the problems that have arisen and of judicial reasoning and method.

BROAD v. JOLLYFE.

In the King's Bench, 1620. Cro.Jac. 596.

Assumpsit. Whereas the defendant was a mercer, and kept a shop at Newport in the Isle of Wight, and had his shop furnished with divers old and sullied wares, and the plaintiff had a shop there furnished with new and fresh wares; in consideration the plaintiff would buy of him all his said wares in the said shop, and would pay for them such prices as he paid for them when he first bought them, that he assumed he would not then any longer keep a mercer's shop in Newport: and alledges in fact, that he bought of him all his said wares, and paid to him three hundred pounds for them, being the price which he had paid for the said wares when he bought them, whereas in truth they were not then worth one hundred pounds; and that the defendant contrary to his promise kept his said shop, and furnished it with new and fresh wares, &c. to the plaintiff's damage five hundred pounds. After non assumpsit pleaded, and verdict for the plaintiff to his damage of forty pounds.

It was moved in arrest of judgment, that this assumpsit is against law, to restrain any to use their lawful trade: and for that purpose was cited 2 Hen. 5. pl. 5. where an obligation that one shall not use the trade of a dyer was held to be void.

HOUGHTON, Justice, was of that opinion, for the reason above-mentioned: but all the other justices held, that it was good assumpsit, for it is voluntary; and upon a valuable consideration one may restrain himself that he shall not use his trade in such a particular place; for he who gives that consideration expects the benefit of his customers; and it is usual here in London for one to let his shop and wares to his servant when he is out of his apprenticeship; as also to covenant that he shall not use that trade in such a shop, or in such a street: so for a valuable consideration, and voluntarily, one may agree that he will not use his trade; for *volenti non fit injuria*. And it is not like to the case in 2 Hen. 5, before cited; for there it is alleged, that he was compelled to enter into such a bond, it being an offense for which Hull swore he would have committed him had he been there; yet there the issue is taken, that he did not use the trade

of a dyer in the said vill; which proves, that the defendant durst not demur thereupon; but the bond was allowed good. But here it is upon a good consideration, viz. that he should pay three hundred pounds for wares which were not worth one hundred and fifty pounds, for which he made the said promise, and is strong enough against himself.

MONTAGUE, Chief Justice, cited the case in 13 Hen. 7. If a feoffment be made upon condition that he shall not alien, it is a void condition, for it is against law: yet a covenant that he shall not alien, is good: wherefore it was adjudged for the plaintiff.—And in Michaelmas term, 19 Jac. 1. this judgment was affirmed in a writ of error before all the justices and Barons of the Exchequer; for they held, that one may voluntarily give over his trade, and is not compellable to use it, especially in one certain place: and therefore he may, upon good consideration, agree that he will not use it within such a vill; and upon the matter, it is but the selling of his custom, and leaving another to gain it. And it was said, that a prescription to restrain one from using a trade in such a place is good. Easter term, 18 Jac. 1. Bragg v. Tanner assumpsit for ten shillings he promised to pay an hundred pounds, if he thenceforward kept any draper's shop in Newgatemarket: judged good, and the plaintiff recovered.

QUESTION:

If one whose business is limited to the buying and selling of used motor cars is paid a large price for his stock in trade and goodwill and for his promise not to engage in the buying or selling of motor cars, new or used, in the same location for a year, is the bargain one that is injurious to consumers? Observe that the restraint imposed by the contract on the trading activities of the seller is more extensive than was his activity in the business that he sold.

HERRESHOFF v. BOUTINEAU.

Supreme Court of Rhode Island, 1890.

17 R.I. 3, 19 A. 712, 8 L.R.A. 469, 33 Am.St.Rep. 850.

On demurrer to bill.

Bill for injunction by Julian L. Herreshoff against A. Boutineau. Defendant demurs to the bill.

STINESS, J. The complainant, director of a school of languages in Providence, employed the respondent to teach French from January 7, 1889, to July 1, 1889. The contract in writing provided that the respondent would not, during the year after the end of his service, "teach the French or German language, or any part thereof, nor aid to teach them, nor advertise to teach them, nor be in any way con-

nected with any person or persons or institutions that teach them, in the said state of Rhode Island." The respondent's service ended July 1, 1889, after which time he gave lessons in French, in Providence. This suit is brought to restrain him from so doing within the time covered by this contract. The respondent demurs to the bill, contending—First, that the contract is void on the ground of public policy, because it imposed a general restraint throughout the state; and, secondly, because it is unreasonable. Is the contract void? * * *

We think it cannot be said here, any more than in England, that a restraint is absolutely void, upon grounds of public policy, because it extends throughout a state. Public policy is a variable test. In the days of the early English cases, one who could not work at his trade could hardly work at all. The avenues to occupation were not as open nor as numerous as now, and one rarely got out of the path he started in. Contracting not to follow one's trade was about the same as contracting to be idle, or to go abroad for employment. But this is not so now. It is an every-day occurrence to see men busy and prosperous in other pursuits than those to which they were trained in youth, as well as to see them change places and occupations without depriving themselves of the means of livelihood, or the state of the benefit of their industry. It would therefore be absurd, in the light of this common experience now, to say that a man shuts himself up to idleness or to expatriation, and thus injures the public, when he agrees, for a sufficient consideration, not to follow some one calling within the limits of a particular state. There is no expatriation in moving from one state to another, and from such removals a state would be likely to gain as many as it would lose. We do not think public policy demands an agreement of the kind in question to be declared void, and we do not think such a rule is established upon authority. We therefore hold that the agreement set out in the bill is not void simply because it runs throughout the state.

Is the contract unreasonable? Courts should be slow to set aside as unreasonable a restriction which has formed a part of the consideration of a contract; yet, when it is a restriction upon individual and common rights, which only oppresses one party without benefiting the other, all courts agree that it should not be enforced. In determining the reasonableness of a contract, regard must be had to the nature and circumstances of the transaction. For example, if one has sold the good-will of a mercantile enterprise, receiving pay for it, upon an agreement not to engage in the same business in the same state, for a certain time, such a stipulation would stand upon quite a different footing from the similar stipulation of a mere servant in an ordinary local business. In many undertakings, with modern methods of advertising and facilities for ordering by telegraph or mail, and sending goods by railroad or express, it would matter little whether

one was located at Providence or Boston or some other place. In such cases a restriction embracing the state, or even a larger territory, could not be said on that account to be unreasonable; for without it the seller might immediately destroy the value of what he sold and was paid for. But it is unreasonable to ask courts to enforce a greater restriction than is needed. So it has been uniformly held that restrictions which go too far are void. As was said in the note of the *Law Quarterly Review*, above cited: "Covenantees desiring the maximum of protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp at too much, and so lose all."

Besides the matter of protection, the hardship of the restriction upon the party and the public should also be considered. In the present case, we think the restriction is unreasonable. Not as a rule of law because it extends throughout the state, but because it extends beyond any apparently necessary protection which the complainant might reasonably require, and thus, without benefiting him, it oppresses the respondent, and deprives people in other places of the chance which might be offered them to learn the French and German languages of the respondent. The complainant urges that he has established a school in Providence, at great expense, to teach languages by a new method, where scholars come from all parts of the state, and that by reason of the small extent of the state, and the ease of passing to and fro within it, such a restriction is reasonable and necessary to keep teachers from setting up similar schools, and enticing away his scholars. All this may be true with reference to Providence and its vicinity. But while, as is averred, many pupils from all parts of the state may come to Providence, as a center, for the same reason few would go to other places. For example, a school in Westerly or Newport would not be likely to draw scholars from Providence, or places from which Providence is more easily reached. Indeed, the complainant says he offered, after the contract was made, and now offers, to allow the respondent to teach in Newport; thereby admitting that the restriction is greater than the necessity. The people of Newport, Westerly, and other places have the right to provide for education in languages without coming to Providence. It is hard to believe, and the bill does not aver, that losing the few, if any, from some such place who might leave the complainant, if the respondent were to teach there, would seriously affect the complainant's school. Teaching in Providence, or in any place from which the complainant receives a considerable number of pupils, might affect it, and a restriction limited accordingly might be reasonable; but we think it is unreasonable to go further. The complainant bought nothing of the respondent whose value he now seeks to destroy. He hired the latter as a teacher at no more than fair wages. He needs and has the right only to be secured against injury to his school, from teachers who

may entice away his scholars, after leaving his employ. The contract clearly goes beyond this. The demurrer must be sustained.

NOTE

Although the restraint is greater than is reasonable, some courts are very liberal in holding that the bargain is divisible in case it indicates any geographical lines subdividing the restricted territory, and in such case enforce the bargain so far as it is reasonable. *Trenton Potteries Co. v. Oliphant*, 58 N.J.Eq. 507, 43 A. 723 (1899), "within any state in the United States of America or within the District of Columbia, except in Nevada and Arizona", enforced as to New Jersey; *Mallan v. May*, 11 M. & W. 653 (1843), dentist, restraint in London and in other towns; *Price v. Green*, 16 M. & W. 346 (1847), perfumery, London and within 600 miles.

DIAMOND MATCH CO. v. ROEBER.

Court of Appeals of New York, 1887.
106 N.Y. 473, 13 N.E. 419, 60 Am.Rep. 464.

ANDREWS, J. Two questions are presented—First, whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the twenty-seventh day of August, 1880, that he shall and will not at any time or times within 99 years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employé of the said Swift & Courtney & Beecher Company) within any of the several states of the United States of America, or in the territories thereof, or within the District of Columbia, excepting and reserving, however, the right to manufacture and sell friction matches in the state of Nevada, and in the territory of Montana, is void as being a covenant in restraint of trade; and, second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant.

There is no real controversy as to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manufacturing friction matches, and of the stock and materials on hand, together with the trade, trademarks, and good-will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was trans-

ferred, August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff; the plaintiff company having prior to said payment purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant.

It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the states of Connecticut, Delaware, and Illinois, and of selling the matches which it manufactured "in the several states and territories of the United States, and in the District of Columbia"; and the complaint alleges and the defendant in his answer admits that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed traveling salesmen, and that his matches were found in the hands of dealers in 10 states. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the twenty-seventh of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff, and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when, a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year, the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff.

The contention by the defendant that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law, first definitely declared, so far as I can discover, by Chief Justice Parker (Lord Macclesfield) in the leading case

of *Mitchel v. Reynolds*, 1 P.Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date, in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality was considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (volume 2, p. 748, note). The earliest reported case, decided in the time of Henry V., was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court.² This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts, and gave judgment for the plaintiffs; and before the case of *Mitchel v. Reynolds* it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances, and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases prior to *Mitchel v. Reynolds* sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint, and the contract was sustained.

It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this state are of that character, and in all of them the particular contract before the court was sustained. *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brockway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N.Y. 241, 61 Am.Dec. 746. In *Alger v. Thacher*, 19 Pick. 51,

² This statement is in part incorrect. The Dyer's case is reported in Y.B. 2 Hen. V, pl. 26. It is true that the judge "indignantly denounced the plaintiff" but not that he "turned him out of court." The defendant, who was sued for the penalty of the bond, showed that the obligation was conditioned to be void if he "should not use his art and craft of a dyer in the town for half a year," that in fact he had not so used his art and craft, and he asked judg-

ment. Hull J. said: "In my opinion you could have demurred on the ground that the obligation is void, the condition being against the common law, and by God if the plaintiff were here he should go to prison until he made a fine to the king." But the plaintiff's attorney denied the defendant's statement that he had not used his art within the time; and the defendant joined issue on this without demurring. What later happened is not reported.

31 Am.Dec. 119, the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchel v. Reynolds* the court, in assigning the reason for the distinction between a contract for the general restraint of trade and one limited to a particular place, says: "for the former of these must be void, being of no benefit to either party, and only oppressive"; and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz., the mischief which may arise (1) to the party by the loss by the obligor to his livelihood and the subsistence of his family, and (2) to the public by depriving it of a useful member, and by enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have for the purposes of trade and commerce almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth, and the restless activity of mankind striving to better their condition, have greatly enlarged the field of human enterprise, and created a vast number of new industries, which gives scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent business corporations are practically partnerships, and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The tendency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void, irrespective of special circumstances. Indeed, it has of late been denied that a hard and fast rule of that kind has ever been the law of England. *Rousillon v. Rousillon*, 14 Ch.Div. 351.

The law has for centuries permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves*, 7 Bing. 735, Chief Justice Tindal considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial, and there is a corresponding partial

restraint. And is there any real public interest which necessarily condemns the one, and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good-will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who, having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case, and not in the other? Indeed, what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If", said Sir George Jessel in *Printing Co. v. Sampson*, L.R. 19 Eq. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good, and shall be enforced by courts of justice."

It has sometimes been suggested that the doctrine that contracts in general restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint, where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling, and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary, we suppose a party may legally purchase the trade and business of another for the

very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production, and to enhance prices, are or may be unlawful, but they stand on a different footing. * * *

In the present state of the authorities, we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed. The covenant in the present case is partial, and not general. It is practically unlimited as to time, but this under the authorities is not an objection, if the contract is otherwise good. *Ward v. Byrne*, 5 Mees. & W. 548; *Mumford v. Gething*, 7 C.B.(N.S.) 317. It is limited as to space since it excepts the state of Nevada and the territory of Montana from its operation, and therefore is a partial and not a general, restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the state of New York constitutes a general restraint within the authorities. In *Chappel v. Brockway*, *supra*, *Bronson, J.*, in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the state, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet-boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the state of New York, but excepted other states from its operation. The remark relied upon was obiter, and in reason cannot be considered a decision upon the point suggested.

We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the states are not those of trade and commerce, and business is restrained within no such limit. The country as a whole is that of which we are citizens, and our duty and allegiance are due both to the state and nation. Nor is it true as a general rule that a business established here cannot extend beyond the state, or that it may not be successfully established outside of the state. There are trades and employments which from their nature are localized, but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon state lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed

to put such construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Steam Co. v. Winsor*, supra, supports the view that a restraint is not necessarily general which embraces an entire state. In this case the defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void. • • •

NOTE

The court held that the bond liquidating the damages for breach at \$15,000 did not preclude remedy by injunction in addition. This provision was for the purpose of making performance more certain, and not to give the defendant the power to regain the privilege of doing business by paying \$15,000. Compare the contract in *Baird v. Smith*, 128 Tenn. 410, 161 S.W. 492, L.R.A.1917A, 376 (1913). "Should the said Smith enter into any business * * * the said Smith agrees to pay \$1,000 to the said Baird for this privilege."

A leading English case in harmony with the *Diamond Match* case is *Nordenfelt v. Maxim Nordenfelt Guns & Amm. Co.*, [1894] A.C. 535, a manufacturer of implements of war sold his business and good will for a large sum and covenanted not to engage in the business anywhere for 25 years.

Some state courts have had a narrower view of liberty of contract and have held that restraint throughout an entire state is illegal.

An excellent classification of bargains in restraint of trade is given by Taft, J., in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 29 C.C.A. 141, 150, 46 L.R.A. 122 (1898).

In *Mitchell v. Reynolds*, 1 Peere Wms. 181 (1711), often cited as a leading case, the defendant had assigned to the plaintiff a lease of a messuage and bakehouse for a term of five years, and gave a bond conditioned not to engage in the trade of a baker within that parish during the five years. The defendant did engage in the trade and was sued in debt in the bond. The court gave judgment for the plaintiff, and classified restraints on trade at great length. Parker, C. J., said: "And we are all of opinion, that a special consideration being set forth in the condition, which shows it was reasonable for the parties to enter into it, the same is good; * * * and that wherever a sufficient consideration appears to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained; but with this constant diversity, viz. where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place;

for the former of these must be void, being of no benefit to either party, and only oppressive."

See Restatement, Contracts, §§ 513-519, for a statement of present-day law, not including statutes.

PUBLIC POLICY AS A BASIS OF ILLEGALITY

The sources to which one must go in order to determine the legality of a bargain are the statutes, court decisions, and common opinions as to the general welfare. Each of these sources, in the outer fringes of application, involves a degree of uncertainty that lawyers and their clients are inclined to resent. Risks are inevitable in many transactions; but men of probity and intelligence can greatly reduce them by giving a reasonable amount of thought to the general welfare.

Judges have exhibited varying attitudes toward "public policy" as a basis for determining the legality of a bargain; but no judge can escape the necessity of making use of it in the decision of a case. No doubt this alliterative phrase is sometimes used as if it had a magic quality, needing no explanation of its applicability. In *Mogul S. S. Co. v. McGregor* [1892] A.C. 25, Lord Justice Bramwell said: "'Public policy,' said Burrough, J. (I believe quoting Hobart, C. J.), 'is an unruly horse and dangerous to ride.' I quote also another distinguished judge (more modern), Cave, J., 'Certain kinds of contracts have been held void at common law on the ground of public policy; a branch of the law, however, which certainly should not be extended, as judges are more to be trusted as interpreters of the law than as expounders of what is called public policy.' I think the present case is an illustration of the wisdom of these remarks. I venture to make another. No evidence is given in these public policy cases. The tribunal is to say, as matter of law, that the thing is against public policy and void. How can the judge do that without any evidence as to its effect and consequences?"

There is every reason why judges should require "evidence" on the subject before making a decision. See, for example, *Apted v. Apted & Bliss*, [1930] 46 T.L.R. 456; and many of the opinions of Mr. Justice Brandeis in the United States Supreme Court. It may also be remarked that, however unruly the horse may be, it is not possible for the courts to refuse to ride. Justice (whether described as "natural" or artificial), public policy, general welfare, the settled convictions of mankind, community ideals, are all modes of describing substantially the same thing. It is this that the courts are established to administer, and upon which in the last analysis their judgments are based.

In *Hyams v. King*, [1908] 2 K.B. 696, Sir G. Barnes, P., said: "It is necessary to avoid confusion between judicial and legislative functions

• • • care must be taken not to lay down new principles of public policy without sufficient warrant." It should be needless to suggest with what conservative care this great judicial function should be exercised.

In *Wilson v. Carnley*, [1908] 1 K.B. 729, 738, Vaughan Williams, L. J., partly quoting Lord Bowen, said: "The determination of what is contrary to the so-called 'policy of the law' necessarily varies from time to time. Many transactions are upheld now by our own courts which a former generation would have avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion. I cannot myself in the least acquiesce in the suggestion that, as habits change and time goes on, we may not find new instances of contracts which cannot be enforced on the ground that they are contrary to public morality."

For conservative statements, see Baron Parke, in *Egerton v. Brownlow*, 4 H.L.C. 1, 122 (1853), and Halsbury, L. C., in *Janson v. Driefontein Mines*, [1902] A.C. 484, 491.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), Mr. Justice Holmes said: "I think that at least it is safe to say that the most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear."

In many of the older cases a distinction was often drawn between what was "malum in se" and "malum prohibitum." It requires only a little thought to see why many judges have declared that this distinction has been "exploded." But in spite of the false assumption underlying the distinction in the form stated, all must admit that some things are worse than others. Some things have been thought to be evil according to the mores of many tribes, nations, and religions over long periods of time. Other things have been prohibited only because a small fraction of the community believe them to be evil and have urged the legislation with great vociferation and voting threats. When a bargain involving the former of these is made, there may be more reason for a bargainer to know that he is doing wrong and more reason for attaching serious results to his conduct. The enforcement of a bargain in part or the granting of a restitutionary remedy often turns on the degree of the evil that is involved in the transaction. Restatement, Contracts, in several instances uses the term "serious moral turpitude." So do the courts and legislatures. There is a borderline zone in which its applicability will be subject of dispute; but the difficulty is one that can not be avoided.

HALL MFG. CO. v. WESTERN STEEL & IRON WORKS et al.

Circuit Court of Appeals of the United States, 1915.
227 F. 588, 142 C.C.A. 220, L.R.A.1910C, 620.

Suit in Equity by the Hall Manufacturing Company against the Western Steel & Iron Works. Decree for defendants, and complainant appeals. Reversed.

BAKER, Circuit Judge. This appeal is from a decree dismissing appellant's bill on final hearing.

Facts, counted on in the bill and established by the proofs, may be summarized as follows:

Appellant, an Iowa corporation, located at Monticello, was engaged in making wire stretchers, hoisting blocks, stake irons, weed pullers, and similar farm appliances, and in selling them generally wherever there was a demand.

Appellee, Western Steel & Iron Works, a Wisconsin corporation, located at De Pere, was engaged in making farm gates, trowels, spades, etc. It was organized in 1905. Prior to November 26, 1910, it also made and sold post hole augers and diggers—diggers since 1905 and augers since the beginning of 1909.

During the summer and fall of 1910 appellee was financially embarrassed, its property was under mortgage, and it was in pressing need of ready money. It solicited appellant to buy its digger and auger business, which amounted to about half of its total business. Officers of appellee visited Monticello, officers of appellant examined the property at De Pere, and meetings were had at Milwaukee. On November 26, 1910, appellee sold and conveyed to appellant everything pertaining to the digger and auger business, machinery, tools, dies, finished and unfinished stock, orders, patents, and "the good will of the business." Collateral to the sale of the good will appellee covenanted "to render such assistance as it reasonably can in introducing it (appellant) to the trade and in forwarding to it any orders it may receive for augers and diggers after December 10, 1910," and "not again to go in to the manufacture of post hole augers and diggers."

At the time of the sale, when appellee's business in diggers was five years old and in augers two, it had marketed these articles in thirty-four of the United States and in two Canadian provinces. In considerable regions these articles cannot be used. Appellee's sales were entirely to jobbing houses. In addition to seed that had already brought forth fruit, appellee through advertisements, commission men, and the outstretched hands of jobbers had sown other seed, so that we may take the fact to be in accordance with the admitted representation of appellee's treasurer that appellee was trying to sell wherever there

was a demand and that by reasonable attention the trade could be expected to extend "throughout all parts of the United States and Canada where augers and diggers can be used." So it is evident that appellee was selling and was covenanting to protect a national and international good will.

Appellant paid the agreed price, \$13,500, less deductions, provided for in the contract, of about \$3,000 for appellee's failure to turn over the stipulated amount of orders. The evidence in the record warrants the conclusion that appellee under the contract obtained about double the fair selling value of its worn machinery, tools, etc., and that appellant would not have purchased the physical property apart from the good will of the business and appellees' protective covenants.

This purchase was made by appellant because diggers and augers would fit in well with the lines of farm appliances it was already making and selling. Neither before nor afterwards was appellant a party to any combination or agreement for fixing prices or restraining competition. And consumers have been able to purchase diggers and augers at prices as low as formerly, under competition of the same number of independent manufacturers doing business throughout the country.

Appellant began promptly to manufacture and market the same seven styles that appellee had been supplying to the trade, and under the same seven names, which, except as to "Ideal" and "Western," for which patents were assigned to appellant, had become generic names of styles on which patents had expired.

Within a month or so appellee, with its mortgage discharged and its financial embarrassment relieved, began to manufacture all its former open styles under the old names, and to sell them wherever it could. When appellant learned of this conduct, some six months later, it protested; and, its protest being defied, this suit was begun. * * *

Is appellant remediless? The trial court so decided because the protective covenants are without limitation of either time or place.

In the first reported case, that of John Dier, decided in 1415, Year Book 2 Hen. V, 5, covenants were held to be unenforceable, no matter how limited in time and place. Hull, J., said: "In my opinion you might have demurred upon him, that the obligation is void, inasmuch as the condition is against the common law; and (per Dieu) if the plaintiff were here he should go to prison till he paid a fine to the king."

During the generations when an artisan had to pass through apprenticeship into a guild, when he was tied to his trade and place by statutes forbidding him to leave his parish under pain of pillory or prison, when if he could not stand where he was rooted he would be-

come a public charge, it may have been right enough for the king's courts to see no public interest but the artisan's ability to pay taxes and serve the king. If, however, fifteenth century doctrines of absolutism were to govern in twentieth century conditions of democracy, a victim of a covenantor's perfidy might well prefer to settle his legal rights by the fifteenth century wager of battle. But the glory of the common law is its inherent power of growth, its adaptability to new and enlarged conditions of life, its responsiveness to higher standards of social and business ethics. And so during the centuries naturally there were developments and departures with respect to this ancient doctrine. It took the courts a long time to get beyond testing the validity of a restrictive covenant purely by the presence or absence of limitations. If a restraint was unlimited as to both time and place, or was unlimited as to place though not as to time, it was unenforceable; if limited as to both time and place, or if limited as to place, though not as to time, it was valid.

But, beginning about 1830, the advent of the factory system, multi-fold new machines, railroads, steamships, fast mail and express service, telegraphs, telephones, wireless, trolleys, automobiles, aeroplanes, lessening space, shortening time, offering continually new and widening avenues for both labor and capital, emphasized a point of view that had been suggested in somewhat earlier times; and that is that the validity of a restrictive covenant should be tested by determining whether on the facts of the particular case the restraint is greater than is reasonably necessary for the protection of the purchaser of the business and good will. The history of the development, with its waves of progress and recession, may be traced in England and our own country in the following cases: * * *

Tested by the rule of reason, a restrictive covenant is not necessarily valid because it is limited in time and place. Logically the corollary follows that by the same rule of reason a restrictive covenant is not necessarily invalid because it is unlimited in time and place. A restraint of 500 miles and 50 years on a village doctor, who had only a local practice, would be unreasonable, because not reasonably necessary to the protection of his successor, while a general covenant by Pears Soap Company should be enforced (at least to the extent of the decreeing court's reach) because the good will of the business is world-wide and of expected indefinite continuance.

In *Prame v. Ferrell*, supra, a general covenant was enforced. The court construed the covenant "as limiting the restraint to the United States." In the present case the trial court accepted counsel's criticism that our brethren of the Sixth circuit were violating the rule that courts cannot lawfully remake the contract of the parties. But in our judgment the same result of enforceability is reached by taking the covenant as written, without limitation of time or place. For the

covenant is neither immoral nor criminal. It stands, unless it must be overthrown on account of the covenantor's objection. His objection is based wholly on our domestic public policy. Our domestic public policy has no extraterritorial force. And therefore the limitation of the decree, if so made, comes from the inherent limitation of the covenantor's objection, not from constructively limiting his unlimited covenant.

In this case, and in all of the kind, two public interests are to be balanced against the one that is opposed to restrictive covenants: Honesty and fidelity among our business men; and the interest of every one, and so of all, in being able to sell on the most advantageous terms whatever property he owns or has produced, whether tangible or intangible. Unless injury to the public manifestly outweighs the public policies of honesty and of freedom of alienation, restrictive covenants should be enforced. Here, of course, honesty condemns the conduct of appellee. Freedom of alienation is a byword, if appellee may sell property, retain the proceeds, and then repossess itself of the property with impunity. And what injury to the public was done that preponderates over honesty and freedom of alienation in the other scale? Appellee is a corporation. If any stockholder or officer is skilled in any profession or art, he is not restrained from exercising his skill by the corporation's covenant. Even the capital that was at hazard in the digger and auger branch of appellee's factory may be reinvested in the same business by the stockholders individually or collectively outside of appellee corporation. Appellee itself, rescued from financial embarrassment, and with its remaining business made sound by the use of appellant's money has been benefited. Consumers in Wisconsin and everywhere in our country get as fair prices as before, under competition of the same number of independent manufacturers. In our judgment there is no injury to the public, and the scale containing honesty and freedom of alienation strikes bottom. Inasmuch as the collateral covenants are no broader than the conveyed good will, full-grown and embryonic, they should be enforced.

But, apart from the covenants, we think appellant is not remediless. If the covenants were considered void, that would not vitiate the contract in other respects, since there is nothing immoral or criminal in making such covenants. They are merely unenforceable civilly at the worst. * * *

If one should sell a chattel, and then retake it by stealth or force or fraud, both the criminal and the civil law would lay hold. Because the retaking of a conveyed good will has not yet been included in the penal code is no reason, in our judgment, why equity should hesitate to arrest the trespass.

As to appellee corporation the decree is reversed, and the cause remanded for proceedings in consonance with this opinion.

SAMUEL STORES, Inc., v. ABRAMS.

Supreme Court of Errors of Connecticut, 1919.
94 Conn. 248, 108 A. 541, 9 A.L.R. 1450.

Action by the Samuel Stores, Incorporated, against Aaron H. Abrams. Demurrer to complaint sustained, and plaintiff appeals. No error.

Action for an injunction to restrain the defendant from conducting a clothing business in Bridgeport and from soliciting former and present customers of the plaintiff to trade with him. * * *

CURTIS, J. The plaintiff is a corporation of the state of New York engaged in conducting branch clothing stores in various cities.

It employed the defendant as manager of one of its branch stores for the period of one year from September 5, 1918, under the written contract attached to the complaint.

The contract contains the following stipulation on the part of the defendant: "And, whereas, in the course of such employment, Aaron H. Abrams may be assigned to duties that may give him knowledge and information of confidential matters relating to the conduct and details of the business of the Samuel Stores, Incorporated, as to result in the opinion of the Samuel Stores, Incorporated, irremediable injury to it, for which no money damages could adequately compensate, if the said party of the second part should enter the employment of rival concern while this contract was still in effect, the said Aaron H. Abrams agrees not to engage in any other occupation during the life of this contract, and further agrees not to either directly or indirectly connect himself with any firm engaged in business similar to that of the party of the first part, which would compete with the business of the party of the first part, nor will he himself engage in any business that will compete with the business of the party of the first part, for five years after the date of his connection with the party of the first part being severed. The said Aaron H. Abrams agrees to use his best endeavors and his entire time to promote the business and business interests of the Samuel Stores, Incorporated."

The defendant in November, 1918, left the employ of the plaintiff, and on December 9, 1918, opened a store in Bridgeport, and engaged in the business of selling clothing for men, women and children, and engaged in the same line of business conducted by the plaintiff in Bridgeport, and has advertised himself as formerly with the People's Store, the same being the trade-name under which the plaintiff has been conducting business in Bridgeport and the defendant has been and is soliciting the customers of the plaintiff to trade with him.

This case presents the question whether or not the restrictive stipulation in the contract between the parties is void as against public policy.

The public policy to be applied is the public policy of the present time. The changing conditions of life modify from time to time the reasons for determining whether the public interest requires that a restrictive stipulation shall be deemed void as against public policy. * * *

The cases in relation to restraints of trade soon disclosed two leading classes of contracts, contracts between the vendor and vendee of a business and its good will, and, on the other hand, contracts between an employer and an employee.

Under the law, restrictive stipulations in agreements between employer and employee are not viewed with the same indulgence as such stipulations between a vendor and vendee of a business and its good will.

In the latter case, the restrictions add to the value of what the vendor wishes to sell, and also add to the value of what the vendee purchases. In such cases also the parties are presumably more nearly on a parity in ability to negotiate than is the case in the negotiation of agreements between employer and employee.

In a restrictive covenant between a vendor of a business and the vendee, "a large scope for freedom of contract and a correspondingly large restraint of trade" is allowable. In a restrictive covenant between employer and employee on the other hand, there is "small scope for the restraint of the right to labor and trade and a correspondingly small freedom of contract."

In dealing with a restrictive stipulation between an employer and an employee, as in this case, in order that the court may uphold and enforce the restriction, if it is not otherwise contrary to public policy, the court must find that the facts alleged disclose a restriction on the employee "reasonably necessary for the fair protection of the employer's business or rights, and not unreasonably restricting the rights of the employee, due regard being had to the interests of the public and the circumstances and conditions under which the contract is to be performed." *Wm. Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 A. 467, 7 L.R.A. 779, 18 Am.St.Rep. 278; *Eureka Laundry Co. v. Long*, 35 L.R.A., N.S., 119, note; *Simms v. Burnette*, 16 L.R.A., N.S., 389, note; *Herbert Morris, Limited, v. Saxelby*, [1916] 1 A.C. 688; *Mason v. Provident C. & S. Co.*, [1913] A.C. 724; *Nordenfeldt v. Maxim N. G. & A. Co.*, [1894] A.C. 565; *Id.*, 10 T.L.Rep. 636; *Konski v. Peet*, [1915] 1 Ch. 530; *Herreshoff v. Boutineau*, 17 R.I. 3, 19 A. 712, 8 L.R.A. 469, 33 Am.St.Rep. 850.

We are then to determine whether the facts set up in this complaint make it reasonably necessary for the fair protection of the plaintiff's business to hold that the restrictive stipulation in the contract should be enforced.

This stipulation provides, in effect, that the defendant, for five years after he leaves the employ of the plaintiff, shall not either directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, in any city where the plaintiff conducts one of its branch stores.

It appears from the complaint that the services of the defendant contracted for by the plaintiff are not peculiar or individual in their character, nor purely intellectual, nor are they special or extraordinary services or acts.

The defendant's services and the plaintiff's business are not of a character to involve the acquisition of special business secrets of the plaintiff by the defendant. The agreement relates merely to services in a local retail business, and primarily aims to restrict competition.

The plaintiff conducts a local retail clothing business in which the defendant was employed as manager. The situation of manager could have been filled by any person of sufficient business capacity.

The clothing business may be entered upon by any one who desires to enter it, and whether the defendant opened a competitive store or another did so was immaterial to the plaintiff, except that the defendant having acquaintance and knowledge of the plaintiff's customers might solicit their trade.

The restriction in question provides, in substance, that in any city where the plaintiff carries on its business the defendant shall not directly or indirectly connect himself with any firm engaged in business similar to that of the plaintiff, which would compete with the business of the plaintiff, for five years after his employment with the plaintiff ceases.

This restriction, binding for that period and relating to every city in which the plaintiff has established a branch store, is not reasonably necessary for the fair protection of the plaintiff's business. It covers a number of cities in which the defendant, from his employment in one city, could have had no acquaintance with the local customers.

A restrictive agreement, providing that the defendant, while connected with a competing business, should not solicit trade from persons who were customers of the plaintiff at the branch store where the defendant was employed during his employment, might reasonably be claimed to be such a restriction as is reasonably necessary for the fair protection of the plaintiff's business. *Konski v. Peet*, [1915] 1 Ch. 530.

Such a restriction obviously would not unduly restrict the rights of the defendant, since it would not otherwise restrict the field of his employment than by prohibiting the solicitation of the clothing trade of a limited number of people in one city.

By the sweeping terms of the restrictive stipulation in question, it is true that the solicitation of such customers of the plaintiff is indirectly prevented. But at what cost to the defendant? He is prohibited from entering or being employed in the clothing business in various cities, the number of which may be large, and the area in which he may exercise such experience in and aptitude for that business as he may possess is greatly limited.

The reasonable and fair protection of the plaintiff's business does not require such an extended restriction of the defendant's field of employment. Public policy requires that the defendant's liberty of action in trading or employment shall not be unduly restricted. To enforce the sweeping terms of this restriction would be a useless, unnecessary, and undue curtailment of the defendant's liberty of trading and employment, and an unjustified restraint on competition.

The case at bar illustrates the following comment found in *Herreshoff v. Boutineau*, 17 R.I. 7, 19 A. 713, 8 L.R.A. 469, 33 Am.St.Rep. 850: "Covenantees [in contracts in restraint of trade between employer and employee] desiring the maximum protection have, no doubt, a difficult task. When they fail, it is commonly because, like the dog in the fable, they grasp too much, and so lose all."

There is no error.

NOTE

Bargains between competitors, whether "full-grown" or "embryonic," for the fixing of prices, the pooling of profits, the division of territory, or the suppression of competition by other means, are illegal irrespective of the extent of harm actually suffered by the public. A limitation on competition is valid only when it is ancillary to the sale of a business with its goodwill, and even then only so far as it is reasonably necessary for the protection of the purchaser in the enjoyment of the "goodwill" that is transferred. Such bargains are merely worse in degree if their purpose or effect is to create a monopoly or a near-monopoly.

The federal statutes have gone far in legalizing combinations among laborers to fix the scale of wages or conditions of employment, including the closed shop, and among agricultural producers to regulate production and sales. By these statutes the combining classes are recognized as having been unfairly handicapped in the struggle of life. Further legislation may be expected with reference to the continuing industrial and commercial conflicts of interest and desire.

SECTION 2.—WAGERING BARGAINS

COLLAMER v. DAY.

Supreme Court of Vermont, 1829. 2 Vt. 144.

This was an action of trover, brought up from the County Court for the revision of their decision presented in the following case, agreed to by the parties to wit:

"In this action, plaintiff offered to prove, at the trial, that, on the day mentioned in the declaration, the plaintiff and defendant were together in the office of Jacob Collamer, at Royalton—that while there, a gentleman passed in a chaise: when defendant asked, whose chaise is that? Plaintiff answered, Dr. Denison's. Defendant said no, it is not Denison's chaise: I will bet my watch against yours that it is not Denison's chaise—That to this proposal plaintiff agreed—That each of the parties then took out his watch, and laid it upon the table: and it was then mutually agreed by the parties, that they would go together, and ascertain whether the said chaise was the said Denison's chaise; and that, if it was, plaintiff should take both watches; and, if not, defendant should take both, as and for his own—That they did proceed and examine, and found it to be said Denison's chaise—That the parties then returned to the said office, and the defendant immediately took up his watch and carried it away—That, on the same day, plaintiff demanded said watch of defendant, who refused to deliver it, but converted it to his own use. This evidence was objected to by the defendant's counsel, and excluded by the Court. To which decision the plaintiff excepted, and the exception was allowed, and the cause ordered to pass to the Supreme Court."

Mr. Marsh, for plaintiff, contended, That by the common law, a wager in general, is legal, if it be not an excitement to a breach of the peace or to immorality; or if it do not affect the feelings or interests of a third person, or expose him to ridicule, or libel him; or if it be not against sound policy;—and that the wager in question could not lead to any of those consequences. He cited, among other authorities, 2 T.Rep. 693.—Cowp. 37. The counsel, also, contended, that actual delivery of the property in this case, was not necessary in order to vest the property in the plaintiff, and to enable him to maintain trover; and cited Loft, 219.—Cro.Eliz. 866.—1 T.Rep. 56.—7 id. 9.—1 Salk. 113.—1 Strange, 165, *Atkin vs. Barwick*.

The Court declined hearing Mr. Everett, for the defendant.

The opinion of the Court was delivered by

HUTCHINSON, J.—Nothing appears in this case, but that the action would be maintainable by the common law of England. The com-

mon law is adopted by our statute, so far, and so far only, as the same is applicable to our local situation and circumstances, and is not repugnant to the constitution or to any act of the legislature, of this state. Whether applicable, or not, must necessarily be a question of judicial decision: and this is, probably, the first action, that has ever called upon a court in this state to sanction such a contract of betting. The Judges of the Courts in England have expressed their regret, of late years, that such transactions ever received the sanction of a court of justice: but, they yield to the force of the law, which they consider settled by a train of decisions, extending down from remote antiquity. We feel no such embarrassment, nor are we willing to transmit any such embarrassment to our successors; nor diffuse into society the influence of a rule so demoralizing, as would be the sanction of such a contract. It is honorable to this state, that the industrious and moral habits of our citizens have furnished no occasion to litigate questions of this nature. It is honorable to the legislature, that they have interposed checks to such games and sports as they supposed were creeping into us. By the Statute of 1821, page 268, penalties are affixed to the winning or losing, or betting, in money, goods, or chattels, on any game, or on any horse-race, or other sport, within this state. And said statute makes void any contracts and securities made and given for money won on such games. The species of betting now in question may not come within that statute, giving it the strict construction of a penal statute: yet the good morals of society require, that no encouragement should be afforded to the acquisition of property, otherwise than by honest industry. Time might be occupied in seeking occasions to take advantage of the unwary, and acquiring a skill to take such advantage, which ought to be devoted to better purposes.

In this case, according to the terms of the bet, the plaintiff had acquired a right to the possession of the watch, which the defendant had laid down in the bet, but the plaintiff had not acquired the actual possession, when the defendant resumed his possession. The plaintiff, therefore, had no complete right to the watch, without the sanction of such a contract of betting. That sanction is now withheld, and

The judgment of the County Court is affirmed.

NOTE

By the English common law, followed in a few early cases in the United States, a bargain was not made illegal by the fact that it was a wager. During the seventeenth century many actions were brought for the enforcement of betting agreements; and the courts began to find reasons for refusing enforcement, as that it would involve scandalous testimony (a bet on the sex of "Chevalier D'Eon") or that the bet might induce attempts on life (bet on the life of Napoleon). American courts generally agreed with the opinion printed above; and statutes commonly make gambling bargains, with an occasional exception (e. g. *pari-mutual bet-*

ting), illegal. A loan of money for the purpose of inducing a gambling transaction is illegal, but not if made with mere knowledge that it will be so used or if made to enable one to pay his gambling debts. Restatement, Contracts, § 525.

An important distinction exists between illegal wagers and lawful aleatory contracts. All contracts of insurance and suretyship are aleatory in character, and so are sales agreements making the amount of the price dependent on an uncertain event that will affect market values. Gray v. Gardner, 17 Mass. 188 (1821), ante p. 659, is an illustration.

See definition of wager in Restatement, Contracts, § 520. By that definition it appears that a bargain is an illegal wager if it is aleatory in character (no agreed exchange of performances) and if it is not a bargain for the transfer of an already existing risk. By bets and other gambling transactions, each party expects to get something for nothing; and the bargain creates an entirely new risk of loss that theretofore rested on nobody.

HAMPDEN v. WALSH.

In the Queen's Bench Division, 1876. 1 Q.B.Div. 189.

COCKBURN, C. J. This is an action brought to recover the sum of £500 deposited by the plaintiff with the defendant, under the following circumstances:

The plaintiff, it appears, entertains a strong disbelief in the received opinion as to the convexity of the earth, and with the view, it seems, of establishing his own opinion in the face of the world, he published in a journal called *Scientific Opinion*, an advertisement in the following words: "The undersigned is willing to deposit £50 to £500 on reciprocal terms, and defies all the philosophers, divines, and scientific professors in the united kingdom to prove the rotundity and revolution of the world, from scripture, from reason, or from fact. He will acknowledge that he has forfeited his deposit if his opponent can exhibit to the satisfaction of any intelligent referee a convex railway, canal, or lake."

The challenge thus thrown out was answered and accepted by a Mr. Alfred Wallace, who offered to stake the like amount "on the undertaking to shew visibly, and to measure in feet and inches, the convexity of a canal or lake."

The money was deposited accordingly in a bank, to the credit of Mr. Walsh, the defendant. An agreement was drawn up, whereby it was agreed that, "if Mr. A. R. Wallace, on or before the 15th of March, 1870, proved the convexity or curvature to and fro of the surface of any canal, river, or lake, by actual measurement and demonstration, to the satisfaction of Mr. John Henry Walsh, of 346 Strand, and of Mr. W. Carpenter, of 7 Carlton Terrace, Lewisham Park, or, if they dif-

ferred, to the satisfaction of the umpire they might appoint," Wallace was to receive the two sums deposited; while if Wallace failed in shewing such actual proof of convexity, the two sums were to be paid to the plaintiff. The agreement concluded with the following proviso: "Provided always, that, if no decision can be arrived at, owing to the death of either of the parties, the wager is to be annulled; or if, owing to the weather being so bad as to prevent a man being distinctly seen by a good telescope, at a distance of four miles, then a further period of one month is to be allowed for the experiment, or longer, as may be agreed upon by the referees."

Mr. Walsh being unable to act as referee, a Mr. Coulcher was substituted for him. Certain tests having been agreed on, the experiment was tried on the Bedford Level Canal. The referees differed; Mr. Coulcher being of opinion that Mr. Wallace had proved, Mr. Carpenter, that he had not proved, the convexity of the canal. Thereupon it was proposed that the referees should exercise their power of appointing an umpire; but Mr. Carpenter declined to act further in the matter. A correspondence ensued, when it was agreed to leave the matter to the decision of Mr. Walsh, the present defendant, to whom the two referees should submit their reports, and who was to be at liberty to seek any further information he might deem necessary, and to consult Mr. Solomons, an optician, if he thought proper. Having done so, he decided in favour of Mr. Wallace, as having "proved to his satisfaction the curvature to and fro of the Bedford Level Canal between Witney Bridge and Welsh's Dam (six miles), to the extent of five feet more or less."

To this decision the plaintiff objected, and before the defendant had paid over the money to Mr. Wallace, demanded to have the £500 he had deposited restored to him. Notwithstanding which, the defendant paid the two sums of £500 to Wallace.

The question for our decision is, whether upon this state of facts the plaintiff is entitled to recover the sum so deposited by him.

One question which presents itself is, whether this agreement amounts in effect to a wager; and if so, whether the plaintiff by the effect of 8 & 9 Vict. c. 109, § 18, is prevented from maintaining this action.

We will, in the first instance, proceed with the case on the assumption that the agreement is in effect a wager.

It is well established by numerous authorities, which it would be here superfluous to cite, that at common law, a wager, being a contract by A. to pay money to B. on the happening of a given event, in consideration of B. paying money to him on the event not happening, was legal, provided the subject-matter of the wager was one upon which a contract could lawfully be entered on. But by the effect of the stat-

utes of 16 Car. II, c. 7, of 9 Anne, c. 14, and of other statutes for the prevention of gaming, various forms of betting became stamped with illegality, and no action could be maintained by the winner against the loser in respect of them. Nor could any action be brought by the winner against the stakeholder with whom the amount of the wager had been deposited. Wagers not included in these statutes remained as before, and could be made the subject-matter of an action, although judges sometimes refused to try such actions, especially where the subject-matter of the wager was of a low or frivolous character, as unworthy to occupy the time of a court of justice.

As the law now stands, since the passing of 8 & 9 Vict. c. 109, there is no longer, as regards actions, any distinction between one class of wagers and another, all wagers being made null and void at law by that statute.

But though, where a wager was illegal, no action could be brought either against the loser or stakeholder by the winner, a party who had deposited his money with stakeholder was not in the same predicament. If, indeed, the event on which the wager depended had come off, and the money had been paid over, the authority to pay it not having been revoked, the depositor could no longer claim to have it back. But if, before the money was so paid over, the party depositing repudiated the wager and demanded his money back, he was entitled to have it restored to him, and could maintain an action to recover it; and this, not only where, as in *Hodson v. Terrill*, 1 Cr. & M. 797, notice had been given to the stakeholder prior to the event being determined, but also, where, as in *Hastelow v. Jackson*, 8 B. & C. 221, notice was given after the event had come off. * * *

By 8 & 9 Vict. c. 109, § 18, it is enacted "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made."

The present wager, though previously lawful, being thus rendered null and void, it follows that the plaintiff must be entitled to recover his deposit, unless that part of the enactment which provides that, "no suit shall be brought or maintained in any court for recovering any sum of money which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made," affords an answer to the action—a question on which a difference of opinion exists. The question arose in *Varney v. Hickman*, 5 C.B. 271, 17 L.J. (C.P.) 102. The plaintiff and one Isaacs had deposited £20 each with the defendant on the event of a match between two horses. Before the race was run the plaintiff gave notice to the defendant that he declined

the bet and demanded back his deposit. The plaintiff not attending to contest the race, Isaacs was declared the winner, and the amount of the two deposits was handed over to him by the defendant. An action for money had and received having been brought by the plaintiff to recover the amount of his deposit, the statute 8 & 9 Vict. c. 109, § 18, was relied upon for the defence. But it was held by the Court, consisting of Maule, Cresswell, and Williams, JJ., that the part of section 18 relating to deposits was meant to apply only to the nonrecovery by the winner of a sum deposited by the other party to abide the event, and not to the right of the depositor to recover back his deposit, if demanded before the money was paid over. * * *

Thus far we have dealt with the agreement between the parties as a wager. But it was contended before us, on the argument, that this was not a wager, but an agreement entered into for the purpose of trying by experiment a question of science. We think this position altogether untenable. The agreement has all the essential characteristics of a wager. Each party stakes his money on an event to be ascertained, and he in whose favor the event turns out is to take the whole. The object of the plaintiff in offering the challenge he gave was not to ascertain a scientific fact, but to establish his own view in a marked and triumphant manner. To use a common phrase, his object was to back his own opinion. No part of the money staked was to go to the party by whom the experiment was to be made. Lastly, the parties themselves in the written agreement have spoken of it, in terms, as a "wager." We can have no hesitation in holding it to be such.

But even if our view of the agreement were such as was suggested by the defendant's counsel, our decision would be the same, as the principle of the decision of the Court in the cases of *Eltham v. Kingsman*, 1 B. & Ald. 683, and *Hastelow v. Jackson*, 8 B. & C. 221, before cited, would appear to us to apply; according to which we should look upon the defendant merely as the agent of the plaintiff, and as no longer justified in paying over the money when once his authority had been countermanded.

But as we hold the agreement to have been a wager, and consequently that the case is concluded by the authorities we have referred to, it is unnecessary to decide this point.

Our judgment will therefore be for the plaintiff.

Judgment for the plaintiff.

NOTE

In accord: Restatement, Contracts, § 524. Agreements for a prize are distinguished from wagers in *Id.* § 521.

In re GREEN.

District Court of the United States, W.D. Wisconsin, 1877.

7 Biss. 338, Fed. Cas. No. 5751.

HOPKINS, District Judge. Richard Green proved a claim of \$7,715.16 against the bankrupt's estate, and James Norris of \$1,877.23. The assignee moves to expunge Norris' claim and to reduce Green's. The grounds upon which the motion is made are, that the contracts upon which the claims are based were void, first by the statute of frauds, and second, that they were gaming contracts. In the view I have taken of the case, it is only necessary to consider the latter.

There has been considerable testimony taken, and it is in some respects quite contradictory, but I think the conflict is more apparent than real. The proof shows that the part of the claim of Richard Green which is objected to, and all of Norris' claim, arose out of losses on wheat contracts, and it is claimed that no wheat was in fact bought or intended to be bought, but the transactions were only purchases of options—wagers on the price of wheat at a future day, and void under the statute of this state on the subject of betting and gaming. 2 Taylor's Statutes, p. 1881, § 16. If the contract for the purchase and sale of wheat was only colorable and neither party intended to deliver or accept the wheat, but only to pay differences according to the rise and fall of the market price, it would be a gaming contract and void. The form of the contract would not be conclusive. Courts would look into the matter and determine whether the parties really meant to purchase and sell, or whether the transaction was but a mere bet upon the future price of the article. This must be determined by the evidence and circumstances attending the making of the contract and the conduct of the parties in reference to it. The form of the contract would not control or be very material if the transaction itself was illegal. Cave's 7th Ed. Addison on Contracts, page 209; Pickering v. Cease, 8 Chicago Legal News, 340; Kirkpatrick v. Bonsall, 72 Pa. 155; Cassard v. Hinman, 14 N.Y.S.Ct. 107; Grizewood v. Blane, 73 E.C.L. 526; Rourke v. Short, 25 L.J., Q.B. 196; Enderby v. Gilpin, 5 Moore, 571.

The court in 72 Pa. 155, after stating that gambling must not be confounded with mercantile speculation, for that is proper, says, "merchants speculate upon the future price of articles in which they deal, and buy and sell accordingly. They forecast the future and buy and sell in a bona fide way, which is unobjectionable. But" (the court says), "when ventures are made upon the turn of price only, with no bona fide intent to deal in the article, but merely to risk the difference between the rise and fall at a future time, the case is changed. No money or capital is invested in the purchase, but so much only is required as will cover the difference or margin as it is figuratively termed. The bargain represents not a transfer of property but a mere

stake or wager upon its future price. * * * Such transactions are destructive of good morals and fair dealings, and of the best interests of the community."

Against such transactions the statute is aimed, and when they are proven, the parties must in this state be left without remedy. They are unlawful and void as contravening a sound public policy as well as the statute of the state.

Our statute has gone further than the English statutes on this question; ours makes void all agreements and contracts to pay money lost on a wager either to the party winning or to a party who advances it to aid in the enterprise. It is unlawful to bet and equally so to lend money for that purpose. No cause of action arises in favor of a party to an illegal transaction nor will the law lend its aid to enforce any contract which is in conflict with the terms of a statute or a sound public policy or good morals. *Ruckman v. Bryan*, 3 Denio (N.Y.) 340; *Armstrong v. Toler*, 11 Wheat. 258, 6 L.Ed. 468; *Hooker v. Knab*, 26 Wis. 511.

It has also been held that where a stake-holder pays over the money to a winner by the direction of the loser after the bet is decided that it will not prevent a recovery back of him by the loser. *Ruckman v. Pitcher*, 1 N.Y. 392. [It is sometimes so provided by statute.]

Having ascertained the law applicable to such transactions, the question recurs upon the evidence: Did the bankrupt intend or mean to deal in the property, or only pay the difference in price at a future day? If the latter, the contract within the decisions above referred to is void.

It is insisted that both the claimants acted as agents only for the bankrupt in buying, and were not the parties selling, so that, conceding the rule of law to be as above stated, they do not fall within it; that they paid the money to the parties selling to the bankrupt, and although the purchase was made through them as agents of the bankrupt in the usual way of trade, and with knowledge of the illegal nature of the contract, still the bankrupt is liable to them for money paid to third parties for the differences, and that it is in the nature of a claim for money paid at his request, and it is not within the prohibition of the act. Reliance was placed upon the case of *Rosewarne v. Billing*, 109 E.C.L. 316, to sustain this claim. That was an action by a broker to recover of his principal money paid by him for differences on illegal contracts for the purchase of shares of railroad stock made by the broker for the principal. The court say that no action could be maintained to recover the differences on such time contracts, but that when such losses were paid by a party at the request of the defendant, such party could recover. The court hold that such contracts are void, but not illegal, and not being illegal, a party paying at the request of the defendant could recover. But this is not the doctrine of the courts of

this country. They hold them to be illegal; they say they are unlawful as in conflict with sound morals and public policy as well as inhibited by the statute. But this is not all. Our statute is broader than the English statute. The statute of this state declares all contracts, notes or agreements for reimbursing or repaying any money knowingly advanced for any betting or gaming at the time or place of the gaming or betting to be void. These parties, it seems to me, fall within that statute. They advanced the margins at the time to make the gaming contract, and without their aid in that respect the contracts would not have been made. So if these contracts are gaming contracts, they must be held to have advanced the money for margins to make them, and their claim for repayment falls within the prohibited class mentioned in the act. They made the illegal contracts and advanced the money required to give them colorable validity. To take their case out of the statute would be establishing a most flagrant evasion of its provisions.

If the bankrupt had requested a party to pay the difference for him after the loss, and such party had not been an actor, nor aided or assisted in the unlawful dealings out of which the loss grew, there would be some reason in allowing him to recover. He would be an innocent party. *Jessup v. Lutwyche*, 10 Ex. 614. In such a case the consideration would not, as to him be illegal; he would not be chargeable with the act declared to be illegal. But here the statute, as before stated, declares all promises or notes to repay money advanced at the time and place, void. The money here was advanced at the time and place. The contracts of purchase were in the names of these claimants. Their claims are not for money loaned to bankrupt to pay differences, but for money paid by them for differences and for which the bankrupt was not liable. * * *

If transactions like these are illegal I know of no reason why the broker should be favored, or exempted from the usual consequences that attach to other parties aiding or assisting in the commission of unlawful acts. It makes their business quite hazardous, but that grows out of its illegal character. They can refuse to aid in transactions of such a character, and if they would do so, a great deal of that kind of gambling would stop. Parties like this bankrupt living in the country without means or privileges upon the exchange boards could not embark in such gambling business without their aid. Through brokers and commission men they get access to the exchange boards, and by reason of such facilities are enabled to engage in these gaming contracts which generally end like this in ruin and bankruptcy.

To their complaint of hardship it is a sufficient answer that they should not aid and assist parties in transactions condemned both by the law and the principles of sound morality. If they do, they must take the consequences like other transgressors.

Having ascertained that contracts of sale that do not contemplate the actual bona fide delivery of the property by the seller nor the payment by the buyer, but are intended to be settled by paying the difference in price at some future time, are held to be gambling contracts and that the broker stands in no better position than the seller to recover differences, it only remains to examine the testimony and see whether the contracts in this case were such. And upon this point I do not intend to go over the testimony in detail. It is self-evident from the testimony and the condition of the parties that these sales were not bona fide. The bankrupt was not a dealer in grain. He was a country merchant of little or no means; had no money to invest in wheat, that is to pay for wheat, which fact both Richard Green, his brother, and Norris knew. The idea that they bought for him several thousand bushels of wheat with the expectation that he was to pay for it is preposterous. He swears they did not and it is apparent that he could not, and they knew it.

He did not put up any money even for margins, or but a small amount, if any, and made no arrangements with them to do so. Norris says the wheat was bought for him in their firm name. That probably may have been so in the sense that term is used "on change," but that there was a bona fide purchase, with the intention that he would take and pay for such large quantities of wheat I do not believe. The purchase it is claimed was made in the name of Norris & Spencer, the brokers, not the bankrupt's, and that they had a number of contracts and perhaps some warehouse receipts for grain is quite probable, and that they might have considered such contracts as the property of the bankrupt, and charged the wheat to him on their books on receiving his order to buy, so as to make a colorable sale, is not improbable, but that they expected payment for the whole, the testimony completely negatives. The fact that the parties charged the bankrupt with the price of the grain when he ordered it purchased and credited him with the price sold for, when sold, does not prove what the real transaction was. That only represents the form, not the nature of the transaction. It was as well to keep the account in that way when the real intention was to speculate in and pay only the differences as when the sale was of the article itself. The books would show the differences if it was to pay them, and the profit or loss if it was a genuine sale. The books were properly kept in either case, and do not therefore furnish any evidence as to what the contract was.

But it is said that the bankrupt settled with Norris, and gave him notes, and that these notes are good, if the account was not.

That is not so. If there was no legal liability on the part of the bankrupt to pay the claim, the notes given therefor are void for want of consideration. This point is expressly ruled by the Supreme Court in *Hooker v. Knab*, 26 Wis. 511. See also *Steers v. Lashley*, 6 T.R.

61, *supra*. The question whether the bankrupt could have defended on this ground as against a bona fide holder of the notes, does not arise here, as the original parties are alone before the court. The claim of Norris is therefore invalid, and his proof is rejected.

As to Richard Green's claim, the pretended contracts of purchase were made in his name, and not in the name of the bankrupt, and the testimony shows that as between them, all that either ever contemplated was the payment of differences. Under the evidence this is too plain to admit of question or discussion. His claim so far as such differences on grain contracts are included, is disallowed and the proof is rejected. But as there are some other items of account that are proper and should be allowed, it will be referred to the Register to take and admit proof of such other items.

The motion of the assignee to expunge the proof of such parties is therefore granted.

NOTE

Wagers on the future price of a commodity, where the understanding is that no delivery is to be made but that there shall be a mere "settlement of differences," are illegal. Restatement, Contracts, § 523.

"That a contract of sale may be made for the future delivery of produce, or any article of personal property, will not be controverted; and that such a contract, by the agreement of parties, or by the regulations connected with the boards of trade in the country, may be transferable from one to the other, will be conceded; but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover." *Beadies v. McElrath*, 85 Ky. 230, 3 S.W. 152 (1887).

Every mercantile purchase or sale is a "speculation," because it involves a risk as to loss of values. The subject-matter purchased, whether it be land or wheat or corporate shares or marks or dollars, may decrease in its exchange value in other commodities. But a genuine purchase is not a wager, because there is a bargained-for exchange and because the risk assumed is one that previously existed and is merely transferred from the seller. Restatement, Contracts, § 522.

There is a tendency to make certain "hedging" bargains lawful, even though they are clearly within the Law Institute definition. See Patterson, "Hedging and Wagering on Produce Exchanges," 40 Yale L.Jour. 843 (1931). This may, perhaps, be justified on the ground that such bargains are intended to counterbalance an already existing risk, although it involves a different subject-matter that is not being transferred.

ZEMBLER v. FITZGERALD.

Supreme Judicial Court of Massachusetts, 1919. 234 Mass. 236, 125 N.E. 299.

Action by Louis Zembler against William F. Fitzgerald and others. Resulting in judgment for defendants on plaintiff's motion for judgment on the auditor's report. On report to the Supreme Judicial Court. Judgment for defendants.

CARROLL, J. The plaintiff employed the defendants, who are stock brokers, to buy and sell stock on margin. The contract was made February 23, 1916, when the plaintiff deposited \$2,000 and received from the defendants a receipt "subject to marginal conditions hereon," to the effect that the amount received was to be used by the defendants as margin or collateral security to protect them from losses in their transactions with the plaintiff, and that they were authorized to sell all the stocks, bonds or other property held by them for the plaintiff's account, at private or public sale, if the amount paid were insufficient to protect them from loss. In the superior court the case was heard on the auditor's report. Judgment was ordered for the defendants and the case reported to the Supreme Judicial Court.

Between February 23, 1916, and February 16, 1917, the plaintiff ordered the defendants to sell or purchase for his account shares of stock of different corporations. In October of 1917 the defendants, at the plaintiff's request, delivered to F. H. Milliken & Co. 20 shares of Alaska, 20 shares of Isle Royal, 30 shares of Massachusetts Consolidated, 30 shares of North Butte and 20 shares of Utah Consolidated (which were all the securities then held for the plaintiff's account), and received from F. H. Milliken & Co. the amount of the plaintiff's indebtedness. At no other time did the defendants deliver or tender to the plaintiff or his agent the stocks purchased by them in accordance with his order.

When an order was given to buy or sell, the defendants mailed to the plaintiff a bought or sold slip confirming the transaction. On each of the sale slips there was printed "All orders for the purchase or sale of any security are received and executed with the distinct understanding that an actual purchase or sale is contemplated, and that you so understand and agree," and "in the event of your not making delivery of the securities sold, in time for us to comply with the rule for delivery of securities in the exchange in which the same have been sold, we are hereby empowered to make delivery of the same for your account, the said securities to be loaned by us to you for the foregoing purpose and to be returned to us on demand." Upon each of the slips confirming purchases there appeared the printed statement that "all orders for the purchase or sale of any security are received and executed with the distinct understanding that an actual purchase or sale

is contemplated," and the further statement, "It is agreed that all securities from time to time carried in your marginal account, or deposited to protect the same, may be loaned or may be pledged by us, either separately or together with other securities, either for the sum due thereon or for a greater sum, all without further notice to you." On the 1st of each month, beginning April 1, 1916, the defendants sent to the plaintiff a statement of his account, showing purchases and sales, with the prices, amounts, interest charges and balances. The plaintiff admitted that he read all the printed matter appearing upon the confirmation slips and agreed to all the recitals contained therein.

On April 25, 1916, the plaintiff gave an order to sell 40 shares of Butte & Superior. None of this stock was then held by the defendants for his account. The following day he gave an order to buy 40 shares. This was to protect the order to sell, the plaintiff admitting that the stock bought was to replace that sold. November 27, 1916, he ordered the defendants to sell 20 shares of Pittsburgh Coal. They were then carrying for his account 10 shares of this stock. The following day he gave an order to buy 20 shares of Pittsburgh Coal, which according to the finding of the auditor, was to cover the 10 shares ordered to be sold "beyond the amount which the defendants carried for his account." Except in these two instances, whenever the plaintiff gave an order to sell, he understood that the defendants were carrying for his account on margin the shares which he ordered sold. Whenever an order was given to buy he expected that the defendants would carry out his order by the purchase of shares in accordance with the rules of the stock exchange; and whenever an order was given to sell he intended the defendant would make an actual sale. It was found by the auditor that when the plaintiff opened the account he stated he intended to buy and sell on margin.

R. L. c. 99, § 4, provides so far as material, that whoever employs another to buy or sell for his account any securities, intending at the time there shall be no actual purchase or sale, may recover in an action of contract from the person employed any payment made, if the person so employed had reasonable cause to believe that said intention existed; but there shall be no right of action if in accordance with the terms of the employment an actual purchase or sale of the securities or a valid contract therefor is made. By section 6 of this statute, if the person employing another to sell for his account did not own the securities at the time and settlements were made without the completion of the purchase or sale, these facts shall be prima facie evidence within the meaning of section 4 that it was intended no actual sales or purchases should be made and there was reasonable cause to believe said intention existed.

The purchase and sale of stocks by a broker who carries them on margin for his customer are not prohibited by this statute. Unless

the person employing the broker meant there should be no actual sales or purchases and the broker had reasonable cause to believe that such was the case, the statute is not transgressed. *Rice v. Winslow*, 180 Mass. 500, 62 N.E. 1057. It is not the unrevealed intention of the plaintiff that is to be proved, but his purpose as appears by the transaction, the acts accompanying it, the means employed, and by all the other circumstances competent as evidence to show his intention and its disclosure to the defendant. See *Marks v. Metropolitan Stock Exchange*, 181 Mass. 251, 254, 63 N.E. 410; *Anderson v. Metropolitan Stock Exchange*, 191 Mass. 117, 122, 77 N.E. 706. Unless it appears that the plaintiff intended that a real transaction should not take place by the actual purchase and sale of securities, his case, under the statute, fails. The plaintiff did not show he contemplated there should be no actual sales or purchases by the defendants; the auditor expressly finds as a fact upon all the evidence that the plaintiff expected each time he gave an order to buy that the defendants would execute his order and actually purchase the stocks in accordance with the rules of the stock exchange; and whenever he gave an order to sell that the defendants would sell the stock as directed. Such transactions are not wagering ones, and are not forbidden by the statute, R. L. c. 99, §§ 4, 6; *Rice v. Winslow*, supra; *Post v. Leland*, 184 Mass. 601, 604, 605, 69 N.E. 361.

The meaning and the effect of this finding are not diminished by the findings that the defendants had reason to believe the plaintiff did not intend to receive from them or to deliver to them the stocks which he directed them to purchase or to sell; and that between these parties there should be no actual sales or purchases. It is immaterial that between the plaintiff and the defendants there were to be no deliveries. *Rice v. Winslow*, supra; *Post v. Leland*, supra. The statute refers to the plaintiff's intention—that intention relates solely to sales and purchases to be made by the defendants, and if the plaintiff intended that actual sales and purchases were to be executed between the defendants and those from whom they bought and to whom they sold, the statute does not give the plaintiff a remedy.

In each of the two instances when the 40 shares of Butte & Superior and the 20 shares of Pittsburg Coal were ordered to be sold by the plaintiff, on the following day orders were given by him to buy a like amount to take their place. The slips confirming the sales contained the provision that if delivery was not made by the plaintiff the defendants were authorized to make delivery for his account and to loan the securities for this purpose. The plaintiff read these conditions: he gave no notice that they were adverse to his contract and he testified that he agreed to them. This finding is not inconsistent with the finding that he intended actual sales and purchases should be made, and he failed to show that the transaction was a wagering con-

tract, under the statute he cannot recover. See *Chandler v. Prince*, 221 Mass. 495, 109 N.E. 374.

As it was contemplated that there should be actual purchases and sales of the stock, as found by the auditor, it is immaterial that the defendants did not set apart for the plaintiff the specific shares bought for him. See *Davy v. Bangs*, 174 Mass. 238, 54 N.E. 536; *Chase v. Boston*, 180 Mass. 458, 460, 62 N.E. 1059; *Rice v. Winslow*, *supra*. * * *

Judgment for defendants.

SECTION 3.—CHAMPERTY AND MAINTENANCE

HUTLEY v. HUTLEY.

In the Queen's Bench, 1873. L.R. 8 Q.B.Cas. 112.

Declaration that one John Hutley, a brother of defendant and a cousin of plaintiff, had died, leaving extensive landed estates and large personal property; and defendant was the heir at law of the deceased and one of his next of kin; and the deceased died, leaving a will whereby his property real and personal was left to persons other than plaintiff and defendant; and plaintiff believed that such will revoked a former will by which the testator had bequeathed certain property to plaintiff; and in consideration that plaintiff would take the necessary steps to contest the validity of the said will, and would advance certain moneys and obtain evidence for such purpose and instruct an attorney in that behalf, defendant promised that he would pay to plaintiff one half of any personal property and convey to him a moiety of any landed estates he might recover or which might come to him, defendant, by reason of the taking of such proceedings for the setting aside such will; and plaintiff took such steps as aforesaid, and advanced certain moneys and instructed an attorney, and a large sum of money was thereby recovered by defendant, and the said will was declared invalid and defendant became entitled to and obtained possession of large landed estates of the deceased. Allegation of all conditions precedent. Breach that defendant had not paid to the plaintiff half the said personal property or conveyed to him one half of the said real estates.

Demurrer. Joinder in demurrer.

BLACKBURN, J. The question is whether the contract disclosed on this declaration is such as can be enforced in a court of law. Put-

ting out of the question, for the moment, the position of the plaintiff it alleges that the defendant is heir at law and one of the next of kin of a deceased person who had made a will by which the personal and real estate were left away from the defendant, and in consideration that the plaintiff would take the necessary steps to contest the validity of the will, and would advance certain moneys, and obtain evidence, and instruct an attorney, the defendant promised to pay to the plaintiff one half of the personal estate, and convey to him a moiety of the real estate, which the defendant should recover. If that stood without more, it is clear that it is champerty by the English law, which says that a bargain, whereby the one party is to assist the other in recovering property, and is to share in the proceeds of the action, is illegal: *Sprye v. Porter*, 7 E. & B. 58, 81, 26 L.J. (Q.B.) 64, 71, was one of the cases cited, and I entirely agree with what is there said. Lord Campbell, delivering the judgment of the Court says: "Here we have maintenance in its worst aspect, the plaintiff and Rosaz, entire strangers to the property which they say the defendant has a title to, but which is in the possession of another claiming title to it, agree with him that legal proceedings shall be instituted in his name for the recovery of it, and that they will supply him, not with any specified or definite documents or information, but with evidence that should be sufficient to enable him successfully to recover the property. Each of them is to have one fifth of the property when so recovered; and unless the evidence with which they supply him is sufficient for this purpose, they are to receive nothing. They are not to employ the attorney, or to advance money to carry on the litigation; but they are to supply that upon which the event of the suit must depend, evidence; and they are to supply it of such a nature and in such quantity as to secure success. The plaintiff purchases an interest in the property in dispute, bargains for litigation to recover it, and undertakes to maintain the defendant in the suit in a manner of all others the most likely to lead to perjury and to a perversion of justice. Upon principle such an agreement is clearly illegal; and *Stanley v. Jones*, 7 Bing. 369, is an express authority to that effect." Putting aside that the plaintiff there was an absolute stranger, the present agreement goes further than that, for the present plaintiff agrees to instruct an attorney and advance money, and falls short of it so far as that the present plaintiff only agrees to obtain evidence, whereas in *Sprye v. Porter*, 7 E. & B. 58, 26 L.J. (Q.B.) 64, the plaintiff undertakes to supply evidence sufficient to ensure success. But the mischief is as great in the one case as in the other, and both agreements are void as amounting to maintenance and champerty.

But then it is argued that the position of the plaintiff with relation to the defendant and the property in question takes it out of the rule against champerty and maintenance. The declaration alleges that the

plaintiff was a cousin of the deceased, and so a relation of the defendant, who was the deceased's brother; and the plaintiff's counsel cited cases which he said shewed that such relationship prevented an agreement like the present from being illegal. But he produced no authority that blood relationship between the parties made any difference as to champerty. Then the further allegation was relied on, that the plaintiff believed that the will which was to be contested revoked a former will by which the testator had bequeathed certain property to the plaintiff; and it was argued that because the plaintiff thought he had an interest in the litigation by which the one will was to be upset and the other revived, the agreement was not illegal. But the litigation was to be maintained by the plaintiff not solely, as far as he was concerned, for any benefit he might directly or indirectly derive himself from upsetting the will, but the bargain was that he would maintain the action in consideration of the defendant transferring to him half the property which the defendant might become possessed of as the fruits of the litigation. While, therefore, I incline to agree with every word that is said by Lord Abinger and Lord Cranworth in *Findon v. Parker*, 11 M. & W. 675, 679, that an agreement to assist in bringing an action is not made maintenance by the fact that the party turns out to be mistaken in supposing that he had a common interest with the litigant parties in the result of the suit; I can not see that that case is any authority for the present plaintiff. If every word that is said in the declaration about the plaintiff's belief in his interest in the subject matter of the suit were true, that would not justify or make legal the agreement to share in the property to be recovered by the defendant.

There must, therefore, be judgment for the defendant. • • •

QUESTIONS:

Are the following bargains illegal?

1. A bargain between attorney and client that the former will conduct a suit for damages, his compensation to be fifty percent of the amount recovered. Would it make a difference if the attorney pays the expenses of the suit?
2. In consideration of \$500 (either paid or promised), a private detective promises to procure evidence sufficient to obtain a court decree that a will is invalid because of the testator's mental weakness?
3. A advances \$100 to B to enable the latter to maintain a suit to recover land in Alaska; in return therefor B promises to pay A \$10,000 if he recovers the land.
4. A, who has a claim against B for \$500, assigns it to C, a stranger, for the latter's promise of \$50 within a week and \$100 more if the full amount of the claim is collected.

NOTE

See Restatement, Contracts, §§ 540-546, for common law rules as to Champerty and Maintenance.

There is no champerty, unless the compensation for conducting the suit is to be a share of that which is recovered by the judgment. The agreement is not champertous merely because the fee is to be contingent on success and the amount is dependent upon the amount recovered and the judgment is assigned as security for the fee. Restatement, Contracts, § 542; *Blaisdell v. Ahern*, 144 Mass. 393, 11 N.E. 681, 59 Am.Rep. 99 (1887).

Blackstone defined champerty as a "species of maintenance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire*, to divide the land or other matter sued for between them, if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." See *Thompson v. Reynolds*, 73 Ill. 11 (1874), where a lawyer agreed to bring suit, pay all expenses, and to receive one half of whatever should be recovered.

It is generally held that maintenance is an essential part of champerty, and that the agreement is not illegal, unless he who is to be paid by a share of the proceeds of the suit also is to pay the expense of the litigation.

In some states the common law on this topic has been supplanted by statutes.

WILHITE v. ROBERTS.

Court of Appeals of Kentucky, 1836. 4 Dana, 172.

EWING, J. George Roberts, as the survivor of Roberts and Rudd, brought an action of debt against Presley Wilhite, on a penal bond for four hundred dollars, to which the following condition is attached:

"The condition of the above obligation is such that whereas the above named Roberts and Rudd, as my attorneys, have, for me, commenced an action of ejectment in the Nelson Circuit Court. * * * Now, if the said Rudd and Roberts shall succeed in recovering possession of said lot of ground, on the demise aforesaid, then I oblige myself to pay them to the amount of one half of the value of the above mentioned ground." * * *

The defendant * * * filed the following plea: "that said Roberts and Rudd, at the time of the date of said covenant, had commenced, and were prosecuting, a suit in ejectment, on the demise of plaintiff's wife etc. for a lot of ground, and that, contrary to the law of the land against champerty and maintenance, it was illegally agreed between the said Roberts and Rudd on the one part, and the defendant on the other, that the said defendant should give and convey one half of said lot of ground to said Roberts and Rudd, for their services in

prosecuting said suit, and that said obligation was procured, by the said Roberts and Rudd, as a security for the performance by the said defendant of said illegal agreement, and was taken in the form in which it is written, fraudulently, for the purpose of evading the force of the law against champerty and maintenance, and that the same was given without any other consideration; and this he is ready to verify."

To this plea a demurrer was filed by the plaintiff, and joined, and the demurrer sustained by the Court. And the most important question arising on the record, is as to the sufficiency of this plea to bar the plaintiff's action.

It is provided in the second section of the act "to revive and amend the champerty and maintenance law" (Stat.Law, 286) that "it shall not be lawful for any person or persons, to contract, or to undertake to recover, or carry on any suit for the recovery of any such pretended right or title to land as aforesaid, of which adverse possession is held under conflicting title as aforesaid, for or in consideration to have part or profit thereof; and the parties to such contract shall forfeit all right, title, interest or claim in or to the land claimed under such pretended right or title, and all right to maintain any action or suit at law or equity, upon such pretended right or title; and such right, title or claim shall vest in the Commonwealth, and enure to the benefit of the person in possession without office found."

We have no idea, that the bond sued on, contains any stipulation, on its face, in conflict with the provisions of the foregoing section. It is as competent for a litigant to regulate the amount of his attorney's fee, by the value or half the value of the property in contest, as to regulate it by the value, or half the value, of any other piece of property.

Whether he regulates it by the one or the other, or agrees to pay a contingent fee in money, agreed upon by the parties at the time, he is not subject to the denunciations of the statute,—provided he is not to give a part or profit out of the thing in contest.

But champerty is the most odious species of maintenance, and was an offence at common law, and has been denounced by various highly penal statutes, in aid of the common law. It always has been regarded as an offence against the peace of society, the administration of impartial justice, and tending to the encouragement of litigation and the oppression of the weak. And the courts have been uniformly vigilant, where the peace and quietude and justice of the country are regarded, not only in enforcing their penalties, but in declaring void all contracts made in derogation of their provisions. If the contract contained any stipulation on its face in derogation of their provisions, we should find no difficulty in treating it as a nullity, and refusing all aid from the

law and the Courts in enforcing it, or any stipulation in it however lawful. * * *

But there being no stipulation or recital in this bond, evidencing a violation of the statute of champerty, the question occurs, if there be a secret agreement between the parties, whereby the plaintiff was to receive part or profit of the property in contest, and the written contract was based upon it, and fraudulently exacted as a penalty or security to enforce a compliance with its illegal terms, whether this secret contract can be averred and proved, and if so, will such averment and proof invalidate the written contract?

We can perceive no principle of reason or law that inhibits the averment and proof. Though it be a general rule that nothing can be averred and proved against the stipulations of a written contract, this rule does not apply where the contract is illegal, or against the positive prohibitions of a penal statute. Hence in the case of usury, though a contract in writing be fair on its face, or import a consideration or contract perfectly legal, the real transaction may be averred and proved, by parol testimony.

No instrument is so sacred, when tinctured with illegality or fraud, as to raise it above the scrutiny of parol testimony. And indeed it would be highly impolitic that it should; for if this rule should prevail as applicable to illegal and vicious contracts, it would be an easy matter to place all contracts, however illegal or vicious, above the reach of the law.

It would only be necessary for the parties, as is alleged in the case before the Court, to have a secret, illegal understanding, and to introduce into a written contract, fair upon its face, stipulations that are legal, but highly penal, as a means to enforce a compliance with the terms of the secret illegal bargain. The arm of the law is not so short as to permit such evasion. * * *

It follows that the facts alleged in the plea, if true, are a good bar to the plaintiff's action, and the demurrer should have been overruled * * *

ELLIS v. FRAWLEY et al.

Supreme Court of Wisconsin, 1917. 165 Wis. 381, 161 N.W. 364.

Action by L. Olson Ellis against William H. Frawley and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with direction to dismiss the complaint on the merits.

Action for an accounting and settlement of the affairs of a joint business venture or partnership. The plaintiff is a lawyer residing and practicing at Black River Falls; the defendants are lawyers residing

and practicing at Eau Claire. In October, 1911, a destructive flood occurred in the Black river by which much private and public property was destroyed in the city of Black River Falls. It was claimed generally that the flood resulted from the negligence of the La Crosse Water Power Company in the operation of its dam across said river. The complaint charged that in April, 1912, the plaintiff and defendants made a partnership agreement by which they were to act jointly as attorneys in prosecuting claims for all persons who might employ them to sue for and collect their claims against the power company arising out of said flood, and that in pursuance of that agreement the partnership brought suits for a large number of such claimants and performed professional services in such suits and finally effected a settlement of such claims for a large sum of money, and that the defendants received in payment for such partnership services more than \$20,000, of which one-half belongs to the plaintiff; but that said defendants refuse to pay the plaintiff any part thereof. The defendants denied the existence of any such partnership. The action was tried by the court without a jury, and the court found that no partnership was formed, but "that plaintiff at the request of the defendants rendered services to the defendants in inducing flood sufferers to retain the defendants to prosecute their claims and in procuring assignments of such claims, that he continued to render services to the defendants during the years 1912 and 1913 with reference to the losses sustained and claims made by such flood sufferers which defendants were seeking to recover through actions brought by them acting as attorneys for such flood sufferers"; also, "that said services rendered by the plaintiff to the defendants at their special instance and request are reasonably worth the sum of \$975." There is no bill of exceptions. The defendants appeal from judgment against them in accordance with the findings.

WINSLOW, C. J. (after stating the facts as above). There being no bill of exceptions, the only inquiry presented is whether, upon the facts found by the trial court, the judgment is right. Those facts are: A firm of lawyers requested another lawyer to go around among the flood sufferers and persuade them to employ the firm to prosecute their damage claims and to execute assignments of their claims to one person for the purpose of facilitating the litigation; the second lawyer undertook the task, was successful in his work, and has recovered the value thereof.

The judgment is right unless the arrangement between the parties was against public policy; if it was, the judgment is wrong and must be reversed, even though the objection be now made for the first time. *Jacobson v. Bentzler*, 127 Wis. 566, 107 N.W. 7, 4 L.R.A., N.S., 1151, 115 Am.St.Rep. 1052, 7 Ann.Cas. 633. The court will not allow itself to be used as the means of carrying into effect a contract which

is essentially contrary to morality or to public policy, even though no objection be made by the parties. *Wight v. Rindskopf*, 43 Wis. 344. It seems that the arrangement was clearly against public policy.

The mere intermeddler, the officious stirrer up of litigation in which he has no interest save the possibility of a commission or a fee, has been condemned by courts and legislators since the earliest times. This is so because the practice of the law is not a trade but a ministry.

• • •

It is stated in respondent's brief that the claims secured by the aid of the plaintiff were all assigned to one person, that one action was commenced thereon, but that before trial a settlement was made for a sum somewhere between \$50,000 and \$60,000, out of which the defendants, by virtue of their contracts with the claimants, retained 40 per cent, or about \$22,000. These facts are not in evidence, but they may properly be assumed as true as against the party who asserts them. This then was the scheme to the consummation of which the plaintiff agreed to contribute, i. e., a scheme to get hold of all the claims possible, and in case of success 40 per cent of the proceeds was to go to the lawyers and 60 per cent (probably after payment of costs) to the people whose property had been swept away.

Attorneys are entitled to good pay, for their work is hard; but they are not entitled to fly the black flag of piracy. Such contracts as are here in question tend to make the lawyer forget his high duty as a minister of Justice and to convert him into a mere grubber for money in the muck-heaps of the world. They also tend to make the name of lawyer a proverb and a byword among laymen.

A number of courts have condemned contracts of this nature. 2 Thornton on Attorneys, § 436; *Gammons v. Johnson*, 76 Minn. 76, 78 N.W. 1037; *Holland v. Sheehan*, 108 Minn. 1, 122 N.W. 1, 23 L.R.A.,N.S., 510, 17 Ann.Cas. 687; *Ingersoll v. Coal Co.*, 117 Tenn. 263, 98 S.W. 179, 9 L.R.A.,N.S., 282, 119 Am.St.Rep. 1003, 10 Ann.Cas. 829; *Meguire v. Corwine*, 101 U.S. 108, 25 L.Ed. 899; *Ford v. Munroe* (Tex.Civ.App.) 144 S.W. 349.

In most of the cases cited the party soliciting the business was a layman, but it is not perceived how this fact affects the principle involved. If it is against public policy for a layman to foment litigation and make a claim bureau of himself under contract with a law firm, it would seem to be fully as much so for a lawyer to do the same thing.

The contract being against public policy, the courts will affirmatively assist neither party, but will leave them where it finds them.

• • •

Reversed with direction to dismiss the complaint.

SECTION 4.—AGREEMENTS TO STIFLE A PROSECUTION

JONES v. RICE.

Supreme Judicial Court of Massachusetts, 1837. 18 Pick. 440, 29 Am. Dec. 612.

Assumpsit on a promissory note, dated January 1st, 1835, made by the defendant to the plaintiff, for \$147.

At the trial, before Shaw, C.J., it appeared that on the night of December 31st, 1834, a ball was given at the house of Joel Jones, in Sudbury; that an attempt was made by the defendant and others, to interrupt the ball by violence; that a riot ensued, in which some injury was done to J. Jones and others, assembled at the ball; that a complaint was filed before a justice of the peace and a warrant issued by him against some of the rioters; that the persons assembled at the ball chose a committee to report on the terms which should be proposed to the accused, for a settlement of the difficulty; that the committee reported that the accused should pay the sum of \$184; that of this amount the sum of \$40 was for damages sustained by three individuals, \$10 for the services of the officer, and \$2 for the services of the magistrate, and that the balance was for the purpose of stopping that and other prosecutions; that it was thereupon voted by those assembled at the ball, that if the accused would pay the sum proposed or give security for it, the other party would do nothing more about the matter; that the accused agreed to the terms and paid about \$40, and the defendant, at their request, gave the note in suit for the balance; that J. Jones and others, including the plaintiff, then signed a receipt "in full for all damages sustained by the ball party assembled, &c. and all other demands of any name or nature of said ball party"; and that in consequence of this arrangement the officer made no return of the warrant, and no further proceedings were had upon the complaint.

The Chief Justice was of opinion, that the plaintiff was not entitled to recover, because the evidence proved a want of consideration or a bad consideration for the note; and the plaintiff consented to a non-suit, subject to the opinion of the whole court.

PUTNAM, J., delivered the opinion of the court. The facts reported disclose, that divers persons committed an aggravated riot and assault upon the plaintiff and others, and that the note was given partly for the damages and expenses which the plaintiff and others had sustained, and partly for their agreement no further to prosecute for the offense against the public. The sum of \$52 was given for the damages and expenses, and \$132 for the compounding of the misdemeanor;

part was paid in money, and the balance was secured by the note now sued.

Cases have been cited from the English authorities which sustain the distinction between considerations arising from the compounding of felonies, which is admitted to be illegal, and the compounding of misdemeanors, which is alleged to be lawful; but it appears that there is a conflict in the decisions upon this matter. In *Drage v. Iberson*, 2 Esp. 643, Lord Kenyon held, that the consideration for settling a misdemeanor was good in law. And the case of *Fallowes v. Taylor*, 7 Term. R. 745, proceeds upon the same principle. It was there held by Lord Kenyon and the rest of the court, that a bond given to the plaintiff (who was clerk of the quarter sessions and who was directed to prosecute the defendant for a public nuisance), conditioned to remove the nuisance, was valid, notwithstanding it was taken by the plaintiff for his own use, he agreeing not to prosecute for the nuisance.

We do not think, that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. 1 Russ. Crimes, 210; *Edgcombe v. Rodd*, 5 East. 301.

The power to stop prosecutions is vested in the law officers of the commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort for his own use, money which properly should be levied as a fine upon the criminal party for the use of the commonwealth. The case at bar furnishes a strong illustration of the illegality of such a proceeding. The plaintiff claimed and got the note to secure to his own use four times as much as in his own estimation his individual damage amounted to. Now the sum thus secured might be more or less than the rioters would have been fined; but whether more or less is altogether immaterial; for no part of it belonged to the party. He might settle for his own damage from the riot; but it would enable the party to barter away the public right for his own emolument, if we were to hold that the consideration of this note was lawful.

We are all of opinion, that the nonsuit must stand.

NOTE

In accord is Restatement, Contracts, § 548. But a prosecuting officer may agree to dismiss a prosecution in consideration of the accused giving testimony against other offenders. *Nickelson v. Wilson*, 60 N.Y. 362 (1875); Restatement, Contracts, § 549.

In *Kerridge v. Simmonds* (Australia) 4 C.L.R. 253 (1906), after reviewing certain English cases the court held "that the law allows the compromise of a prosecution for oral defamation for which the injured party can sue and recover damages. Here the plaintiff was entitled to sue for damages for the oral slander. Can it then make any difference that she had laid a complaint for the slander upon the same day on which the agreement was signed? On that complaint the defendant might have been punished by a fine, or committed for trial, but the injury complained of was a purely personal injury. I can draw no distinction between a case of defamation and a case of common assault from the point of view of public concern. For these reasons I am of opinion that it is not unlawful for a person defamed, or who has sustained purely personal injury, to withdraw a prosecution already instituted for such an offence, or to agree not to institute such a prosecution. Where a person is entitled to recover pecuniary damages the suggestion that there is a social duty incumbent upon him to prosecute is untenable. The law allows him either to prosecute or to sue for damages, and I can see nothing to prevent him from agreeing to receive an indemnity for the personal injury he has sustained, leaving the representatives of the public to prosecute if they think fit. If, as in some cases, he is the only person entitled to institute the prosecution, then a fortiori it is a matter of private, and not of public, concern."

**BOARD OF EDUCATION OF DISTRICT OF NORTHFORK v.
ANGEL et al.**

Supreme Court of Appeals of West Virginia, 1915.
75 W.Va. 747, 84 S.E. 747, L.R.A.1915E, 139.

Action by the Board of Education of the District of Northfork against C. S. Angel and others. Judgment for plaintiff, and defendants bring error. Affirmed.

MILLER, J. Defendants, Angel, Toney, Kaufman and Strudwick, seek reversal of a judgment against them on a note dated October 30, 1903, made by one Roberts, payable sixty days after date, to one E. T. Sprinkle, Sheriff of McDowell County, for nine hundred and twenty one dollars and five cents, negotiable and payable at the McDowell County Bank, Welch, West Virginia, and endorsed by them and also by their codefendants, Tipton, Roberts, Ballard and Botsford.

Besides, the general issue and the plea of the statute of limitations of ten years, plaintiffs in error interposed as defenses, by special plea number 2, "that if they signed the note sued upon as endorsers thereon, the said note was given and their endorsements obtained for an illegal consideration, to-wit: to suppress a criminal prosecution for a felony begun and put on foot against the maker of said note, F. G. Roberts, and this they are ready to verify." • • •

The real and only question of merit presented by plea, and by an instruction given by the court in lieu of instruction number 1, requested by plaintiff, and defendants' instructions numbered 2 and 3, rejected, is whether, as alleged in the plea, and as assumed by defendants' two instructions rejected, said note and the endorsements thereon were given or procured in consideration of the suppression of a criminal prosecution for a felony begun and put on foot against said Roberts, as alleged in said plea, or to stop such intended prosecution, as assumed in said instructions.

The evidence is that the note was made by Roberts, who had been secretary of said board of education, to cover the amount of certain orders drawn by him on said sheriff, as treasurer ex officio of the school funds of said district, and on which he had forged the name of the president, and had thereby fraudulently procured and embezzled money and funds belonging to said school district, and that at the time he executed said note with the endorsers he had been arrested and was then in the custody of a constable on a warrant sworn out by the prosecuting attorney, and who also represented the said board of education in the taking of said note.

It is well settled law that, though criminal proceedings have been begun and be pending against the wrongdoer for the crime, one whose money or property has been embezzled, or fraudulently procured, may contract with such wrongdoer for re-payment or satisfaction of the loss, and take security therefor, without invalidating such contract, unless there be included therein and as part consideration therefor some promise or agreement, express or implied, that such prosecution shall be suppressed, stifled or stayed. * * *

On the other hand, it is equally well settled, that if such an unlawful promise or agreement constitutes any part of the consideration for the promise or agreement of the wrongdoer or his sureties, the contract is wholly void and will not be enforced by the courts. All such contracts are deemed contrary to good morals and public policy, and as to which the courts will turn a deaf ear, when their enforcement is sought therein. And this rule of law as between the parties thereto is applicable to the making and enforcement of negotiable instruments. * * *

The evidence is clear and convincing that as between Roberts, the offender, and maker of the note, and the board of education, and the sheriff, the nominal payee in the note, not a word of communication was had. No promise or agreement, written or verbal, was made between them, directly at least, in regard to the pending prosecution, or what was to become of it, on execution and endorsement of the note. The prosecuting attorney in charge of the prosecution, and representing the board of education, admits a conversation with the members of the board who were together conferring on the subject on the day the note was executed and endorsed, in which they indicated to him that

so far as they were concerned, if Roberts would secure them by a note with good security, they would not insist on his being prosecuted. This conference and communication, however, was wholly private, and between the board and prosecutor, and was not communicated in any way, so far as the record shows, to maker or endorsers of the note, and the prosecuting attorney swears positively that he at no time made any promises to Roberts or his endorsers that Roberts would not be prosecuted. He said on cross-examination that his recollection was that Roberts wanted to pay the board the money he admitted he had taken, and wanted these defendants as his friends to endorse the note as an accommodation to him, and he was satisfied that no promise not to prosecute Roberts was made to maker or endorsers, or either of them, as part consideration for the execution of the note by them. Plaintiffs in error, Angel, Toney and Kaufman, the only defendants who gave testimony on the trial, do not swear that any promises not to prosecute Roberts were made to them; and all they did say on the subject was that they endorsed the note to keep Roberts out of jail. Neither of them swore that the prosecuting attorney, or the board of education, or the sheriff who was not present, made any promise not to prosecute Roberts. It is conceded, however, that immediately after the note was made and endorsed Roberts was released from custody, and contrary to his representations that he proposed to go to work and pay the note to the relief and discharge of his sureties, he left the State the same night by a freight train, and never returned. This fact is referred to by plaintiff's counsel as corroborative of the fact that no promise not to prosecute him was made as part consideration for the note. Certainly there is no evidence of an express promise. That is expressly and positively denied. True such a promise and agreement may be inferred from the facts relating to the transaction; but such inference is one of fact for the jury, and not of law for the court, and as their verdict was for plaintiff, we must assume that they decided the issue in favor of plaintiff, and the validity of the note. • • •

We are of opinion to affirm the judgment.

NOTE

One may threaten to prosecute an embezzler as a means of inducing him to make restitution of the stolen money without implying a promise to conceal his offense or not to give testimony against him if he is prosecuted by the state; but a jury may be justified in finding that such a promise is implied, especially if one uses the threat of prosecution as a means of extorting a settlement from the embezzler's parents or others near to him. The use of such a threat as a means of extorting money not actually payable is blackmail; and an express or implied promise to cover up a felony for compensation is the crime of compounding a felony.

Bargains to Procure Evidence.—A promise to pay a contingent fee to one who will procure or will give certain testimony is generally illegal. See Restatement, Contracts, §§ 552, 553.

A bargain to shadow a party to a divorce suit and to report the facts observed is not illegal, if payment is not contingent on success, and there is no agreement to secure specific evidence. *Hare v. McGue*, 178 Cal. 740, 174 P. 663 (1918).

SECTION 5.—AGREEMENTS OUSTING THE COURTS OF JURISDICTION

(Arbitration Agreements)

NASHUA RIVER PAPER CO. v. HAMMERMILL PAPER CO.

Supreme Judicial Court of Massachusetts, 1916.
223 Mass. 8, 111 N.E. 678, L.R.A.1916D, 691.

Action by the Nashua River Paper Company against the Hammermill Paper Company. Demurrers to defendant's answer in abatement and answer in bar overruled, and case reported. Demurrers sustained, and case to stand on answer to the merits.

RUGG, C. J. The question is whether, in a contract between a manufacturer and its sales agent, a provision is valid to the effect that "no action at law, equity or chancery shall be instituted or maintained by the corporation in any court of any state of the United States or in any Circuit or District Court of the courts of the United States against the company other than in the courts of the common pleas of the state of Pennsylvania." This stipulation occurs in an ordinary commercial contract between a corporation domiciled in this commonwealth and another corporation incorporated under the laws of Pennsylvania.

It becomes necessary to review some of the cases. *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, was an action upon a policy of insurance, one stipulation of which, incorporated in the contract by reference to the by-laws of the company, was in substance that any "action shall be brought at a proper court in the county of Essex." It was held that this stipulation was not binding, and that an action could be brought in any county where the venue properly might be laid. The general principle on which this decision was made to rest was that it was not within the province of parties to enter into an agreement concerning the remedy for a breach of contract, which is created and regulated by law. Considerations of public policy were adverted to as supporting the conclusion, but not given decisive weight. Chief Justice Shaw, in concluding the discussion, said: "The greatest inconvenience would be in requiring courts and juries to apply different rules of law to different cases, in the conduct of suits, in matters relating merely to the

remedy, according to the stipulations of parties in framing and diversifying their contracts in regard to remedies." * * *

So far as we are aware, the current of authority (with the exceptions presently to be noted) is unbroken in support of the principle laid down in *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, although that principle is followed by compulsion of authority and under protest by Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.* (D.C.) 222 F. 1006. There are two of our own cases where the principle was not applied and which appear to be exceptions to it. * * *

In *Mittenthal v. Mascagni*, 183 Mass. 19, 66 N.E. 425, 60 L.R.A. 812, 97 Am.St.Rep. 404, the parties were both nonresidents. The action was on a contract made in Florence, Italy, where the defendant, a subject of the king of Italy, had his home and where the plaintiffs, citizens of New York, elected a domicile by a provision of the contract. It related to a concert tour through the various states of this country, and was partly to be performed in Florence, and contained the provision that the courts of Florence, Italy, should have exclusive jurisdiction of any difference between the parties, except that the defendant reserved a right of action in New York for a payment of his recompense due under the contract. It was held that under the circumstances of hurried travel through many different jurisdictions, it was reasonable that the parties should fix upon the jurisdiction of the domicile of the defendant as the one where disputes should be adjusted. As both the parties were nonresidents, they had no standing in the courts of this state as matter of strict right, but only as matter of comity. *National Telephone Mfg. Co. v. Du Bois*, 165 Mass. 117, 42 N.E. 510, 30 L.R.A. 628, 52 Am.St.Rep. 503. It, therefore, was regarded as appropriate to yield to the terms of a contract between the parties having such obvious foundation in convenience and reason, although the court well might have declined to exercise any jurisdiction of the case on the ground that the parties were aliens. *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174, was referred to in the opinion and not treated as overruled. In this connection *Palmer v. Lavers*, 218 Mass. 286, 291, 105 N.E. 1000, 1002, may be adverted to, where it was said that: "Where one of two parties to a possible litigation, in order to obtain a release from what is equivalent to an attachment, agrees that the judgment of a court of first instance shall be final, that agreement does not come within that principle [that is, the principle of *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray, 174], and that it is an agreement which is binding and will be enforced."

That decision has no relevancy to the question now presented. Nor is the question here raised, whether the parties may by contract provide that their respective rights growing out of the agreement shall be determined according to the law of a particular jurisdiction. See

Brandeis v. Atkins, 204 Mass. 471, 476, 90 N.E. 861, 26 L.R.A.,N.S., 230; Pritchard v. Norton, 106 U.S. 124, 136, 1 S.Ct. 102, 27 L.Ed. 104; Greer v. Poole, 5 Q.B.D. 272, 274.

The Daley and Mittenthal Cases, as to the points adjudicated, while not extending the doctrine of the Nute Case, do not overrule it and are not inconsistent with it. All three of these cases may be treated as stating the law applicable to the several states of facts presented to the court. The Nute Case lays down the general principle. The other two cases stand as sound upon their several states of facts. To extend them to the present case involves overruling the Nute Case. That case, as has been pointed out, states a general principle which has been adopted and prevails in all federal courts by reason of the binding decisions of the United States Supreme Court, in *Home Ins. Co. v. Morse*, 20 Wall. 445, 22 L.Ed. 365; and *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L.Ed. 148. The same rule prevails generally in all states where the question has arisen. It relates to a matter as to which uniformity of decision and harmony of law among the several jurisdictions of this country is desirable. It would be unfortunate if contracts touching a subject of general commercial interest and which may be broadly operative as to jurisdiction, should be held valid in one state and invalid in all others. All these circumstances bring us to the conclusion that the clause in the contract here in question is unenforceable and that, therefore, the action can be maintained in the courts of this commonwealth.

The plaintiff's demurrers to the defendant's answer in abatement and to the part of the answer in bar setting up the same matter must be sustained. The case is to stand for disposition upon the issues raised by the answer to the merits. So ordered. • • •

MEACHAM v. JAMESTOWN, F. & C. R. CO.

Court of Appeals of New York, 1914.
211 N.Y. 346, 105 N.E. 653, Ann.Cas.1915C, 851.

Action by Harry W. Meacham against the Jamestown, Franklin & Clearfield Railroad Company. From an order of the Appellate Division of the Supreme Court, First Department (151 App.Div. 941, 136 N.Y.S. 1141), affirming a judgment dismissing the complaint entered upon the decision of the trial justice before whom the issues were severed under section 973 of the Code, plaintiff appeals. Reversed, and new trial ordered.

This action was brought by the plaintiff to recover of defendant the sum of \$30,079.29, claimed to be due plaintiff as assignee for certain work performed, and materials furnished, by the Thomas McNally

Company, a corporation organized under and by virtue of the laws of the state of Pennsylvania.

The Franklin & Clearfield Railroad Company was a corporation organized under the laws of the state of Pennsylvania, and, together with other railroad corporations, was consolidated under the name of the present defendant, respondent, a corporation organized under the laws of Pennsylvania, which assumed all of the debts, liabilities, and obligations of the Franklin & Clearfield Railroad Company, including the claim in suit.

In August, 1905, the Franklin & Clearfield Railroad Company and the Thomas McNally Company made a contract in writing for the construction of a section of the Franklin & Clearfield Company's road in the state of Pennsylvania, and thereafter, as alleged by the plaintiff, the Thomas McNally Company performed work and furnished materials under said contract.

The contract in question was executed on behalf of the railroad company by its chief engineer, and on the part of the McNally Company by its president and general manager. It was conceded in the case that the contract was executed in the state of Ohio.

The contract contained the following provisions: "In order to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, it is mutually understood and agreed that the said chief engineer shall be and hereby is made arbitrator to decide all matters in dispute arising or growing out of this contract between them, and the decision of said chief engineer on any point or matter touching this contract shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives all right of action, suit or suits or other remedy in law or otherwise under this contract or arising out of the same to enforce any claim except as the same shall have been determined by said arbitrator."

The trial justice before whom the issue was submitted determined as matter of law that submission to the arbitrator named in the contract, the chief engineer, and an award by him was and is a valid condition precedent to the plaintiff's right to sue.

The chief engineer of the railroad company at the time of the making of the contract subsequently died and another engineer assumed the duties of his office. The trial justice held as matter of law that the person who held the office of chief engineer at the time the submission should have been made was the proper person to whom such submission should have been made, and such submission to and award by him, or offer and tender of such submission on the part of the plaintiff, was and is a valid condition precedent to plaintiff's right to sue and dismissed the plaintiff's complaint.

The judgment entered was unanimously affirmed by the Appellate Division, and plaintiff appealed to this court.

[The court, in an opinion by Hogan, J., reversed the judgment of the Appellate Division.]

CARDOZO, J. (concurring). An agreement that all differences arising under a contract shall be submitted to arbitration relates to the law of remedies, and the law that governs remedies is the law of the forum. In applying this rule, regard must be had, not so much to the form of the agreement, as to its substance. If an agreement that a foreign court shall have exclusive jurisdiction is to be condemned (*Benson v. Eastern B. & L. Ass'n*, 174 N.Y. 83, 66 N.E. 627; *Nute v. Ins. Co.*, 6 Gray [Mass.] 174, 180; *Slocum v. Western Assur. Co.* [D.C.] 42 F. 235; *Gough v. Hamburg Am. Co.* [D.C.] 158 F. 174), it is not saved by a declaration that resort to the foreign court shall be deemed a condition precedent to the accrual of a cause of action. A rule would not long survive if it were subject to be avoided by so facile a device. Such a contract, whatever form it may assume, affects in its operation the remedy alone. When resort is had to the foreign tribunal for the purpose of determining whether certain things do or do not constitute a breach, the cause of action must in the nature of things be complete before jurisdiction is invoked, and cannot be postponed by the declaration that it shall not be deemed to have matured until after judgment has been rendered.

This must be so whether the tribunal is a court or a board of arbitrators. Indeed, the considerations adverse to the validity of the contract are more potent in the latter circumstances, for in the one case we yield to regular and duly organized agencies of the state and in the other to informal and in a sense irregular tribunals. *Mittenthal v. Mascagni*, 183 Mass. 19, 23, 66 N.E. 425, 60 L.R.A. 812, 97 Am.St.Rep. 404. In each case, however, the fundamental purpose of the contract is the same—to submit the rights and wrongs of litigants to the arbitrament of foreign judges to the exclusion of our own. Whether such a contract is always invalid where the tribunal is a foreign court we do not need to determine. There may conceivably be exceptional circumstances where resort to the courts of another state is so obviously convenient and reasonable as to justify our own courts in yielding to the agreement of the parties and declining jurisdiction. *Mittenthal v. Mascagni*, *supra*. If any exceptions to the general rule are to be admitted, we ought not to extend them to a contract where the exclusive jurisdiction has been bestowed, not on the regular courts of another sovereignty, but on private arbitrators. Whether the attempt to bring about this result takes the form of a condition precedent or a covenant it is equally ineffective. • • •

Building contracts are made in New York to be performed all over the United States. If the judgment of the court below is to stand,

jurisdiction over controversies arising under such contracts may be withdrawn from our courts and the litigation remitted to arbitrators in distant states. The presence of the parties here, the ownership of property in this jurisdiction, these and other circumstances may make resort to our courts essential to the attainment of justice. If jurisdiction is to be ousted by contract, we must submit to the failure of justice that may result from these and like causes. It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary. * * * The jurisdiction of our courts is established by law, and is not to be diminished, any more than it is to be increased, by the convention of the parties.

I concur with Judge HOGAN and vote for reversal.

NOTE

Arbitration agreements classified, with respect to their validity.

I. Agreement to submit to arbitration *an already existing controversy*. This is never illegal; but, in the absence of statute, it is seldom effectively enforced. Damages for its breach are too uncertain for accurate measurement; and specific enforcement was thought too difficult by courts of equity.

II. Agreement to submit *future controversies* to arbitration, if they arise. These may be (1) general in scope, wholly excluding an appeal to the courts, held illegal at common law; or (2) limited to some one specific issue (or a very few such issues), especially issues of fact such as amount of injury or value of certain property, these being not illegal, but difficult of effective enforcement by action.

III. Agreement that arbitration shall be a *condition precedent* to a right of action. Such an agreement as this seems to be illegal at common law if it is one that falls also within class II, subdivision (1). A valid agreement within class III is effective in barring an action on the issue that it was agreed to arbitrate. An agreement to arbitrate, that does not make an award a condition precedent, is called collateral and independent; and it is not a bar. See Restatement, Contracts, §§ 550, 551; *Hamilton v. Home Ins. Co.*, 137 U.S. 370, 11 S.Ct. 133, 34 L.Ed. 708 (1890), ante, p. 505.

Statutes have been passed by Congress and by the legislatures of many States validating general arbitration agreements that comply with the requirements of the statute and directing a stay of court proceedings until arbitration has been carried out as agreed. The terms of the agreement in the case above may not be such as to be validated by a particular statute.

New York Arbitration Statute.—In *Herman Berkovitz v. Arbib & Houlberg*, 130 N.E. 288 (1921), Cardozo, J., said:

"Section 2 of the statute (Laws 1920, c. 275; Consol.Laws, c. 72) declares a new public policy, and abrogates an ancient rule. 'A pro-

vision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title 8 of chapter 17 of the Code of Civil Procedure, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.' Arbitration Law, § 2. * * *

"We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the state. The ancient rule, with its exceptions and refinements, was criticized by many judges as anomalous and unjust. *President, etc., of Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N.Y. 250, at page 258 (1872); *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 399 (1875); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.* (D.C.) 222 F. 1006 (1915), and cases there cited. It was followed with frequent protest in deference to early precedents. Its hold even upon the common law was hesitating and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of the Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if they had abandoned some early precedents as at times they seemed inclined to do. They might have whittled it down to nothing, as was done indeed in England, by distinctions between promises that are collateral and those that are conditions. *Scott v. Avery*, 5 H.L.Cas. 811 (1856); *London Tramways Co. v. Bailey*, L.R. 3 Q.B.D. 217, 221 (1877); *Spackman v. Plumstead District Board of Works*, L.R. 10 App.Cas. 229 (1885); *Trainor v. Phoenix Assur. Co.*, 65 L.T.Rep. 825 (1892). No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. Not different is the effect of like changes when wrought by legislation. *Alexander v. Bennett*, 60 N.Y. 204, 206, 207 (1875)."

GRADY v. HOME FIRE & MARINE INS. Co.

Supreme Court of Rhode Island, 1906. 27 R.I. 435, 63 A. 173, 4 L.R.A., N.S., 288.

Action by Daniel F. Grady against the Home Fire & Marine Insurance Company. Verdict was rendered in favor of plaintiff, and defendant petitioned for a new trial. Granted.

JOHNSON, J. The action was upon a policy of fire insurance which contained the following provisions: * * * "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen

shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. * * * No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The property covered by this policy having been destroyed by fire, the parties entered into an agreement of submission to arbitration, in accordance with the terms of the policy. The arbitrators selected appointed an umpire and proceeded with the appraisal. An award in writing, dated April 23, 1902, was signed by the two arbitrators and the umpire. Subsequently one of the arbitrators erased his name and appended the following memorandum: "Signature erased a/c disagreement 5—27—'02." The defendant offered to abide by the award, although admitting its insufficiency; and, its offer in that regard being rejected, demanded a new appraisal and named its arbitrator. The plaintiff refused to submit to a new appraisal, and subsequently this action was commenced. * * *

It is well settled, both in this country and in England, that a stipulation in a contract providing that all controversies and disputes which may subsequently arise between the parties shall be settled by arbitration is invalid because its effect would be to oust the courts of their jurisdiction. It is, however, equally well settled that if the arbitration agreement relates only to some preliminary matter, such as the ascertainment and determination of the amount of damages to be recovered, and does not apply to the whole question of liability, such an agreement providing a reasonable and definite method for choosing arbitrators is valid and enforceable. * * *

Furthermore, the policy in this case was in the standard form prescribed by chapter 183, p. 578 of the General Laws 1896; and, even if the validity of such a stipulation were less strongly supported by the authorities, it could not well be argued that a contract made in the express terms required by the statute was void as against public policy. A provision in a contract that preliminary matters about which differences may arise between the parties shall be determined by arbitration

may go to the extent of making such determination a condition precedent to a right of action upon the contract, or may be simply a collateral and independent agreement which will not be a bar to an action on the principal contract, and would be a basis for a separate action in case of breach. * * *

In the contract before us the parties have stipulated that "the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required," and also that "no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements." These provisions clearly constitute [an award by the appraisers] a condition precedent to the right of action. * * *

The plaintiff argues that, in accordance with the general rule, the agreement is revocable at any time before an award is made. That, however, does not help the plaintiff. A revocation of the authority of the arbitrators would only stop the proceedings under that arbitration. The provision of the policy requiring an award as a condition precedent to a right of action would still be in force. The revocation, therefore, would only make it necessary to begin the arbitration anew. An award by arbitration having been made by the policy a condition precedent to the right of action, it was incumbent on the plaintiff to allege and prove such award; or, if the award was invalid, then to allege and prove either that the amount of loss had been determined by other arbitrators selected according to the provisions of the policy, or that for some valid reason such determination had become unnecessary or impossible.

The request that a verdict be directed for the defendant should have been granted. And when the case was given to the jury the instructions requested should have been given.

Defendant's exceptions sustained. Petition for new trial granted. Case remitted to the superior court, with direction to enter judgment for the defendant.

LIVINGSTON v. RALLI.

In the Queen's Bench, 1855. 5 El. & Bl. 132.

Count that, by a contract, plaintiff agreed to buy of defendant, and defendant to sell to plaintiff, a cargo of wheat, on certain terms mentioned in the contract, "and that, should any difference arise as to that contract, the same should be left to arbitration in London, in the usual manner; that is to say the arbitration of two London corn factors,

one to be chosen by plaintiff and the other by defendant, or an umpire to be chosen by such arbitrators in case of difference." Averment that the cargo of wheat arrived, and was accepted, and the price paid by plaintiff to defendant according to the agreement, and that a difference thereupon and before this suit arose between plaintiff and defendant as to the said contract, which difference ought to have been left to arbitration in manner so agreed as aforesaid. General averment of performance by plaintiff and of lapse of reasonable time for appointing an arbitrator. Breach: that defendant refused to concur with plaintiff in referring the said difference, or procuring it to be disposed of by arbitration in the usual manner, and wrongfully hindered and prevented its being so left or disposed of. * * *

LORD CAMPBELL, C. J. I have a very great respect for the doubts of Lord Eldon; and he seems, in *Tattersall v. Groote*, 2 B. & P. 131, to doubt much whether such a contract as the present was not altogether nugatory; but I cannot bring myself to doubt that on principle, an action lies on it. There is a sufficient consideration to support any promise; and there is an express promise to refer any disputes that may arise. Why should not such a promise be binding, and one for the breach of which an action would lie? Can it be said that such an agreement is void as being immoral, or as contrary to public policy? It seems to me, on the contrary, that it is a very judicious and proper arrangement, and that it would be a strange restriction on the liberty of the subject if parties could not make such an agreement if they please.

Then, as to the authorities. It certainly seems that, in *Tattersall v. Groote*, 2 B. & P. 131, Lord Eldon expressed much doubt; but neither in that case nor in any other was there a decision that an action could not be maintained on such an agreement: and ever since I have known Westminster Hall at least, the opinion of the profession has been that, though such a prospective agreement of reference could not bar an action in the Courts of law, yet an action was maintainable for the breach of it. There seems at one time to have prevailed in our Courts a horror of a domestic forum which I can neither sympathise with nor account for; but the Legislature has recently, in *The Common Law Procedure Act, 1854* (17 & 18 Vict. c. 125) sect. 11, made a provision in such cases, not that the agreement to refer shall be pleadable in bar, but that the Court may stop the action. This shews the opinion of the Legislature that such agreements are not contrary to public policy. For these reasons I entertain no doubt that the action lies. * * *

COLERIDGE, J. * * * The fallacy of the argument consists in confounding two separate cases; one where the defendant relies on such an agreement as a bar to an action, a defence which, if successful, would oust the Court of its jurisdiction; the other, which is the present case, where the plaintiff seeks damages for not fulfilling the agree-

ment. It is said that the damages in such a case can be only nominal: supposing it were so, that would not bar the action: but it seems to me very difficult to maintain that the damages in such a case may not be substantial. • • •

NOTE

An action for damages was maintainable at common law for breach of an agreement to arbitrate, if the agreement was so limited in terms as not to be illegal. *Pond v. Harris*, 113 Mass. 114 (1873), agreement to arbitrate an existing dispute. Few such cases were ever brought because of the difficulty of proving substantial damages. With a few exceptions, equity did not specifically enforce any arbitration agreements. See *Restatement, Contracts*, § 371. When necessary to prevent an unjust forfeiture such relief might be granted. *Id.* § 374.

If, after a dispute has arisen, the parties submit it to arbitration and an award is made by the arbitrators after a fair hearing and in accordance with the submission, the award has always been held binding and enforceable by the courts. This is true even though the original agreement to arbitrate future disputes was in such general terms as not itself to be enforceable.

SECTION 6.—BARGAINS AFFECTING MARRIAGE

LOWE v. DOREMUS.

Court of Errors and Appeals of New Jersey, 1913.
84 N.J.L. 658, 87 A. 459, 49 L.R.A., N.S., 632.

Action by May Lowe against Cornelius Doremus, executor, etc. Judgment for plaintiff, and defendant brings error. Reversed.

This suit was brought to recover the sum due on a promissory note made by Henry Van Riper, during his lifetime, of which the following is a copy:

"Paterson, N. J., August 28, 1909.

"Thirty days after death, I promise or authorize my executor or administrator, to pay to the order of May Wood, the sum of three thousand (\$3,000) dollars at the First National Bank of Paterson. Value received.

Henry Van Riper.

"Witness: James F. Carroll.

"Indorsements:

"May Wood.

"May Lowe."

May Lowe is the married name of the plaintiff.

In answer to the interrogatories presented to the plaintiff she stated that the consideration for the making and delivery of the note was

"continuing and staying in the employ of, and not marrying until after the death of the maker, Henry Van Riper, and attending to and caring for the wants of said Henry Van Riper until his death."

At the close of the testimony, defendant's counsel moved for the direction of a verdict upon the ground, *inter alia*, that the contract sued on was in general restraint of marriage and void as against public policy. The trial court denied the motion, and of its own motion directed a verdict for the plaintiff and allowed an exception to the defendant who assigns error thereon.

GARRISON, J. (after stating the facts as above). It was an error to direct a verdict for the plaintiff, and it was likewise error to refuse to direct a verdict for the defendant.

The contract sued on was in general restraint of marriage, and consequently void. In *Sterling v. Sinnickson*, 5 N.J.L. 871, *756, the action was on a sealed bill, the maker of which promised to pay \$1,000 to the payee provided he (the payee) was not lawfully married in the course of six months from the date thereof.

It was held that the agreement was void.

The grounds of this decision as stated by Chief Justice Kirkpatrick was that the law regards marriage as at the foundation of the social order, and hence removes out of the way every unreasonable restraint upon it; and that a restraint "upon the freedom of choice and of action in a case where the law wills that all shall be free" is an unreasonable restraint as against public policy.

That case is not so strong as this, for there the sealed bill implied a legal consideration, and the restraint was for but six months, whereas here the consideration that had to be proved was a restraint of indefinite duration.

This early New Jersey case is cited in the note to *Lowe v. Peers*, in 6 Eng.Ru.Cas. 347, where the English and American authorities are collected.

The trial judge was influenced by the argument that the consideration of the note was severable into three distinct undertakings, the performance of any of which would constitute a good consideration. This clearly is not so. The consideration was the services of an unmarried woman, who was to continue as such during the term of her employment. If the plaintiff had married the day after she got the note she could not, by merely tendering her services as a married woman, have maintained an action upon the note, if such services were declined by the maker thereof.

Whether it was not in any event a question for the jury whether the note had in fact the consideration sworn to by the plaintiff, or whether

it was not an attempted testamentary gift is not now before us in view of our decision of the more fundamental question.

The record before us not being such that a final judgment can be entered upon it, the judgment below is reversed, and a venire de novo awarded.

NOTE

Promises and conditions directly in restraint of marriage are void and unenforceable. *Lowe v. Peers*, 4 Burr. 2225 (1768); *Sterling v. Sinnickson*, 5 N.J.L. 756 (1820). It does not follow from this, however, that such a provision invalidates the other terms of a contract. The void promise not to marry is itself inoperative as a consideration; but it is often held that a return promise is enforceable, if there is another sufficient consideration. A promise to pay for services as housekeeper, on condition to remain unmarried during the promisor's life, was enforced in *King v. King*, 63 Ohio St. 363, 59 N.E. 111 (1900). See Restatement, Contracts, § 581.

Bargains for separation of husband and wife, to take place in the future, and bargains not to contest or otherwise to facilitate a divorce are illegal. Restatement, Contracts, §§ 584, 586.

After actual separation has occurred, bargains as to support, care of children, and division of property are not illegal.

Marriage brokerage is illegal. Restatement, Contracts § 582.

SECTION 7.—SUNDAY LAWS

SKINNER IRR. CO. v. BURKE.

Supreme Judicial Court of Massachusetts, 1919. 231 Mass. 555, 121 N.E. 427.

Action by the Skinner Irrigation Company against Charles S. Burke, resulting in judgment for plaintiff. The case was reported to the appellate division of the municipal court of the city of Boston, which dismissed the report, and defendant appeals. Order dismissing report affirmed.

PIERCE, J. This is an action of contract to recover \$218 for the installation of a system of irrigation on the land of the defendant. The answer sets up in defense "that if any contract was made by the plaintiff and the defendant, it was made on the Lord's Day, and cannot be enforced."

The facts, so far as they are material to the determination of the single question raised by the answer and argued in the brief of the

defendant, are in substance as follows: On Sunday, June 27, 1915, the duly authorized agent of the plaintiff met the defendant and they made an oral agreement for the installation of the irrigation system at a fixed price. This contract was void in its inception and could not be ratified because its validity did not depend in any degree on the choice of the defendant. "The law annulled it, and there was no subject of ratification." *Day v. McAllister*, 15 Gray, 433, 434. On Monday, June 28, 1915, the agent wrote the defendant a letter which began: "We wish to confirm agreement which we reached yesterday regarding the installation * * * of irrigation at your place. * * *" In the paragraphs which followed, the work which the plaintiff agreed to perform and accomplish was set out in minute detail, as was the "price for this work, installed complete as outlined." The defendant received the letter but did not reply to it. There was evidence that thereafter, in good faith, the plaintiff installed on the defendant's premises a system of irrigation, substantially in accordance with his letter of June 28, 1915; and that the defendant, as he testified, was present at times during the installation of the system and knew that it was being done. There was also evidence that the fair value of the system as installed was the contract price, \$218. Later, on August 9, 1915, the defendant wrote the agent that he had examined the plant and had found a leak which he had not the necessary tools to tighten, and concluded the letter by saying, "I guess you will have to send your man down to see just what the trouble is." On September 13, 1915, the defendant wrote the plaintiff company that "when all the pipes are working I can't cover the ground as your guarantee said it would." In response to this last letter the plaintiff proposed to visit and inspect the plant on Sunday, September 19, 1915; and did in fact inspect it on Sunday, September 26, 1915.

On the foregoing facts, we think the contract under which the irrigation system was installed was not the oral contract of Sunday, June 27, 1915, but was a new contract adopted on Monday, June 28, 1915, upon the terms and conditions stated in the letter of the plaintiff to the defendant on the last-named date. See *Miles v. Janvrin*, 200 Mass. 514, 517, 86 N.E. 785, and cases cited. The fact that, after the work was completed and the right to receive the agreed price had accrued, the plaintiff, on a Sunday, examined and tested the plant on the defendant's complaint of an insufficiency which the judge of the municipal court found was not due to any defect in the system itself or its method of installation or any other fault of the plaintiff, does not by relation affect the validity of the contract or the plaintiff's right to recover the agreed price, and distinguishes the case at bar from the cases of *Stewart v. Thayer*, 168 Mass. 519, 47 N.E. 420, 60 Am.St.Rep. 407; and *Stewart v. Thayer*, 170 Mass. 560, 49 N.E. 1020.

The judge refused rightly to rule as requested that "on all the evidence the plaintiff cannot recover," and that "the offer contained in the letter of the plaintiff to the defendant of June 28, 1915, not having been accepted by the defendant, only constitutes an offer and is not sufficient as a matter of law to enable the plaintiff to recover."

Order dismissing report affirmed.

NOTE

See Restatement, Contracts, §§ 538, 539.

Bargains made on Sunday and bargains to do work on Sunday were not invalid at common law. There are statutes invalidating such bargains, but their provisions vary widely. See *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 42 N.W. 872, 4 L.R.A. 466, 16 Am.St.Rep. 695 (1889), publishing Sunday newspaper (cf. *Pulitzer Pub. Co. v. McNichols [Mo.]* 181 S.W. 1, L.R.A.1916C, 1148 [1915]); *Merritt v. Earle*, 29 N.Y. 115, 86 Am. Dec. 292 (1864); *Bryan v. Watson*, 127 Ind. 42, 26 N.E. 666, 11 L.R.A. 63 (1890), contract for a charitable purpose valid; *Stewart v. Thayer*, 170 Mass. 560, 49 N.E. 1020 (1898), bargain indivisible and no recovery in quantum meruit for weekday services.

SECTION 8.—BARGAINS INDUCING CRIME, TORT, OR PUBLIC HARM

(Lobbying—Fraud—Breach of Trust and Official Duty)

COLLINS v. WILLS et ux.

In the Queen's Bench, 1601. Cro.Eliz. 774.

Assumpsit. And declares, that whereas the defendant Wills was a suitor to the other defendant (his now wife, and the plaintiff's daughter), and the plaintiff offered to give with her in marriage £80 and would give no more; and Wills, the other defendant, required £90 and without that would not marry; and the feme, before marriage, in consideration that the plaintiff would give the other £10 at her request, to make the £80 £90 assumed, and promised to repay it within a month after she should be required: and alleged in facto, that he thereupon gave £90 to the defendant Wills in marriage, &c. and alledgeth request after marriage, &c. The defendant pleaded non assumpsit and found against him; and judgment entered accordingly, without privity of the Court. And it was now alleged, that this was an insufficient and unlawful consideration to ground this action, and made only in deceit

of the defendant, who was her husband.—And of that opinion was the whole Court; for as well as she may promise the repayment of £10 she may promise the repayment of all, or more, so as her husband should be defrauded of all: and that which is given in marriage, cannot be a consideration to ground a promise; especially to charge the baron with that promise. Wherefore, in regard the judgment was entered this term and the record is yet in their breasts, it was adjudged that it should be altered, and made *quod querens nihil capiat per billam*. And a supersedeas was awarded to stay execution.

ATKINS v. JOHNSON.

Supreme Court of Vermont, 1870. 43 Vt. 78, 5 Am.Rep. 260.

PIERPOINT, C. J. The case comes into this court upon a general demurrer to the plaintiff's declaration.

The declaration alleges that "on the 22d day of July, 1867, the defendant, by his agreement in writing on that date, undertook and promised the plaintiff that, in consideration that the plaintiff would print and publish an article in the *Argus & Patriot*, a weekly newspaper published in Montpelier by the plaintiff, entitled 'A Jack at all Trades Exposed,' that said article was all true, that there was enough to back it up, &c., and that he, the said defendant, would defend and save harmless the plaintiff from all damage and harm that might accrue to the plaintiff in consequence of publishing said article. That said article, if untrue, was a libel upon the character of one John Gregory; that relying upon the said promises of the defendant he published the article; that after said publication the said Gregory called upon the plaintiff for the name of the writer of the article; that thereupon the defendant requested the plaintiff not to give the said Gregory the name of the writer, and in consideration thereof, promised the plaintiff that he would save him from all harm; that if said Gregory sued the plaintiff, that he, the defendant, would defend the suit, prove the charges, and save the plaintiff from all trouble and expense in the premises. The plaintiff, relying thereon, withheld the name of the defendant as the author of said article; that the said Gregory sued the plaintiff; that the defendant failed to defend the said suit, and the said Gregory recovered a judgment against the plaintiff, which he has been compelled to pay, and the defendant refuses to indemnify him."

The plaintiff is here seeking to compel the defendant to indemnify him for the damage which he has sustained, in consequence of publishing a libel, at the request of the defendant, and from the consequences of which the defendant agreed to save him harmless.

The question is, whether such an agreement as the plaintiff sets out in his declaration can be legally enforced.

The general principle, that there can be no contribution or indemnity, as between joint wrong-doers, is too well settled to require either argument or authority.

To this rule there are many exceptions, and prominent among them is the class of cases where questions arise between different parties as to the ownership of property, and a third person, supposing one party to be in the right, upon the request and under the authority of such party, does acts that are legal in themselves, but which prove in the end to be in violation of the rights of the other party, and he, in consequence thereof, is made liable in damages. If in such case there was a promise of indemnity, the law will enforce it, and if there was not, if the circumstances will warrant it, the law will imply a promise of indemnity, and enforce that. Of this class are most of the cases cited and relied upon by the counsel for the plaintiff, such as, *Betts v. Gibbins*; *Adamson v. Jarvis*; *Wooley v. Batte*; *Avery v. Halsey, &c.* But we apprehend that no exception has ever been recognized broad enough to embrace a case like the present; indeed such an exception would be a virtual abrogation of the rule.

In this case, these parties in the outset conspired to do a wrong to one of their neighbors, by publishing a libel upon his character. The publication of a libel is an illegal act upon its face. This, both parties are presumed to have known. The publication not only subjects the party publishing to a prosecution by the person injured for damages, but also to a public prosecution by indictment. In either case, all that would be required of the prosecutor would be to prove the publication by the party charged. The law in such case presumes malice and damage, and the prosecutor would be entitled to a judgment, unless the party charged could introduce something by way of defense that would have the effect to discharge him from legal liability; failing in that, the party would be made liable upon a simple state of facts, all of which he perfectly understood at the time he commenced his unjustifiable attack.

In this case, both these parties knew that they were arranging for and consummating an illegal act, one that subjects them to legal liability, hoping, to be sure, that they might defend it; but the plaintiff, fearing they might not be able to do so, sought to protect himself from the consequences, by taking a contract of indemnity from the defendant. To say under such circumstances that these parties were not joint wrong-doers, within the full spirit and meaning of the general rule, would be an entire perversion of the plainest and simplest proposition. This being so, the law will not interfere in aid of either. It will not inquire which of the two is most in the wrong, with a view of adjusting the equities between them, but regarding both as having been understandingly engaged in a violation of the law, it will leave them as it

finds them, to adjust their differences between themselves, as they best may. * * *

The position, in which the facts confessed upon the record place the defendant, is not an enviable one. He seems to have originated the mischief—to have induced the plaintiff to aid him in carrying it into effect by assurance of the truth of the statements, and a promise of indemnity, and after standing by and seeing the plaintiff amerced in damages takes advantage of a strictly legal defense, and throws the whole responsibility upon the plaintiff. Personally, it would have given me satisfaction to have decided the case for the plaintiff, if it could have been done without violating well-established and salutary rules of law.

Judgment of the county court is affirmed.

NOTE

A bargain to publish a book not yet written is not made invalid merely because it contains a provision for indemnity against libel suits, where no libel was published and it is not shown that any was intended. *Jewett Pub. Co. v. Butler*, 159 Mass. 517, 34 N.E. 1087 (1893). A bargain by a seller of a soft drink to indemnify the buyer against damages that might come from prosecution for violation of a prohibitory law is not illegal, no intent to sell intoxicating liquor being shown. *Owens v. Henderson Brewing Co.*, 185 Ky. 477, 215 S.W. 90 (1919).

Any bargain to commit a crime or a tort is illegal. Restatement, Contracts, § 571; *The Highwayman's Case* (Exch.) 2 Evans' Pothier on Oblig. 3, N. 1 (1725), *Scott's Cases on Quasi Contracts*, 666. The commonest example is a bargain the purpose of which is to defraud or injure a third person financially. Restatement, Contracts, § 577.

A bargain, the purpose of which is to induce a breach of a contract with a third person, is illegal. Restatement, Contracts, § 576; *Reiner v. North American Newspaper Alliance*, 259 N.Y. 250, 181 N.E. 561 (1932).

PROVIDENCE TOOL CO. v. NORRIS.

Supreme Court of the United States, 1864. 2 Wall. 45, 17 L.Ed. 868.

In July, 1861, the Providence Tool Company, a corporation created under the laws of Rhode Island, entered into a contract with the government, through the secretary of war, to deliver to officers of the United States, within certain stated periods, twenty-five thousand muskets, of a specified pattern, at the rate of twenty dollars a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, and the defendant in error in this court, upon a previous agreement with the corporation, through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to its extent.

Norris himself, it appeared,—though not having any imputation on his moral character,—was a person who had led a somewhat miscellaneous sort of a life, in Europe and America. Soon after the rebellion broke out, he found himself in Washington. He was there without any special purpose, but, as he stated, with a view of “making business—anything generally”; “soliciting acquaintances”; “getting letters”; “getting an office,” &c. Finding that the government was in need of arms to suppress the rebellion, which had now become organized, he applied to the Providence Tool Company, already mentioned, to see if they wanted a job, and made the contingent sort of contract with them just referred to. He then set himself to work at what he called, “concentrating influence at the war department”; that is to say, to getting letters from people who might be supposed to have influence with Mr. Cameron, at that time secretary of war, recommending him and his objects. Among other means, he applied to the Rhode Island senators, Messrs. Anthony and Simmons, with whom he had got acquainted, to go with him to the war office. Mr. Anthony declined to go; stating that since he had been senator he had been applied to some hundred times, in like manner, and had invariably declined; thinking it discreditable to any senator to intermeddle with the business of the departments. “You will certainly not decline to go with me, and introduce me to the secretary, and to state that the Providence Tool Company is a responsible corporation.” “I will give you a note,” said Mr. Anthony. “I do not want a note,” was the reply; “I want the weight of your presence with me. I want the influence of a senator.” “Well,” said Mr. Anthony, “go to Simmons.” By one means and another, Norris got influential introduction to Mr. Secretary Cameron, and got the contract, a very profitable one; the secretary, whom on leaving he warmly thanked, “hoping that he would make a great deal of money out of it.”

But a dispute now arose between Norris and the tool company, as to the amount of compensation to be paid. Norris insisted that by the agreement with him he was to receive \$75,000; the difference between the contract price and seventeen dollars a musket; whilst the corporation, on the other hand, contended, that it had only promised “a liberal compensation” in case of success. Some negotiation on the subject was had between them; but it failed to produce a settlement, and Norris instituted the present action to recover the full amount claimed by him. * * *

Mr. Justice FIELD delivered the opinion of the court.

Several grounds were taken, in the court below, in defence of this action; and, among others, the corporation relied upon the proposition of law, that an agreement of the character stated,—that is, an agreement for compensation to procure a contract from the government to furnish its supplies,—is against public policy, and void. This

proposition is the question for the consideration of the court. It arises upon the refusal of the court below to give one of the instructions asked. • • •

The question, then, is this: Can an agreement for compensation to procure a contract from the government to furnish its supplies be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction, is against public policy. That agreements, like the one under consideration, have this tendency, is manifest. They tend to introduce personal solicitation, and personal influence, as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service, and to unnecessary expenditures of the public funds.

The principle which determines the invalidity of the agreement in question has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question, whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies, and agreements to procure favors in the shape of contracts from the heads of departments. The introduction of improper elements to control the action of both, is the direct and inevitable result of all such arrangements. *Marshall v. Railroad Co.*, 16 How. 314, 14 L.Ed. 953; *Harris v. Roof's Ex'rs*, 10 Barb. (N.Y.) 489; *Fuller v. Dame*, 18 Pick. (Mass.) 472.

The same principle has also been applied in numerous instances, to agreements for compensation to procure appointments to public of-

fices. These offices are trusts, held solely for the public good, and should be conferred from considerations of the ability, integrity, fidelity, and fitness for the position of the appointee. No other considerations can properly be regarded by the appointing power. Whatever introduces other elements to control this power, must necessarily lower the character of the appointments, to the great detriment of the public. Agreements for compensation to procure these appointments tend directly and necessarily to introduce such elements. The law, therefore, from this tendency alone, adjudges these agreements inconsistent with sound morals and public policy. *Gray v. Hook*, 4 N.Y. 449.

Other agreements of an analogous character might be mentioned, which the courts, for the same or similar reasons, refuse to uphold. It is unnecessary to state them particularly; it is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements; and it closes the door to temptation, by refusing them recognition in any of the courts of the country.

It follows that the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

NOTE

In accord, as to contracts for aid in getting an appointment to public office, see *Meguire v. Corwine*, 101 U.S. 108 (1879), promise to split fees with the plaintiff if the latter would procure the promisor's appointment as special counsel for the Government; *Restatement, Contracts*, § 560.

In *Martin v. Francis*, 173 Ky. 529, 191 S.W. 259, L.R.A.1918F, 966, Ann. Cas.1918E, 289 (1917), rival candidates agreed that one should withdraw, should later be appointed deputy, and should divide fees.

In accord as to bargains to procure Government contracts: *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 26 L.Ed. 539 (1880), agreement to pay a Turkish consul a commission if he would induce his government to buy rifles; *Montefiore v. Menday Motor C. Co. (K.B.)* 119 L.T. 340 (1918), to use personal influence in getting money from the government to finance aircraft company; *Hyland v. Oregon Hassam Paving Co.*, 74 Or. 1, 144 P. 1160, L.R.A.1915C, 823, Ann.Cas.1916E, 941 (1914), to "do everything in his power" to obtain a municipal contract, at a 3 per cent commission; *Oliver v. Wilder*, 27 Colo.App. 337, 149 P. 275 (1915), secretary of state bargained for the publication of constitutional amendments at maximum statutory figure—in fact 20 times market value—the county paper agreeing to divide the money with all other local papers who would support the entire Democratic ticket.

On the lawful side of the line, not always easily distinguishable, see *Anderson v. Blair*, 202 Ala. 209, 80 So. 31 (1918), joint adventure to help get a contract from the government for construction of a camp, to help in its performance, for a share of the profits, nothing indicating the use of improper influence.

TRIST v. CHILD.

Supreme Court of the United States, 1874. 21 Wall. 441, 22 L.Ed. 623.

Appeal from the supreme court of the District of Columbia; the case being thus:

N. P. Trist having a claim against the United States for his services, rendered in 1848, touching the treaty of Guadalupe Hidalgo—a claim which the government had not recognized—resolved, in 1866–7 to submit it to Congress and to ask payment of it. And he made an agreement with Linus Child, of Boston, that Child should take charge of the claim and prosecute it before Congress as his agent and attorney. As a compensation for his services it was agreed that Child should receive 25 per cent of whatever sum Congress might allow in payment of the claim. If nothing was allowed, Child was to receive nothing. His compensation depended wholly upon the contingency of success. Child prepared a petition and presented the claim to Congress. Before final action was taken upon it by that body Child died. His son and personal representative, L. M. Child, who was his partner when the agreement between him and Trist was entered into, and down to the time of his death, continued the prosecution of the claim. By an act of the 20th of April, 1871, Congress appropriated the sum of \$14,559 to pay it. The son thereupon applied to Trist for payment of the 25 per cent stipulated for in the agreement between Trist and his father. Trist declined to pay. Hereupon Child applied to the treasury department to suspend the payment of the money to Trist. Payment was suspended accordingly, and the money was still in the treasury.

Child, the son, now filed his bill against Trist, praying that Trist might be enjoined from withdrawing the \$14,559 from the treasury until he had complied with his agreement about the compensation, and that a decree might pass commanding him to pay to the complainant \$5,000, and for general relief.

The defendant answered the bill, asserting with other defences going to the merits, that all the services as set forth in their bill were “of such a nature as to give no cause of action in any court either of common law or equity.”

The case was heard upon the pleadings and much evidence. A part of the evidence consisted of correspondence between the parties. It tended to prove that the Childs, father and son, had been to see vari-

ous members of Congress, soliciting their influence in behalf of a bill introduced for the benefit of Mr. Trist, and in several instances obtaining a promise of it. There was no attempt to prove that any kind of bribe had been offered or ever contemplated; but the following letter, one in the correspondence put in evidence, was referred to as showing the effects of contracts such as the one in this case: "From Child, Jr., to Trist. House of Representatives, Washington, D. C., Feb. 20th, 1871. Mr. Trist: Everything looks very favorable. I found that my father has spoken to C——and B——, and other members of the House. Mr. B——says he will try hard to get it before the House. He has two more chances, or rather 'morning hours,' before Congress adjourns. A——will go in for it. D——promises to go for it. I have sent your letter and report to Mr. W——, of Pennsylvania. It may not be reached till next week. Please write to your friends to write immediately to any member of Congress. Every vote tells; and a simple request to a member may secure his vote, he not caring anything about it. Set every man you know at work, even if he knows a page, for a page often gets a vote. The most I fear is indifference. Yours, &c., L. M. Child."

The court below decreed:

1st. That Trist should pay to the complainant \$3,639, with interest from April 20th, 1871.

2d. That until he did so, he should be enjoined from receiving at the treasury "any of the moneys appropriated to him" by the above act of Congress, of April 20th, 1871.

From this decree the case was brought here.

The good character of the Messrs. Child, father and son, was not denied.

Mr. Justice SWAYNE, delivered the opinion of the court. • • •

Was the contract a valid one? It was, on the part of Child, to procure by lobby service, if possible, the passage of a bill providing for the payment of the claim. The aid asked by the younger Child of Trist, which indicated what he considered needful, and doubtless proposed to do and did do himself, is thus vividly pictured in his letter to Trist of the 20th February, 1871. After giving the names of several members of Congress, from whom he had received favorable assurances, he proceeds. "Please write to your friends to write to any member of Congress. Every vote tells, and a simple request may secure a vote, he not caring anything about it. Set every man you know at work. Even if he knows a page, for a page often gets a vote."

In the Roman law it was declared that "a promise made to effect a base purpose, as to commit homicide or sacrilege, is not binding." Just. Inst. lib. 3, tit. 19, par. 24. In our jurisprudence a contract may be il-

legal and void because it is contrary to a constitution or statute, or inconsistent with sound policy and good morals. Lord Mansfield said (*Jones v. Randall*, 1 Cowp. 39): "Many contracts which are not against morality, are still void as being against the maxims of sound policy."

It is a rule of the common law of universal application, that where a contract express or implied is tainted with either of the vices last named, as to the consideration or the thing to be done, **no alleged right founded upon it can be enforced in a court of justice.** • • •

The question now before us has been decided in four American cases. They were all ably considered, and in all of them the contract was held to be against public policy, and void. *Clippinger v. Hepbaugh*, 5 Watts & S. (Pa.) 315, 40 Am.Dec. 519; *Harris v. Roof's Ex'r*, 10 Barb. (N.Y.) 489; *Rose & Hawley v. Truax*, 21 Barb. (N.Y.) 361; *Marshall v. Railroad Co.*, 16 How. 314, 14 L.Ed. 953. We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included, drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principle of ethics as professional services rendered in a court of justice, and are no more exceptionable. But such services are separated by a broad line of demarcation from personal solicitation, and the other means and appliances which the correspondence shows were resorted to in this case. There is no reason to believe that they involved anything corrupt or different from what is usually practiced by all paid lobbyists in the prosecution of their business.

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. 1 Montesq. *Spirit of Laws*, 17. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and the public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong. No people can have any higher public interest, except the preservation of their lib-

erties, than integrity in the administration of their government in all its departments.

The agreement in the present case was for the sale of the influence and exertions of the lobby agent to bring about the passage of a law for the payment of a private claim, without reference to its merits, by means which, if not corrupt, were illegitimate, and considered in connection with the pecuniary interest of the agent at stake, contrary to the plainest principles of public policy. No one has a right, in such circumstances, to put himself in a position of temptation to do what is regarded as so pernicious in its character. The law forbids the inchoate step, and puts the seal of its reprobation upon the undertaking.

If any of the great corporations of the country were to hire adventurers who make market of themselves in this way, to procure the passage of a general law with a view to the promotion of their private interests, the moral sense of every right-minded man would instinctively denounce the employer and employed as steeped in corruption, and the employment as infamous.

If the instances were numerous, open, and tolerated, they would be regarded as measuring the decay of the public morals and the degeneracy of the times. No prophetic spirit would be needed to foretell the consequences near at hand. The same thing in lesser legislation, if not so prolific of alarming evils, is not less vicious in itself, nor less to be condemned. The vital principle of both is the same. The evils of the latter are of sufficient magnitude to invite the most serious consideration. The prohibition of the law rests upon a solid foundation. A private bill is apt to attract little attention. It involves no great public interest, and usually fails to excite much discussion. Not unfrequently the facts are whispered to those whose duty it is to investigate, vouched for by them, and the passage of the measure is thus secured. If the agent is truthful, and conceals nothing, all is well. If he uses nefarious means with success, the spring-head and the stream of legislation are polluted. To legalize the traffic of such service, would open a door at which fraud and falsehood would not fail to enter and make themselves felt at every accessible point. It would invite their presence and offer them a premium. If the tempted agent be corrupt himself, and disposed to corrupt others, the transition requires but a single step. He has the means in his hands, with every facility and a strong incentive to use them. The widespread suspicion which prevails, and charges openly made and hardly denied, lead to the conclusion that such events are not of rare occurrence. Where the avarice of the agent is inflamed by the hope of a reward contingent upon success, and to be graduated by a percentage upon the amount appropriated, the danger of tampering in its worst form is greatly increased.

It is by reason of these things that the law is as it is upon the subject. It will not allow either party to be led into temptation where the thing to be guarded against is so deleterious to private morals and so injurious to the public welfare. In expressing these views, we follow the lead of reason and authority.

We are aware of no case in English or American jurisprudence like the one here under consideration, where the agreement has not been adjudged to be illegal and void.

We have said that for professional services in this connection a just compensation may be recovered. But where they are blended and confused with those which are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together. Services of the latter character, gratuitously rendered, are not unlawful. The absence of motive to wrong is the foundation of the sanction. The tendency to mischief, if not wanting, is greatly lessened. The taint lies in the stipulation for pay. Where that exists, it affects fatally, in all its parts, the entire body of the contract. In all such cases, *potior conditio defendentis*. Where there is turpitude, the law will help neither party.

The elder agent in this case is represented to have been a lawyer of ability and high character. The appellee is said to be equally worthy. This can make no difference as to the legal principles we have considered, nor in their application to the case in hand. The law is no respecter of persons.

Decree reversed, and the case remanded, with directions to dismiss the bill.

NOTE

As to lobbying bargains valid and invalid, see Restatement, Contracts, §§ 559, 563.

The reasoning in the above case is followed in *Gesellschaft v. Brown*, 78 F.2d 410 (1935, App.D.C.), 104 F.2d 227 (1936), refusing to enforce a bargain for services in getting through an Act of Congress for restoration of Enemy Alien Property.

STONE et al. v. WILLIAM STEINEN MFG. CO.

Court of Errors and Appeals of New Jersey, 1946. 133 N.J.L. 593, 45 A.2d 486.

BODINE, Justice. The appeal is from a judgment of the Supreme Court whose opinion is reported in 133 N.J.L. 16, 42 A.2d 268. The judgment affirmed a determination in favor of the defendant in a case tried before the Circuit Court without a jury. The findings of the learned trial Judge are reported in 22 N.J.Misc. 353, 39 A.2d 241. The defendant's counterclaim was struck but that is not inconsistent with sustaining the defenses interposed to the action.

The plaintiffs sought to recover two weekly installments of salary on the basis of \$400 a week. The parties to this action on December 31, 1942, entered into a written agreement operative and effective as of July 1, 1941, whereby the defendant employed the plaintiffs for a period of three years commencing as of July 1, 1941 and ending June 30, 1944, at a salary of \$400 per week payable weekly. The contract terminated a previous contract in which the plaintiffs agreed to assist the defendant in its dealings with the United States Navy Department respecting contracts for the manufacture of supplies. Contracts were obtained and payment was made until September 11, 1943, when the payments stopped and this suit was brought.

Every contract negotiated by the United States Navy, including those procured by the defendant contain the following provision: "Article 11. Covenant against contingent fees. The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

It was the defendant's contention at the trial that the agreement of December 31, 1942 was a modification of a contract of July 1, 1941, whereby the defendant agreed to pay the plaintiffs commissions on such contracts as it might procure for the manufacture of materials for the United States Navy. Clearly, it was since the Navy was disallowing the commissions which were paid to the plaintiffs and was deducting the amount thereof from the payments which were being made to the defendant. It was hoped that the new plan would thwart the ruling and the salary would be allowed as part of the administrative expense.

The plaintiffs are partners. The partnership was composed of Alexander H. Stone, his brothers and their wives. Mr. Stone, for a number of years, was engaged in the mortgage business in Newark. He went to Washington in 1934 and was employed for a period of six years in the Federal Housing Administration. On November 20, 1940, he commenced the business of being an alleged manufacturers' representative, but his firm does not seem to have been regarded by the Navy Department as a bona fide established commercial or sales agency. Such finding was concurred in by the Circuit Court Judge. He points out in his opinion that the plaintiffs maintained no office in Washington save the residence where Alexander H. Stone lived and

where the other partners visited from time to time. There was no consecutive clerical force and no usual office equipment.

It is perfectly apparent, as the Circuit Court found, that the first agreement calling for a contingent fee was illegal and that the change was made merely for the purpose of carrying out the original arrangement for commissions somewhat reduced in amount.

The learned trial Judge, as his guide in determining the questions presented, accepted as law the statement made by Chief Justice Rugg in *Noble v. Mead-Morrison Manufacturing Co.*, 237 Mass. 5, 129 N.E. 669, 674: "The general principle fairly deducible from the decisions is that ordinarily no one factor is decisive in determining whether the contract concerning furnishing supplies to the government is void as contrary to public policy. Contingency of compensation upon success, percentage upon the amount involved in sales directly to the government, and the size of the fee, all are elements entitled to consideration. The words 'contingent compensation' in connection with a contract may be used either in an obnoxious or a harmless sense. The tenor of the contract may be such in connection with its setting as to stamp it with invalidity. If it bears any badge of fraud, either covertly or openly, it must be stricken down. The question of the legality of the contract in each case is to be determined by weighing all the elements involved and then deciding whether its *inherent tendency is to invite or promote the use of sinister or corrupt means to accomplish the end* or to bring influences to bear upon public officials of any other nature than the single one of genuine advantage to the government. If such is its tendency, it must be pronounced illegal. If that point is open to fair doubt upon all the evidence, its purpose must be left to the jury under appropriate instructions." Italics ours.

The question for our determination is whether the evidence supports the finding of fact that the contract in question had a tendency to invite or promote the use of sinister or corrupt means to accomplish the end.

As we before noted, the plaintiffs had no Washington office and no real clerical force. The work which Mr. Stone performed could have been done by any sales representative who was familiar with the details of the setup of government departments. He had no technical training and the work done was merely contact work with representatives of the Navy. The provision for the continuance of the contract, in the event of death of one of the partners, seems indeed curious if the contract contemplated continuance of work since two of the partners were women and not familiar with the business details at all. The provisions in the Navy contract against contingent procurement agreements is obviously wise. Such agreements tend to the corruption of the personnel of the Navy and have been very costly as experience has shown in past wars.

The trial court could find, as it did, from the evidence that the substitute agreement was a mere blind. The correspondence between the parties indicates that the purpose was to appease the Navy and insure payment to both of them. Obviously they were equally to blame, and hence the learned trial Judge would not permit a recovery by one against the other.

We are not impressed with the reasoning in *Bradford v. Durkee Marine Products Corporation*, 180 Misc. 1049, 40 N.Y.S.2d 448, nor with that in *Dodge v. Allison*, 3 Cir., 13 F.2d 588, certiorari denied 273 U.S. 774, 47 S.Ct. 239, 71 L.Ed. 885.

There is nothing in the case before us to indicate that there was any reason for the employment of the plaintiff firm other than the fact that they had been successful in procuring Navy contracts, whereas the defendant had failed so to do. The only reason for the employment was that the plaintiffs knew how to make contracts with the Navy Department, but this Mr. Stone stated required no special training. They were employed by several other concerns and the salaries were out of all proportion to any work done. The employment had an inherent tendency to promote a corrupt means to accomplish the end. The evidence abundantly supports the findings.

The judgment under review will be affirmed with costs.

NOTE

In this case the defendant had contracts with the Navy amounting to \$1,700,000, on which the plaintiff's commission at 5 per cent would have been \$85,000. Before the modification of the contract, the case had been involved in an investigation by a Committee of Congress. Other Governmental Departments as well as the Navy enforce the quoted regulation by reason of a Presidential order. Some of the State courts, including New York, had receded considerably from the strict rule laid down in *Providence Tool Co. v. Norris*. See also *Valdes v. Larrinaga*, 233 U.S. 705, 34 S.Ct. 750, 58 L.Ed. 1163 (1914). These cases no doubt influenced the rules given in *Restatement, Contracts*, §§ 562, 563. The governmental regulation is strictly applied in *Bradley v. American Radiator & S. S. Corp.*, 6 F.R.D. 37 (1946, D.C.).

HIDALGO COUNTY WATER IMPR. DIST. v. FEICK, 111 S.W.2d 742 (1937). The plaintiff, as an officer in the employ of RFC, had disapproved of the defendant's application for a government loan. He then suggested to the Water District that if it would employ him he could obtain a grant of PWA funds for their assistance. The District agreed to employ him at \$1,000 per month for from three to six months. After securing the assent of his superiors in RFC, he resigned and became attorney for the District. In a suit for his salary, the court held that the contract was not illegal. In 1944, Congress passed an Act making it illegal for an officer to act as a representative of applicants and claimants in specified matters within a period of two years after leaving Government service. *Autre temps, autre mœurs*.

In *Zell v. American Seating Co.*, printed in part in Chapter 5, Interpretation, the plaintiff was employed to procure contracts for a percentage fee. The contracts that he procured were not with the Government; they were with Airplane companies that had contracts with the Government. In the Circuit Court of Appeals, the question of illegality was not raised.

GLASS V. SWIMASTER CORP., — N.D. —, 21 N.W.2d 468 (1946). The court refused to enforce payment of a contingent fee of five per cent for obtaining a contract for the sale of life belts to the Navy Department. With respect to the Department regulation, quoted in the Steiner case above, the court said: "We are dealing here with a question of public policy which may or may not coincide with governmental policy as expressed in a contract or an executive order. While this provision does not determine what is contrary to public policy, it is of some value as indicating a feeble attempt on the part of the Government to discourage the payment of commissions for obtaining government contracts."

With respect to the services actually rendered by the plaintiff the court said: "In addition to these factors it appears that the parties contemplated and actually attempted the exercise of both personal and political influence upon the Navy Department in an effort to secure the contract. They procured the services of Mr. Leyde with whom they had been dealing as a Naval Officer while he was performing duties in connection with the type of contract that the defendant corporation was seeking to obtain. The dubious credit for his employment is claimed by both the plaintiff and the President of the defendant corporation. When one bid was rejected the parties began to contact politicians who they thought could influence the Navy Department. In carrying out the plan of contact the aid of two United States Senators was sought. This act has sinister implications. Congress, through the medium of appropriations, provides funds with which the Navy Department operates and pays its personnel. It follows that the pleasure of the members of Congress is of considerable moment to that personnel. The intervention of members of Congress in the affairs of executive departments in behalf of individuals and firms seeking to deal with the Government on a contract basis is, as a matter of general policy, inimical to the public interest and against public policy."

BORDEN v. ELLIS et al.

Superior Court of Pennsylvania, 1945. 158 Pa.Super. 259, 44 A.2d 530.

Ross, Judge. This is an appeal from an order of the Court of Common Pleas No. 1 of Philadelphia County reversing an order entered by the chancellor requiring defendant to render an account, on the theory that the agreement upon which the account was based was void as against public policy.

The plaintiff is the owner of "The Observer and Sporting News," a newspaper published in Philadelphia County. The corporate defendant is "The Philadelphia Dispatch Publishing Company," which also

publishes a newspaper, "The Dispatch," in Philadelphia. The bill as to the individual defendants has been dismissed.

In June 1939 the parties to this action each attempted to secure from the Secretary of Revenue a contract for advertising escheat notices in their newspapers. Knowing that only one of their newspapers could obtain the contract, the parties agreed between themselves that one newspaper should publish the notice and after deducting certain expenses divide the net proceeds with the other. This agreement was known to the Secretary of Revenue and approved by him, and the notices were published in "The Dispatch."

In 1939 the Commonwealth paid for its advertisement in the defendant's newspaper \$2,239, and after deducting costs of publishing the advertisement amounting to \$60, the remainder of \$2,199 was divided between the two newspapers, \$1,089.50 to each. In 1940 the Commonwealth paid \$3,509, and after deducting expenses of \$309, \$1,600 was distributed to each party. In 1941 the Commonwealth paid \$3,749 and the costs of the defendant were \$338. One-half of the balance of \$3,411 is the amount which the chancellor found to be the amount of the plaintiff's claim.

The court below entered a decree nisi ordering the defendant to file an account showing the net profit from said transaction and the amount due the plaintiff. Exceptions to the decree nisi having been filed by the defendants, the court en banc vacated the decree and ordered that the bill be dismissed on the ground that the contract was against public policy and therefore void, and this appeal followed.

"Whether or not a contract, the terms of which have been ascertained, is void as in contravention of public policy is a question of law to be determined by the court." *Constructors Association of Western Pennsylvania v. Seeds et al.*, 142 Pa.Super.Ct. 59, 15 A.2d 467, 469. A contract against public policy cannot under any circumstances be made the basis of a cause of action. "If the contract is still executory, the promisor is left undisturbed in the possession of the money or other property which he agreed to pay or transfer; if the contract has been executed, the promisee is left undisturbed in the possession of the money or other property which has been paid or conveyed to him." *City of Pittsburgh v. Goshorn*, 230 Pa. 212, 227, 79 A. 505, 510. It is not essential that evil actually follows the enforcement of the contract. What is struck at in the refusal to enforce contracts of this kind is tendency to evil in other cases. Enforcement of such contracts when actual evil does not follow would destroy the safeguards of the law and lessen the prevention of abuses. *Crooks' Estate*, 316 Pa. 285, 175 A. 410; *Bruno v. Cara*, 116 Pa.Super.Ct. 544, 548, 176 A. 863.

The record in this case shows that both parties to this action were keen and persistent competitors for this advertising contract. As a

result of the agreement entered into, the competition of the plaintiff was extinguished. In *Kuhn v. Buhl*, 251 Pa. 348, 96 A. 977, Ann.Cas. 1917D, 415, the Supreme Court, speaking through Mr. Justice Moschzisker, stated 251 Pa. at page 367, 96 A. 983, Ann.Cas.1917D, 415: "The law is established that, where any public right, franchise, contract, or privilege is to be disposed of by government officials or agents, whether by a public letting or awarding upon bids, or by the exercise of official discretion without public bids (*Hunter v. Nolf*, 71 Pa. 282; *Gulick v. Ward & Bailey*, 10 N.J.L. 87, 18 Am.Dec. 389; *Boyle v. Adams*, 50 Minn. 255, 52 N.W. 860, 17 L.R.A. 96), it is against public policy for one competing applicant, candidate or bidder to contract for the extinguishment of another's competition."

Under the facts of this case it might very well be found that the public interest was damaged as a result of the elimination of competition between the parties. The record discloses that for the years 1939 and 1940 the defendant received from the State \$5,748, and out of that sum paid to the plaintiff the sum of \$2,689.50. The defendant, therefore, for the printing of the escheat notices for these years received a net total of \$3,058.50. For the year 1941 the defendant received \$3,749 from the Commonwealth and if the agreement in this case were not against public policy, it would be compelled to pay to the plaintiff \$1,705.50. Therefore, it is certainly logical to assume that if the competition between the parties had continued the Commonwealth might have saved \$4,395, or nearly 50 per cent. of the cost to it for the printing of these notices. However, it is not necessary for us to decide that the Commonwealth was damaged because where a contract belongs to a class which is against public policy it will be declared illegal, although in that particular instance no actual injury may have resulted to the public, as the test is the evil tendency of the contract and not its actual result. * * *

We are of the opinion that the contract involved in this case is against public policy and, therefore, unenforceable.

Judgment is affirmed; the appellant to pay the costs.

NOTE

Bargains for the suppression of competition among bidders may be illegal even though the one inviting the competitive bids, whether at auction or otherwise, is a private individual. See *McMullen v. Hoffman*, 174 U.S. 639, 19 S.Ct. 839, 43 L.Ed. 1117 (1898), municipal contract bidders; *Gibbs v. Smith*, 115 Mass. 502 (1874), private auction; *Restatement, Contracts*, § 517.

It is not illegal, however, for two or more, who in good faith feel unable to make separate bids, to join their resources and make a joint bid. Witness the Six Companies who combined for the purpose of contracting with the Government to build Hoover Dam.

Cases of this type should be compared with those dealing with bargains in restraint of trade. There may be combinations among buyers and consumers as well as among sellers and producers; but they are far less frequent and are less likely to be regarded as against the general welfare.

FROST v. GAGE.

Supreme Judicial Court of Massachusetts, 1862. 3 Allen, 560.

Contract. At the second trial of this case, after the facts reported in 1 Allen, 262, had been proved, the plaintiff offered in evidence a release of their several claims by the creditors of Richard Frost, and Richard testified that, after the release had been signed by the plaintiff and defendant, the latter procured the signatures of other creditors to the same and delivered it to him, and he thereupon executed the assignment to the defendant. The defendant then offered to prove that he was Richard's largest creditor; that the plaintiff, who was Richard's son, requested him to aid in obtaining a settlement with Richard's creditors, and promised to make no claim upon him for any part of the proceeds of Richard's estate which might come into his hands as assignee, but to allow him to retain the plaintiff's share for his services, and also to execute to him a promissory note for a further sum, if he would sign the release and procure the signatures of other creditors to the same; and that he, being induced by said promise did sign the release and procure the signatures of other creditors to the same. Morton, J., rejected this evidence, and the jury returned a verdict for the plaintiff. The defendant alleged exceptions.

BIGELOW, C. J. The right of the plaintiff to maintain his action on the second count, on proof of the facts therein set forth, was determined at the former hearing of this case. 1 Allen, 262. The only point now raised which was not then considered by the court arises on the evidence offered by the defendant to show that there was an agreement between him and the plaintiff, by which the former agreed to sign the composition deed and procure the release of the other creditors of Richard Frost on a promise by the latter to pay a portion of the debt due from said Richard to the defendant, in addition to the dividend which he might receive under the assignment, in common with the other creditors. That such an agreement would be a fraud on the other creditors, and that the defendant could maintain no action upon it against the plaintiff, is too clear to admit of any doubt. It was a secret and underhand contract by which the defendant secured to himself an advantage over other creditors of the insolvent, while at the same time he was holding out to the same creditors that he was to share in the assets equally with them, and thereby inducing them to sign the composition deed and release the debtor from their claims.

Story, Eq. § 378; Cockshott v. Bennett, 2 Term.R. 763, 766; Lewis v. Jones, 4 Barn. & C. 511; Case v. Gerrish, 15 Pick. 49. The question then presents itself, whether such a fraudulent agreement can be set up by the defendant, who was a party to it, as a defense to an action by the plaintiff to recover the same share or dividend of the assets of the debtor as has been paid to the other creditors by the defendant. This is in some respects a novel question; but it seems to us to come within principles recognized in the adjudged cases, by the application of which it can be readily solved.

Assuming that the defendant could establish all the facts contained in his offer of proof, it is clear that the plaintiff was a party to the fraudulent agreement by which the signatures of the other creditors to the release of the debtor were obtained. It was by his procurement, and on a promise by him to pay the defendant a portion of his debt beyond the amount which he would receive from the estate of the debtor, and the latter was induced to sign the release and to become the agent in procuring the signatures of the other creditors. It was through the procurement and instrumentality of the plaintiff, and by means of an agreement which operated as a fraud on the other creditors, to which he was a party, and for which he furnished the consideration, that the composition and release were obtained. He was therefore a participator in the fraud. Holding the relation of a creditor, and bound to act with good faith toward the other creditors, in entering into an agreement with them to compound with their debtor and to release him from their debts, he became a party to an agreement by which a secret advantage was attempted to be secured to the defendant, by which he was induced to become a party to the assignment and release, and thereby to hold out false colors to the other creditors, and lead them to believe that all were acting on equal terms, and to grant a discharge to their debtor on the faith that all were to receive a like portion of their respective debts. To adopt the significant figure which has been used to describe the effect of a transaction of this nature, in Story, Eq. § 378, the plaintiff did not himself act as a decoy duck to mislead the other creditors, but he did that which was quite as effectual in accomplishing the fraud on them; he procured the duck, and placed him in a position in which he was enabled to practice a deception, and to draw the creditors into an arrangement with their debtor to which otherwise they might not have assented.

In this aspect of the case, we do not see that the plaintiff stands in any better situation, or is entitled to any greater favor in a court of law than the defendant. As participators in the fraud, they both stand on an equal footing. Neither can claim to recover anything in an action which can be maintained only by proof of a transaction into any part of which his fraud has entered as an essential element,

affecting the rights of any parties interested therein. It is on this ground that it has been held that a creditor cannot recover his share or dividend under a composition deed to which he became a party, if he had previously taken a private agreement for the payment of the residue of the debt. His right to recover the amount to which the fraudulent agreement did not extend is forfeited by his participation in a fraud connected with another part of the same transaction. The whole is regarded as an entire agreement which is vitiated by the fraudulent act of the party, as to him, so that he can claim no benefit under any of its provisions. *Higgins v. Pitt*, 4 Exch. 323; *Knight v. Hunt*, 5 Bing. 432; *Howden v. Haigh*, 11 Adol. & E. 1033; *Fors. Comp. Cr.* 152. It is quite immaterial, that the funds to be distributed among other creditors are not diminished or rendered less available in consequence of the secret agreement. The fraud consists, not in causing any injury to the assets of the debtor, or in reducing the share or interest to which the creditors are entitled under the composition, but in the attempt to induce them to enter into an agreement for an equal dividend on their debts in ignorance of a private bargain, whereby a creditor is to receive an additional sum to that to which he may be entitled in common with all the creditors. Such an agreement vitiates the whole transaction, so that the party can claim no benefit under a composition into which he entered in consequence of such corrupt or fraudulent contract. It is quite clear, therefore, that the defendant, if he did not stand in the position of assignee having possession of the assets, and were compelled to bring an action for the share or dividend on his debt which might be coming to him in common with the other creditors, could not recover. The agreement into which he entered with the plaintiff would be a bar to his right to recover even that sum to which the fraudulent agreement did not extend. For a like reason, the plaintiff in this suit ought not to be allowed to recover. The fraud in which he participated, and by which he aided in inducing creditors to become parties to the release of their debtor, taints the whole transaction as to him, and deprives him of the right of maintaining an action to enforce in a court of law that part of the agreement of composition to which the secret agreement did not immediately relate.

It may be suggested that the application of this rule leads in the present case to the result of leaving in the hands of the defendant, who was equally guilty with the plaintiff, the fruits of the fraud. But this is often the consequence of allowing a party to plead in defense the illegality of a transaction on which a cause of action is founded. Such defenses are allowed, not out of favor to defendants, or to protect them from the effects of their unlawful contracts, but on the ground of public policy, which does not permit courts of justice to be used to aid either party in enforcing contracts which are unlawful or

tainted with fraud, but leaves them in the condition in which their illegal or immoral acts have placed them.

We are therefore of opinion that the evidence offered at the trial was competent, and that it should have been admitted and submitted to the jury, with instructions in conformity to the principles above stated.

Exceptions sustained.

QUESTIONS:

1. Was the secret agreement between plaintiff and defendant by the performance of which the defendant would get a preference over other creditors though not out of the debtor's assets, an illegal bargain or merely a voidable one? Restatement, Contracts, § 577.
2. Did the making of the secret agreement cause the general composition agreement to be voidable by the other creditors?

EBERT v. HASKELL.

Supreme Judicial Court of Massachusetts, 1914. 217 Mass. 209, 104 N.E. 556.

Action by Clarence E. Ebert against George D. Haskell. Verdict for defendant, and case reported. Judgment ordered to be entered for defendant on the verdict.

The second count of the declaration was as follows:

"Now comes the plaintiff in the above-entitled action and says that on or about October 1, 1909, having been duly authorized by the trustees of the Young Men's Christian Association of the city of Boston to sell some property situated at that time at the corner of Berkeley and Boylston streets, he offered said property for sale to the defendant and that the defendant promised him that if he, the defendant, could effect a sale of the property to any of his, the defendant's, clients, he would pay the plaintiff one per cent of the purchase price, provided however, that the plaintiff would promise not to mention to the trustees of the Y. M. C. A. the fact that the defendant was considering a purchase of the property; that the plaintiff did so promise and did faithfully keep said promise. That thereafter the defendants did effect a sale of said property to one of his, the defendant's, clients, whereupon the one per cent of the purchase price became due and payable to the plaintiff. That although the plaintiff has demanded of the defendant said one per cent of the purchase price he has utterly failed to pay the same. Wherefore the defendant owes the plaintiff one per cent of the purchase price of the property with interest. That throughout the whole proceedings heretofore mentioned the plaintiff has fully kept his side of the bargain and all promises made by him,

whereas the defendant has broken his promises and has failed to keep his side of the bargain."

SHELDON, J. The plaintiff was not a mere middleman charged with no other duty than that of bringing possible purchasers into communication with the owner of the property. In the second count of his declaration, the only one upon which he relied at the trial, he averred that he had been authorized by the trustees of the Young Men's Christian Association to sell the property, and that he offered it for sale to the defendant. His testimony at the trial, although apparently he sometimes sought to avoid calling himself a broker, was to the same effect. But in legal intendment he described himself always as an agent or broker, and not as a mere middleman. Accordingly he owed to the owner all the duties of a broker employed to sell the property, and not merely those of a middleman who undertakes nothing more than to bring the parties together and leave them to make their own bargains. It follows that such cases as *Rupp v. Sampson*, 16 Gray, 398, 77 Am.Dec. 416, can give him no comfort.

As such a broker the plaintiff was bound not to put himself in a position antagonistic to the owner's interests. *Quinn v. Burton*, 195 Mass. 277, 81 N.E. 257. And he could not enforce against any party to the transaction an agreement by which he should pledge himself to conduct inconsistent with this obligation on his part. There was a fiduciary relation between the plaintiff and his principal, the owner of the property, and he was bound, not only to exert his skill and best efforts for the benefit of his principal, but to disclose to the latter all facts material to the transaction which should come to his own knowledge. *Young v. Hughes*, 32 N.J.Eq. 372; *Beury v. Davis*, 111 Va. 581, 588, 69 S.E. 1050; *Pratt v. Patterson*, 112 Pa. 475, 3 A. 858; *Hobart v. Sherburne*, 66 Minn. 171, 68 N.W. 841. He can enforce no agreement relating to the sale of the property, made by him either with his principal or with a third party, by which he undertakes to do anything or to subject himself to the temptation of doing anything inconsistent with the full discharge of his obligations towards his principal. *Sullivan v. Tufts*, 203 Mass. 155, 89 N.E. 239. The courts will refuse to enforce such a contract, not merely if its avowed purpose is to bring about the doing of unlawful acts, but if by making it and complying with it the plaintiff put himself into a position where there was a strong inducement for him to violate his duty to his principal, where he became subject to a wrong influence to do what might affect injuriously the interests of his principal. *Fuller v. Dame*, 18 Pick, 472, 481. If this was the case, it is not material whether the principal actually suffered loss or injury. *Quinn v. Burton*, 195 Mass. 277, 279, 81 N.E. 257, and cases there cited.

The name of the proposed purchaser, or of the firm by which the defendant was employed and which stood in the position of a pur-

chaser, was highly material here, especially in view of the fact that the plaintiff's claim is that the reason for the purchaser's desire to keep this secret was, as the plaintiff was informed, an apprehension that if the name was made known a higher price might be demanded for the property. In this respect the case is unlike *Veasey v. Carson*, 177 Mass. 117, 58 N.E. 177, 53 L.R.A. 241. See *Pratt v. Patterson*, 112 Pa. 475, 479, 3 A. 858; *Wilkinson v. McCullough*, 196 Pa. 205, 46 A. 357, 79 Am.St.Rep. 702; *Young v. Hughes*, 32 N.J.Eq. 372.

* * *

Judgment must be entered for the defendant on the verdict.

NOTE

One who acts as an agent, an attorney, or a trustee for others is in a position of danger and temptation. It is easy to defraud those by whom you are trusted, not only by direct embezzlement and thievery but by taking bribes and "rake-offs". Very often such bribery is veiled under pious phrases. As to bargains tending to induce such breaches of trust see *Restatement, Contracts*, § 570. An agreement to influence the action of a judge or other public official is not only illegal; it is a crime. See *U. S. v. Manton*, 107 F.2d 834 (1938).

Other illustrations of illegal bargains within the title of this section are as follows:

Assignment of salary by a public officer before the service is rendered. *Restatement, Contracts*, § 547; *Granger v. French*, 152 Mich. 356, 116 N.W. 181, 125 Am.St.Rep. 416 (1908).

Bargain by a public officer for a salary either less or more than that fixed by law. *Restatement, Contracts*, § 565; *Rhodes v. City of Tacoma*, 97 Wash. 341, 166 P. 647 (1917), less; *Dodson v. McCurnin*, 178 Iowa, 1211, 160 N.W. 927, L.R.A.1917C, 1084 (1917), more.

Bargain to influence the location of a railway station, post office, or other public facilities. *Restatement, Contracts*, § 564; *Baird v. Salina Northern R. Co.*, 103 Kan. 452, 173 P. 1069, L.R.A.1918F, 1201 (1918); *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U.S. 643, 9 S.Ct. 402, 32 L.Ed. 819 (1889), payment to induce the location of a railroad at a certain place; *Fuller v. Dame*, 18 Pick (Mass.) 472 (1836), location of depot. Bargains to give money or property in aid of the construction of a railway are not made illegal by the fact that they are conditional on the location of the railway through the town or county in which the givers are interested for personal or pecuniary reasons. See *Steele v. Drummond*, 275 U.S. 199, 48 S.Ct. 53, 72 L.Ed. 238 (1927).

Bargain tending to induce a public service corporation to neglect its public duty. *Restatement, Contracts*, § 575; *New York Central R. Co. v. Lockwood*, 17 Wall. 357, 21 L.Ed. 627 (1873), contract to exempt carrier from liability for negligence.

Bargain by corporate official or shareholder to use his power in specified way for personal compensation. *Restatement, Contracts*, § 569; *Palmbaum v. Magulsky*, 217 Mass. 306, 104 N.E. 746, Ann.Cas.1915D, 799 (1914).

SECTION 9.—CONDUCTING BUSINESS WITHOUT A LICENSE

GRIFFITH v. WELLS.

Supreme Court of New York, 1846. 3 Denio, 226.

Griffith sued Wells before a justice of the peace in December, 1843, and declared in assumpsit for two half gallons of whiskey and two glasses of beer, sold and delivered to the defendant, of the value of three shillings and six pence. The plaintiff, who was a grocer, proved his declaration. The defense was, that the plaintiff sold the liquor without having a license to sell spirituous liquors. The justice gave judgment for the plaintiff for 44 cents damages, besides costs. On certiorari, the C. P. reversed the judgment, on the ground that the plaintiff did not show a license to sell spirituous liquors. The plaintiff brings error.

BRONSON, C. J. Our excise law does not in terms, prohibit the sale of strong or spirituous liquors without a license, nor declare the act illegal; but only inflicts a penalty upon the offender. 1 Rev.St. 680, §§ 15, 16. From this it is argued, that although the seller without a license incurs a penalty, the contract of sale is valid, and may be enforced by action. But it was laid down long ago, that "where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful; for it cannot be intended that a statute, would inflict a penalty for a lawful act." *Bartlett v. Viner*, Skin. 322. In the report of the same case in *Carthew* (page 252), Holt, C. J., said: "A penalty implies a prohibition, though there are no prohibitory words in the statute." Although this was but a dictum, the doctrine has been fully approved. *De Begnis v. Armistead*, 10 Bing. 107; *Foster v. Taylor*, 3 Nev. & M. 244, 5 Barn. & Adol. 887; *Cope v. Rowlands*, 2 Mees. & W. 149; *Mitchell v. Smith*, 1 Bin. 110, 4 Dall. 269, 1 L.Ed. 828; *Seidenbender v. Charles*, 4 Serg. & R. (Pa.) 159, 8 Am. Dec. 682, per Tilghman, C. J.; *Bank v. Merrick*, 14 Mass. 322.

When a license to carry on a particular trade is required for the sole purpose of raising revenue, and the statute only inflicts a penalty by way of securing payment of the license money, it may be that a sale without a license would be valid. *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & C. 93; *Chit. Cont.* (Ed. 1842) 419, 697. But if the statute looks beyond the question of revenue, and has in view the protection of the public health or morals, or the prevention of frauds by the seller, then, though there be nothing but a penalty, a contract which infringes the statute cannot be supported.

• • •

Now I think it quite clear, that in the enactment of our excise law the legislature looked beyond the mere question of revenue, and intended to prevent some of the evils which are so likely to flow from the **traffic in spirituous liquors**. If revenue alone had been the object, licenses would have been allowed indiscriminately to all. But the statute forbids a license to any one, whether tavern-keeper or grocer, who is not of good moral character; and he must moreover give bond, with sureties, that his house or grocery shall not become disorderly. Sections 6, 7, 13. These regulations were evidently intended to protect the public, in some degree, against the consequences which might be expected to follow from allowing all persons, at their pleasure, to deal in strong liquors. And although the statute only inflicts a penalty for selling without a license the contract is illegal, and no action will lie to enforce it. The justice was wrong; and his judgment has been properly reversed by the common pleas.

Judgment affirmed.

NOTE

Cases are very numerous in which a party who has received goods or services and is sued for payment defends on the ground that the plaintiff was not licensed to sell the goods or render the services as required by law. It is not always easy to determine whether the purpose of the legislature in passing a licensing statute was the protection of the public against fraud, incompetence, and other evils or was only to provide additions to revenue. In cases near the borderline, courts will be influenced by the fact that the defendant received the full value for which he bargained and that no public harm can in fact be shown. The statute sometimes expressly provides that bargains made without first obtaining a license shall not be enforceable. The following are some of the classes of persons who are required to procure a license for protection of the public rather than for revenue: lawyers, doctors, teachers, officers and pilots of ships, brokers, drug clerks. See Restatement, Contracts, § 580.

A licensing statute, even though not for revenue, may be such that the invalidation of all bargains made without a license seems far too drastic a penalty and the court avoids imposing it. See *John E. Rosasco Creameries v. Cohen*, 276 N.Y. 274, 11 N.E.2d 908, 118 A.L.R. 641 (1937), where an unlicensed milk dealer was given judgment for \$11,000, the price of milk sold to another milk dealer.

**SECTION 10.—CONTRACTS IN AID OR WITH KNOWLEDGE
OF ILLEGAL PURPOSE**

WAYMELL v. REED et al.

In the King's Bench, 1794. 5 Term R. 599.

In assumpsit for goods sold and delivered, the defence was, that the contract was a smuggling transaction. It appeared in evidence that the defendants had applied to the plaintiff, who was a foreigner living at Lisle, for a quantity of lace, which he knew was intended to be smuggled into England; and for that purpose it was packed by the plaintiff in a peculiar manner, by the direction of the defendants, for the more easy conveyance of it without a discovery. A verdict was taken for the plaintiff, subject to be set aside, and a nonsuit entered, if this Court should be of opinion that the plaintiff was not entitled to recover under these circumstances. A rule having been obtained for that purpose.

Erskine and Best shewed cause.

Bower and Garrow, contra, were stopped by the Court.

LORD KENYON, C. J. It is not necessary to enquire now, whether or not it be immoral for a native of one country to enter into a contract with the subject of another, to assist the latter in defrauding the revenue laws of his country? It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in *Holman v. Johnson*, Cowp. 344, to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord Mansfield, at the end of *Holman v. Johnson*, comes up to the present case.

Rule absolute.

PAUL JONES & CO. v. WILKINS.

Supreme Court of Tennessee, 1916.
135 Tenn. 146, 185 S.W. 1074, Ann.Cas.1918B, 977.

Suit by Paul Jones & Co. against T. B. Wilkins. To review judgment for defendant, plaintiff petitions for certiorari. Writ denied.

WILLIAMS, J. This suit was commenced by Paul Jones & Co., a wholesale liquor concern of Louisville, Ky., to recover the sale price of 35 cases of whisky sold to Wilkins and shipped to Memphis. The defense was based on the ground that the liquor was sold to Wilkins to be by him retailed in Shelby county, in violation of the prohibition laws of this state in force in that city. The trial judge and the Court of Civil Appeals have concurred in a denial of a remedy to plaintiff in the suit; and the cause is before us for review on a petition for certiorari.

The fundamental principles that must govern the controversy are those announced in the case of *Bank v. Burke*, 135 Tenn. 19, 185 S.W. 704, Ann.Cas.1918C, 439, at this term of court. That case involved the legality of a contract of lease, but the opinion also discussed contracts of sale.

The general rule is that in case of the sale of intoxicating liquors mere knowledge on the part of the seller that the purchaser intends illegally to resell such liquors will not render the contract void so as to bar the seller's action for the purchase price. *Tracy v. Talmage*, 14 N.Y. 173, 67 Am.Dec. 132; *Anheuser-Busch Brewing Asso. v. Mason*, 44 Minn. 318, 46 N.W. 558, 9 L.R.A. 506, 20 Am.St.Rep. 580; *Washington Liquors Co. v. Shaw*, 38 Wash. 398, 80 P. 536, 3 Ann.Cas. 153; *Frankel v. Hillier*, 16 N.D. 387, 113 N.W. 1067, 15 Ann.Cas. 265; 9 Cyc. 571.

However, if the seller participates or contributes to the intention of the purchaser to sell in violation of law, or does any act, however slight, to facilitate or in furtherance of the design to transgress, or has an interest therein, the right to recover for the price is lost. The participation in the illegal purpose or act must be in some manner other than the mere act of making the sale. Authorities, *supra*.

We are of opinion that the facts in this case show such a participation on the part of the plaintiff vendor as to bar him of any remedy. The plaintiff knew through its local solicitor in Memphis that Wilkins was running a "wide-open" retail liquor saloon; the solicitor had bought drinks for himself and others over the bar. The shipment represented by the account in suit was not made to Wilkins as consignee, but to the Lewis Transfer Company for delivery—so agreed in order that the public would not know to whom it was to be delivered.

The cases were not marked with the name of T. B. Wilkins, but with the initials, "T. B. W."

The manager of the vendor company testifies that the shipment to the transfer company as consignee was for the purpose of insuring delivery to Wilkins. We fail to see how that end could have been more safely attained by the marking of the outside of the cases with mere initials, rather than with the name and street address of the purchaser, even though it was desirable thus to use the transfer company.

Where it appeared that the plaintiff, a wholesale liquor dealer, supplied a retailer in another state with intoxicating liquors, and aided the latter by shipping to a fictitious consignee part of the liquors, and by packing other portions so as to conceal their true character, it was held that his account could not be recovered. *Kohn v. Melcher* (C.C.) 43 F. 641, 10 L.R.A. 439; *Feineman v. Sachs*, 33 Kan. 621, 7 P. 222, 52 Am.Rep. 547; *Corbin v. Houlehan*, 100 Me. 246, 61 A. 131, 70 L.R.A. 568.

In *Gaylord v. Soragen*, 32 Vt. 110, 76 Am.Dec. 154, it was held that an action by the seller could not be maintained when, at the defendant's request, the plaintiff marked the packages in a peculiar way, omitting the defendant's name so as to enable the defendant with greater facility to save them from seizure.

Particular pertinency is given to these authorities by the fact that we have in this state a statute (Act Extra Session 1913, c. 1) that requires common carriers to cause all consignees of liquors to sign, before delivery of goods, an affidavit setting out his name, address, the fact of consignment to affiant, the use to be made of the liquors, etc. It is manifest that the manipulation resorted to by the plaintiff was to circumvent the object sought to be attained by the Legislature in the passage of this act.

A correct result has been reached in this case. Writ denied.

NOTE

A bargain by the owner of land or goods, involving a share in the profits of their illegal use, is an illegal bargain. One who rents a house, or sells furniture by a conditional sale retaining title, to one who he knows will use it in conducting a house of prostitution, cannot enforce the bargain. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 P. 145, 51 L.R.A. 889, 79 Am.St.Rep. 960 (1900).

Knowledge of Other Party's Illegal Purpose.—In the United States, a bargain that is in itself lawful is not made unenforceable by the fact that the plaintiff knew that the defendant had an unlawful purpose ulterior to the bargain, if the plaintiff does not share the purpose and aid its execution unless the intended purpose is a very serious offense. See *Restatement, Contracts*, § 602; *Graves v. Johnson*, 156 Mass. 211, 30 N.E. 818, 15 L.R.A. 834, 32 Am.St.Rep. 446 (1892); s. c., 179 Mass. 53, 60 N.E.

383, 88 Am.St.Rep. 355 (1901); *Tracy v. Talmage*, 14 N.Y. 162, 67 Am.Dec. 132 (1856). But see *Hanauer v. Doane*, 12 Wall. 342, 20 L.Ed. 439 (1870), "heinous crime."

In *Pearce v. Brooks*, L.R. 1 Ex. 213, 14 L.T. 288 (1866), the plaintiff sold a brougham to the defendant, knowing that the defendant was a prostitute, who expected to use the brougham in her illegal trade, and that payment would be made out of her illegal gains. It was held that the bargain was illegal and void. Cases in the United States are generally contra, assuming that the seller does nothing in aid of the business and retains no interest in the chattels sold.

An agreement between a married man and a woman to marry as soon as the former shall secure a divorce from his existing wife is illegal. *Restatement, Contracts*, § 588.

ROYS v. JOHNSON et al.

Supreme Judicial Court of Massachusetts, 1856. 7 Gray, 162.

METCALF, J. It is agreed by the parties that the plaintiff performed for the defendants the services for which he now seeks to recover payment and that they have not paid him. It is for them, therefore, to show that he is not entitled to recover. This, in our opinion, is not shown by the statement of facts submitted to us. It appears, indeed, from that statement, that the defendants, without a license, set up theatrical exhibitions, in which they employed the plaintiff as an actor; and it follows, of course, that they thereby violated the law, and subjected themselves to punishment. But it does not appear that the plaintiff knew that they had no license. Unless he knew that fact, he is in no legal fault; and where a defendant is the only person who has violated the law, he cannot be allowed to take advantage of his own wrong, to defeat the rights of a plaintiff who is innocent.

In the cases cited by the defendants' counsel, where defences were sustained because the claims were void for illegality, the parties suing knew, or were bound to know, that they or the parties sued were violating or undertaking to violate the law. And this distinguishes all those cases, as well in law as in common justice, from the case at bar; as was held in *Bloxsome v. Williams*, 3 Barn. & C. 232. In that case, a suit was brought to recover damages for breach of a warranty of a horse sold to the plaintiff on Sunday. The defence was, that the contract was void within St. 29 Car. II, which prohibits worldly labor, business or work, in the exercise of one's ordinary calling. It appeared that the defendant's ordinary calling was that of a dealer in horses, and therefore, that he had violated the statute by selling and warranting the horse; but that dealing in horses was not the plaintiff's ordinary calling, and therefore, that he had not violated the statute by purchasing the horse and taking a warranty. But, as the case states,

there was no evidence that the plaintiff knew that the defendant was by trade a horsedealer at the time the bargain was entered into. The court held that the defendant was answerable for the breach of his contract. Bayley, J., said: "The defendant was the person offending, within the meaning of the statute, by exercising his ordinary calling on the Sunday. He might be thereby deprived of any right to sue upon a contract so illegally made; and upon the same principle any other person knowingly aiding him in a breach of the law, by becoming a party to such a contract, with the knowledge that it was illegal, could not sue upon it. But in this case, the fact that the defendant was a dealer in horses was not known to the plaintiff. He, therefore, has not knowingly concurred in aiding the defendant to offend the law; and that being so, it is not competent to the defendant to set up his own breach of the law as an answer to this action." See report of the same case in 5 Dowl. & R. 82, and a recognition of the doctrine of that case in *Fennell v. Ridler*, 8 Dowl. & R. 207, 208, and 5 Barn. & C. 409, and also in *Begbie v. Levy*, 1 Tyrw. 131, and 1 Crompton & J. 183.

It is to be noticed that in the case of *Bloxsome v. Williams*, it was said that it was not known to the plaintiff that the defendant was a dealer in horses, because there was no evidence that he knew it. In the present case, we treat the plaintiff as not knowing that the defendant had no license, because the statement of facts does not show that he knew it.

It is ignorance of a fact, and not of the law, that saves the plaintiff's case. He undoubtedly knew, or was bound to know, that unlicensed theatrical exhibitions were unlawful; but he was not bound to know that the defendants had no license and were doing unlawful acts.

Judgment for the plaintiff.

NOTE

In accord, Restatement, Contracts, § 599. Where one party to a sale for future delivery intends it as a gambling transaction, but the other party does not, the latter can enforce the bargain. *Pixley v. Boynton*, 79 Ill. 351 (1875). Also where a married man agrees to marry a woman who does not know that he is married, she can maintain suit for breach of promise. *Millward v. Littlewood*, 5 Ex. 775 (1850).

The innocent party has rights under the bargain; but he is also privileged not to perform, and may repudiate on learning of the illegal action or purpose of the other. *Church v. Proctor*, 66 F. 240, 13 C.C.A. 426 (1895); *Cowan v. Milbourn*, L.R. 2 Ex. 230 (1867).

The Statute may Mark the Criminal.—If the statute is intended for the protection of one class of persons against another, the courts frequently enforce a bargain in favor of the former and against the latter, or else create a quasi contractual duty of reimbursement in order to carry out the real purpose of the statute. See Restatement, Contracts, § 601; Tracy

v. Talmage, 14 N.Y. 162, 67 Am.Dec. 132 (1856); *White v. President, etc., of Franklin Bank*, 22 Pick (Mass.) 181 (1839).

Ignorance of the law is no excuse; but if a bargain can be performed in a lawful manner it will be enforced, in spite of the fact that the parties expected to perform it in an alternative manner, which, unknown to them, was illegal. *Waugh v. Morris*, L.R. 8 Q.B. 202 (1873).

SECTION 11.—BARGAINS ILLEGAL IN PART

SULLIVAN v. HORGAN.

Supreme Court of Rhode Island, 1890. 17 R.I. 109, 20 A. 232, 9 L.R.A. 110.

MATTESON, J. This is an action of assumpsit to recover moneys claimed to be due to the plaintiff from the defendant under a contract of hiring. It appears from the evidence reported that the plaintiff was employed by the defendant in his business of a dealer in groceries and liquors, as bar-tender and clerk, from November 27, 1886, until April 19, 1888, and was to receive as wages \$18 per month until May 1, 1887, and \$25 per month thereafter. At the trial the defendant set up as a defense the illegality of the contract, the sale of liquors being prohibited by law when the contract of hiring was made, and during the period of the plaintiff's employment. The jury returned a verdict for the plaintiff for \$187.84. The defendant moves for a new trial, on the ground that the verdict is against the law and the evidence.

The principle that if a contract or promise be founded on a legal and an illegal consideration, and the illegal consideration cannot be separated from the legal, and rejected, the illegality of part vitiates the whole, so that no action can be maintained upon it as a contract, is conceded; but it is suggested that, inasmuch as the contract is illegal and void, and is therefore, as it is contended, a nullity, the plaintiff is entitled to recover for that portion of his services performed as clerk in the grocery part of the business, upon a quantum meruit, what such services were reasonably worth, and therefore that the verdict may be supported. We do not, however, agree with the suggestion. Although a contract thus infected with illegality is regarded in law as a nullity, in so far that the law will not lend its aid to enforce it, it is nevertheless not treated as if it had no existence in fact. The illegality extends to every part of the transaction, and it cannot, therefore, be made the foundation of an assumpsit. Both parties are in *pari delicto*, and the law will, for that reason, not aid either party to enforce the contract, but leaves them where it finds them. It may sometimes hap-

pen, in consequence, that a defendant may gain a pecuniary benefit by reason of his wrong-doing, or of that in which he has equally participated; but it is not for the sake of the defendant that his objection to his own illegal contract is sustained. In *Holman v. Johnson*, Cowp. 341, 343, Lord Mansfield remarks: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or from the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because it will not lend its aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, *potior est conditio defendentis*."

* * *

In the present case the sums which the defendant promised to pay formed one entire consideration for all the services to be rendered by the plaintiff, both those in tending the bar, which were illegal, and those as clerk in the grocery store, which were legal. Had one price been agreed upon for the services as bar-keeper, and another as clerk in the grocery business, so that it would have been possible to separate the legal from the illegal part of the transaction, an action could have been maintained for the services which were legal; but, as it is, the defendant's promise being entire, and the consideration for it being partly legal and partly illegal and indivisible, both parties are to be regarded as equally in fault, and the law will lend its aid to neither.

Petition granted.

NOTE ON PARTIAL ILLEGALITY AND DIVISIBILITY

With respect to bargains that are said to be illegal in part, two rules are very frequently encountered worded somewhat as follows: (1) If a lawful consideration is given for two promises, one of which is lawful and the other unlawful, the lawful promise is enforceable. (2) If any part of the consideration that is given for a promise is unlawful, the promise is unenforceable even though in itself the promise would be in every respect lawful. As so worded, neither rule is supportable in

all cases and neither one is consistently applied. No more will here be said, however, than is necessary to constitute a warning.

In determining what is lawful and what is unlawful in a bargain, no promise can ever be considered apart from its consideration, and no performance apart from that which is given in exchange for it. The quality of either an act or a promise—its lawfulness or unlawfulness—can not be determined without knowing the purpose for which it is performed or given and the circumstances under which it is performed or given. The degree of evil involved must be considered and the harm to the community that would be involved in partial enforcement.

One who pays \$100 in "lawful" money for two promises by another, to cut cord-wood for a month and to shoot a feuding neighbor if he appears, can get no judgment for damages for failure to cut the wood whether the promised shooting occurs or not. One who pays for murder is as guilty as the one who shoots.

On the other hand, if A pays lawful money to B for two promises by the latter, to transfer his bakery to A and to remain forever after out of the bakery business, rule (1) above has been applied in favor of A enabling him to enforce the lawful promise to transfer the bakery if he abandons the promise in unlawful restraint of trade. If the bargain had been bilateral and B had sued A for the money promised, rule (2) above would prevent recovery of anything. To make both rules thus operate against B and in favor of A is grave injustice, since it is A who induces the injurious restraint and hopes to profit by it at the expense of consumers. In this case, the performances promised (or actually performed) by the two parties are in no respect unlawful. It is the making of such a bargain that is unlawful, and in making it A is generally the more guilty of the two. See Restatement, Contracts, §§ 518, 603.

Compare Restatement, Contracts, §§ 606, 607, with the foregoing part of this note. In these sections a distinction is made between bilateral and unilateral bargains that the present editor can not accept. It is to be observed that not a single Illustration is given for either section.

The following statements are offered for consideration: (1) A bargain should not be enforceable in any respect if either the making of the bargain or the performance of any promise in it is a felony or involves "serious moral turpitude" on the part of the one asking enforcement. (2) A bargain involving a lesser degree of illegality may be enforced with respect to any performance that is not itself illegal if the court is convinced that enforcement will not do injury to the public and if refusal of enforcement would result in a penalty or forfeiture disproportionate to the offense. (3) Enforceability within paragraph (2) is determined on grounds of social policy, not upon the "divisibil-

ity" of the bargain by reason of the supposed intention of the parties or the terms in which it is expressed. (4) Even if the remedies in Damages or Specific Performance are not available, the remedy of Restitution may be granted in favor of one who is not in *pari delicto* with the defendant, if the case is not within paragraph (1) and if he has repented and seeks the remedy before the attainment of his illegal purpose.

CHAPTER 14

THE STATUTE OF FRAUDS

INTRODUCTORY NOTE

The reign of Charles II in England appears to have been a time in which there was a somewhat higher degree of moral degeneracy than usual, perhaps in reaction from the sternness of Cromwell and his Roundheads. Some evidence of this is found in the fact that in the 29th year of Charles' reign Parliament enacted a Statute for the Prevention of Frauds and Perjuries, a statute containing 25 sections some of which prescribed new criminal penalties. Under the then existing common law, contracts were not denied enforcement merely because they were made by word of mouth and never reduced to writing; and the authors of the new statute believed that actions were being maintained in the courts for the enforcement of promises that had never been made and that fraud was thus successfully consummated with the aid of perjured testimony. Hardened offenders are not sufficiently deterred by threat of criminal penalties that can themselves be avoided by more perjury; and it was therefore provided in this statute that certain classes of contracts, presumably those in which fraud was thought to be most frequent, should not be enforceable by action in the absence of a writing evidencing the contract, with the signature of the party against whom enforcement was sought.

The lawyers and judges who were responsible for this legislation were not prevented from putting it through by the fact that its provisions are operative as strongly against the innocent as against the guilty. No doubt it makes the successful enforcement of a falsely asserted contract more difficult; the defrauder must now exercise his arts so as to induce the other party to sign a writing (the terms of which he may not have read or clearly understood) or he must risk the penalties for forgery in addition to perjury. But it also prevents an innocent party from enforcing an unwritten or unsigned contract that was in fact made and that the other party now repudiates after it has turned out to be disadvantageous.

There is no way of determining with certainty whether the statute has done more good than harm. Lord Nottingham is reported to have said of it, in his pride of authorship, that "every line of the statute has been worth a subsidy." Most lawyers and judges have declared it to be a beneficial statute, a South Carolina judge once having declared, "But for the salutary influence of this statute, thousands would tumble

into ruin by having their estates taken from them to answer for the debts, defaults, and miscarriages of others * * * I think it the only bulwark of security to shield men from those evils which the statute was intended to remedy." Many others, including such names as Lord Mansfield, Sir Frederick Pollock, and Sir William Holdsworth, have thought the exact contrary, one writer having retorted, to Lord Nottingham's statement above, that "every line has cost a subsidy, for it is universally admitted that no enactment of any Legislature ever became the subject of so much litigation." It is the truth that the application of this statute, and its successors under the same name, has been one of the principal issues in tens of thousands of cases.

"This statute and its successors." The student must be warned at once not to be misled by references to "The Statute of Frauds." The original act of Parliament bearing that name, with its 25 sections dealing with conveyances, wills, and trusts, as well as with the enforcement of contracts, has never been re-enacted in exact words and as a whole in any of the United States. The two sections with which we are concerned in this Chapter, sections 4 and 17 as reprinted below, have been very generally re-enacted in the United States, but not in identical form. It is never safe to give advice on this subject without making careful examination of the statutes of the jurisdiction whose law is applicable. All of the states have statutes affecting the enforceability of the five classes of contracts included within the original section 4, the statutory requirements being sufficiently similar to justify the study of that original section and perhaps to justify the American Law Institute in including in its "Restatement" a number of advisory Sections on the interpretation and application of an assumed statute like the original one. About one third of the states never re-enacted the provisions of the original section 17. Such provisions were included, however, in the Uniform Sales Act, drafted in 1906, and since then very widely adopted. Even these provisions have been enacted without being "Uniform;" the price term in particular, in lieu of the original "ten pounds sterling", varying from \$30 to \$2,500. A new "Uniform Revised Sales Act" was completed in 1945, at the instance of the American Law Institute and the Commissioners on Uniform State Laws. If this shall be adopted by Congress and the States, much of the learning with respect to the original section 17 and to the Uniform Sales Act of 1906 will be obsolete. For that learning the student is referred to Restatement, Contracts, secs. 199-206, and to the courses on Sales that are offered in all law schools and very generally taken by law students. No cases on the application of section 17 are here included.

The subject matter of certain clauses in section 4 of the statute is also dealt with in other law school courses. Contracts for the sale of an interest in land are included in property courses entitled "Vendor and Purchaser" or "Conveyancing." Courses and treatises on "Sure-

tyship and Guaranty" are concerned with promises to answer for the debt of another. Cases dealing with the subject matter of these clauses are represented in this Chapter in order to present more effectively the application of the statute as a whole, the nature of its legal operation, and the attitude of the courts toward it. At best, the attainment of this purpose is possible only to a limited degree, not only because of differences in the existing statutes, but because the courts have greatly varied in their understanding and application of the original statute and the others substantially identical with it. The cases herein are presented as samples taken from a vast number, for critical study, with the warning that they do not constitute an adequate basis for broad generalization. They are no more than a brief introduction to a large statutory field and to the judicial process of statutory interpretation and application.

Many of the states have passed additional statutes making other classes of contracts unenforceable by legal action in the absence of a signed writing. Among these are promises to pay a debt barred by statute of limitations or discharged in bankruptcy, promises in ratification of a contract made by an infant, promises of some performance to be rendered after the promisor's death, and promises to pay a commission to a real estate broker.

ST. 29 CAR. II, c. 3 (1677). AN ACT FOR PREVENTION
OF FRAUDS AND PERJURIES

Sec. 4. And be it further enacted that from and after the said 24th day of June no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

Sec. 17. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June no contract for the sale of any goods, wares, or merchandises, for the price of ten pounds sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that

some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

SECTION 1.—CONTRACTS OF GUARANTY

THOMAS v. WELLES.

Superior Court of Connecticut, 1773. 1 Root, 57.

Error. Welles was a constable of the town of Hartford, had a rate warrant and a rate against Jacob Brown for which he levied upon Brown's body and was about to commit him to gaol. Thomas, in consideration that Welles would suspend any further proceedings against Brown that night, assumed and promised that he would see him forthcoming to said officer the next morning, or he would pay the debt. Upon this Welles released said Brown, and Thomas did not see him forthcoming, nor has he paid the debt, &c.

Plea in bar—The statute against frauds and perjuries; demurrer. **Judgment**—That the plea is insufficient, and for plaintiff to recover.

Error assigned is—That the plea was sufficient. **Judgment**—Manifest error; for this is clearly a promise for the debt and duty of another.

NOTE

In *Reader v. Kingham*, 13 C.B.(N.S.) 344 (1862), the decision was in conflict with that of the final judgment above. The reason given for enforcing the oral promise to pay another's debt was that the promise was made to the bailiff and not to the creditor, although the latter had authorized the bailiff to accept settlement. Is this clause of the statute applicable only to promises made directly to the creditor to whom another person owes the debt?

KANTER v. M. HOFHEIMER & CO., INC.

Supreme Court of Appeals of Virginia, 1916. 118 Va. 625, 88 S.E. 60.

Action by M. Hofheimer & Co., Incorporated, against Israel Kanter. There was judgment for plaintiff, and defendant brings error. **Affirmed.**

WHITTLE, J. From the point of view of a demurrer to the evidence, the essential facts of this case are these: Plaintiff in error, Kanter

(who was defendant below), for several years prior to 1912 had been engaged in the retail liquor business in the city of Norfolk, where for some violation of the statute his license was revoked. Thereupon Kanter, in association with his brother-in-law, Kesser, and one Rice, organized and had incorporated the South Norfolk Liquor Company, and through the agency of Rice the corporation obtained from the circuit court of Norfolk county a license to keep an ordinary in South Norfolk, a suburb of the city of Norfolk. Kanter practically owned the entire stock and conducted the business of the corporation as the general manager. While in business in the city of Norfolk he was a customer of the defendant in error, and bought his stock of liquors from that concern. As soon as the corporation was organized and licensed, Kanter approached the secretary and treasurer of M. Hofheimer & Co., Incorporated, for the purpose of establishing trade relations between them and his corporation, and to purchase the opening stock; but the offer was declined, and the secretary and treasurer absolutely refused to do business with the corporation or to sell it goods, but agreed to sell the stock to Kanter as an individual and deliver the goods to the South Norfolk Liquor Company. That proposition was accepted, and the goods (for the price of which the judgment under review against Kanter was recovered) were sold in pursuance of that agreement.

The plaintiff in error seeks to escape liability on two grounds:

1. That the sale was made to the South Norfolk Liquor Company, Incorporated, and that Kanter was not liable therefor under the statute of frauds, because his promise to pay was not in writing.

That issue of fact was submitted to the jury upon correct instruction, and, upon conflicting evidence, having been resolved in favor of the plaintiff, the finding of the jury is conclusive. Kanter's liability being positive and personal, not contingent and collateral, the transaction was not within the statute of frauds. 2 Va. Law Reg. 465; *Hopkins v. Richardson*, 9 Grat. (50 Va.) 485; *Noyes' Ex'x v. Humphreys*, 11 Grat. (52 Va.) 636; *Wright v. Smith*, 81 Va. 777; *Skinker v. Armstrong*, 86 Va. 1015, 11 S.E. 977.

2. That if the sale was made to Kanter, with knowledge that the liquor was to be resold by him in violation of the statute, plaintiff could not recover.

That issue was likewise submitted to the jury upon an extremely favorable instruction as to the defendant's contention, and the jury again adopted the theory of the plaintiff that Kanter purchased the goods upon his individual credit for a corporation in which he was a controlling stockholder, and which, under its license, had the lawful right to sell the liquors.

The jury having so found, upon proper instructions and sufficient evidence, and their verdict having been sustained by the trial court, on familiar principles, it cannot be disturbed in this court.

We are of opinion that the judgment should be affirmed.

NOTE

Not infrequently a person promises to pay for services to be rendered or goods to be delivered to some third person at the request of the promisor, with the understanding (express or implicit) that the third person is not bound to pay for them. In such a case the promisor is the sole obligor; he is a "debtor," not a "surety." There are cases in which the parties themselves, including the third person, are not clear in their own minds as to whether the third person is bound to pay.

It is a question of fact whether "sole credit" was given to the defendant. It is easy for a plaintiff to testify that he gave credit to the defendant alone, meaning thereby that he would not have contracted on the credit of the third person and did not rely on him at all. In such cases, if the jury is well satisfied that the defendant made the oral promise alleged, its verdict will be for the plaintiff. A count of 1,000 cases shows that the appellate courts sustain these verdicts in two-thirds of the appealed cases. Since there is little doubt that most such cases are not appealed, it seems highly probable that the statute operates largely as a clog rather than as a prevention of enforcement. Restatement, Contracts, § 180, interprets the statute logically, and says nothing of the possible shift in meaning given to such a phrase as "sole credit"—the shift from "the only party with whom I contracted" to "the only party in whose financial ability I had any confidence."

Joint Contracts.—No writing is required to bind A., where A. and B. promise jointly to pay for goods delivered to B. (This seems to be due to a fiction of unity as to the two promisors.) Restatement, Contracts, § 181; *Gibbs v. Blanchard*, 15 Mich. 292 (1867).

GRIFFIN v. CUNNINGHAM.

Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 505, 67 N.E. 660.

Action by one Griffin against one Cunningham. Verdict for plaintiff, and defendant excepts. Exceptions overruled.

Contract to recover for lumber furnished by the plaintiff to one Griffiths, a contractor, for the purpose of making alterations on a house owned by the defendant. Griffin proposed to bring a suit against Griffiths, and the three parties entered into an agreement by which Cunningham promised to pay Griffin the amount of his bill against Griffiths, if Griffiths approved the bill, payments to be made direct to Griffin.

BRALEY, J. If the promise made to the plaintiff by the defendant was nothing more than an oral agreement on his part to pay any balance due Griffiths that remained after a settlement of liens for labor, the undertaking was collateral, as the original debt owed by Griffiths to the plaintiff was not extinguished. And as it is not claimed that the defendant derived any benefit from the arrangement, the statute of frauds on which the defendant relies would be a full defense. *Curtis v. Brown*, 5 Cush. 488; *Manley v. Geagan*, 105 Mass. 445; *O'Connell v. Mount Holyoke College*, 174 Mass. 511, 514, 55 N.E. 460. But there was something more. What the parties agreed to was in dispute. And as the case is before us on a refusal to rule that upon all the evidence the plaintiff could not recover, it becomes necessary to determine whether there was any evidence to sustain the verdict.

The plaintiff puts his case on a substitution of debtors, and his evidence in substance tended to prove that Griffiths, who was owing him a large amount for lumber that had been used in reconstructing a house belonging to the defendant with whom Griffiths had a contract to furnish materials and do the work, agreed that the balance coming to him under the contract should be paid by the defendant to the plaintiff in settlement of his bill for the lumber, and that the defendant, at whose suggestion the arrangement was made, assented to the substitution, and promised to pay the plaintiff the balance remaining due under the contract after the settlement of any liens for labor. Relying on this agreement, and in consequence of it, the plaintiff released Griffiths, his original debtor, and looked to the defendant solely for the payment of his bill. The question is, what was the intention of the parties? and, in order to determine the character of the transaction, all the circumstances are to be considered.

The substitution sought to be accomplished was a change of debtors to the extent of the plaintiff's claim against Griffiths, and it was not necessary that the whole indebtedness of the defendant to Griffiths, if it exceeded the amount of the plaintiff's bill, should have been discharged. But the arrangement between the parties was enough under the evidence in this case to fully discharge the defendant from any liability under the building contract, as there was no contention that the amount due the plaintiff from Griffiths was more than the sum finally paid to him by the defendant in the settlement made between them. There was also evidence from which the jury might find that the original debt of Griffiths to the plaintiff had been discharged, though this follows if mutual consent to the substitution is proved. *Walker v. Sherman*, 11 Metc. 170. If the claim of the plaintiff against him had been converted into a claim of the plaintiff against the defendant, it is not necessary to consider the transaction as a possible assignment of a part of the claim of Griffiths against Cunningham, and that in such a case the plaintiff could have relief only in equity. See *James v. Newton*, 142

Mass. 366, 374, 8 N.E. 122, 56 Am.Rep. 692; *Holbrook v. Payne*, 151 Mass. 383, 384, 24 N.E. 210, 21 Am.St.Rep. 456. Under the plaintiff's evidence, the defendant, by accepting the order of Griffiths, who signed it with the understanding that the bill of the plaintiff was to be paid by the defendant, contracted not only to pay the debt, but also, as a part of the transaction, undertook that the debt should be paid to the plaintiff, while the plaintiff at the same time agreed to accept the defendant as his debtor in place of Griffiths. It would not be enough that the defendant accepted the order; he must go further and promise to pay the plaintiff. The consideration for the promise is that the plaintiff, as a part of the completed arrangement, became bound to look solely to the defendant for the money owed him, instead of to Griffiths. If the original debtor did not remain liable, the defendant's promise was not to answer for the debt of another, and it was not within the statute.

• • •

In the case at bar the plaintiff was the promisee, and the contract between him and the defendant gave all the contractual rights provided for his benefit, and had an ample consideration to support it by the release of the original debtor. If there had been no conflict of testimony, and the terms of the alleged substitution of debtors was not in dispute, whether enough had been made out to establish the claimed novation would have been a matter of law for the court. But there were two possible conclusions on the evidence: If the defendant was believed, the plaintiff could not prevail; while if the plaintiff's testimony was accepted as true, a complete substitution had taken place, and the defendant was liable. Obviously it could not be ruled as matter of law that the plaintiff was not entitled to recover; and, as the case was submitted to the jury under instructions not excepted to, the presumption is that they were full and accurate, and the order must be.

Exceptions overruled.

NOTE

In attempting to enforce what he believes to be a just demand against a defendant, who orally accepted an order drawn on him or otherwise promised to pay the debt of another, it is easy for a creditor to convince himself that he discharged the debtor in exchange for the oral acceptance or promise.

EASTWOOD v. KENYON.

In the Court of Queen's Bench, 1840. 11 Adol. & E. 438.

LORD DENMAN, C. J. The first point in this case arose on the fourth section of the Statute of Frauds, viz., whether the promise of the defendant was to "answer for the debt, default, or miscarriage of another person." Upon the hearing we decided, in conformity with

the case of *Buttemere v. Hayes*, 5 M. & W. 456, that this defence might be set up under the plea of non assumpsit.

The facts were that the plaintiff was liable to a Mr. Blackburn on a promissory note; and the defendant, for a consideration, which may for the purpose of the argument be taken to have been sufficient, promised the plaintiff to pay and discharge the note to Blackburn. If the promise had been made to Blackburn, doubtless the statute would have applied: it would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another, because the promise is made to that other, viz., the debtor, and not to the creditor, the statute not having in terms stated to whom the promise, contemplated by it, is to be made. But upon consideration we are of opinion that the statute applies only to promises made to the person to whom another is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one. * * *

NOTE

The statement of facts is omitted and only a part of the opinion is here printed. That part dealing with the validity of past consideration is printed ante, p. 331.

See, in accord, Restatement, Contracts, § 191. A very common illustration similar to the above case is found in the promise that one who buys land subject to a mortgage makes to his vendor (the mortgage debtor) to assume and pay the mortgage debt (to the mortgagee creditor).

NOTE ON CONTRACTS OF INDEMNITY

A broker, in order to induce a customer to make an investment, says: "I will indemnify you against loss." This promise is not within the statute of frauds. There is no third person indebted to the customer for whose default the broker is promising to answer. The situation is exactly the same if the broker had said: "I will guarantee that you suffer no loss," or "If the investment turns out to be a losing one, I will make up the deficit."

Suppose, however, that the customer has not sufficient funds for the investment and asks his bank to lend him the money. The bank telephones to the broker, who says to the bank: "If you will lend him the money I will indemnify you against loss." This oral promise to the bank is within the statute and is not enforceable. The same would be true if the broker had said: "I will guarantee payment." In this case the promisee is the bank; and when the

money is lent as requested there is a third person (the customer) who is indebted to the promisee and for whose default the broker promises to answer.

The application of the statute and the character of the contract must be determined with reference to the number of parties and their relations to each other; they are not determined by the use of the verbs "indemnify" and "guarantee." In any language, word symbols may be as variable as a sign post that is built like a weather vane. There is somewhat less variation in the use of the nouns "indemnity" and "guaranty."

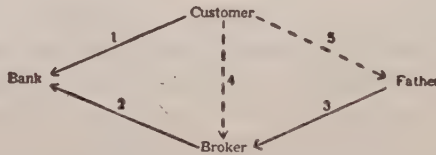
One frequently recurring sort of case is much more difficult of analysis than the two stated above. Suppose that in the second case above the broker is unwilling to guarantee payment to the bank without being himself "indemnified." Thereupon, the customer's father telephones to the broker: "Give the bank the guaranty that it asks and I will indemnify you against loss." About two thirds of the cases have held that the father's oral promise is not within the statute and is enforceable; the other cases hold the contrary. This conflict grows out of the uncertainty of language and the complexity of parties. The promisee in this case is the broker. Is any third party indebted to him for whose default the father is promising to answer?

In the drawing below, the relations of the four parties involved, in this case are indicated. The father asks the broker to become surety for his son's debt to the bank. When the broker makes the requested promise, he becomes an obligor, not a creditor. Therefore, the father's promise seems to be made to a *debtor*, as in *Eastwood v. Kenyon*, to pay that debtor's debt to the bank or to reimburse him in full if he ever has to pay it. This is what "indemnification" requires. This analysis is accepted in the majority decisions. Very likely the broker and the father look at the case in this way. See *Guild & Co. v. Conrad* [1894] 2 Q.B. 885.

But the foregoing analysis does not consider the customer who borrows the money, and his relations with the broker. The broker, having become surety for the customer's debt to the bank, has a right that the customer shall exonerate him and a right that the customer shall reimburse him if he is forced to pay the bank. Such is the duty of a principal debtor to his surety. Therefore, it is argued by the minority that the father's promise to the broker is a promise to a *creditor* to whom a third party (the customer) is under obligation, and that the father's promise is one to answer for the default of this third party. This analysis is also a correct one. In some cases the broker and the father may themselves understand the transaction in this way. In most cases, they may make no analysis at all.

The father might have said to the broker: "Become surety as my son requests. I assure you that he will exonerate or reimburse you. If he does not, I will do so." This shows clearly an intention that the father shall be surety for his son's performance of a contemplated duty to the broker; the promise so made is within the statute.

Restatement, Contracts, § 186, supports the minority view. The present editor does not; see Corbin, "Contracts of Indemnity," 41 Harv.L.Rev. 689 (1928).



The solid arrows represent express promises. Promise numbered 2 is a promise to a creditor to answer for the default of its debtor, the customer, and is within the statute.

Broken arrows numbered 4 and 5 do not represent promises; they indicate legal duties that the law enforces, sometimes saying that a promise is "implied."

If we disregard 4 and 5, promise numbered 3 is not within the statute. If we disregard 1 and 2, promise numbered 3 seems to be within the statute.

BAILEY v. MARSHALL.

Supreme Court of Pennsylvania, 1896. 174 Pa. 602, 34 A. 326.

DEAN, J. Whether the debt in controversy be that of him who has assumed to pay it, or of another, is in most cases a question of fact. There can be no precise legal definition of liability under the act of 26th of April, 1855 (P.L. 308) [33 PS §§ 1, 2] which will determine in all cases—perhaps in but very few—the answerability of him who promises to pay. The act says: "No action shall be brought whereby to charge . . . the defendant upon any special promise to answer for the debt or default of another unless the agreement . . . shall be in writing." This is clearly meant to relieve an alleged guarantor or surety. It was never intended to relieve him who had a personal, beneficial interest in the assumption. There cannot be a better construction of this statute than in *Nugent v. Wolfe*, 111 Pa.St. 480, 4 A. 15, where we held (the present chief justice rendering the opinion) that: "It is difficult, if not impossible to formulate a rule by which to determine in every case whether a promise relating to the debt or liability of a third person is or is not within the statute; but

as a general rule, when the leading object of the promise or agreement is to become guarantor or surety to the promisee for a debt for which a third party is and continues to be primarily liable, the agreement whether made before or after or at the time with the promise of the principal, is within the statute, and not binding unless evidenced by writing. On the other hand, when the leading object of the promisor is to subserve some interest or purpose of his own, notwithstanding the effect is to pay or discharge the debt of another, his promise is not within the statute."

Applying these principles to the facts in the case before us, to what conclusion do they impel us? In September, 1892, Mary E. Bailey held a note against Davis Pennock, in the sum of \$1,000, with power of attorney to confess judgment. At this time Marshall, the defendant, entered a judgment against Pennock for \$5,000, issued execution, and levied on all the real and personal property of Pennock. The amount actually due and payable on his \$5,000 judgment did not exceed, as appeared afterwards, from his own statement, \$200. The plaintiff was standing there with her judgment ready for entry on which she could immediately issue execution, seize and bid upon the property. Just at this juncture, Marshall, knowing her rights, sent for her, and said "I will stand by thee, and see thee is paid every cent, if thee says nothing and does nothing." She accepted his proposition,—neither entered her judgment, nor took any steps to collect it. The sheriff's sale went on, and Marshall bought the larger part of the real and personal property, and was credited on his purchase with the amount of his own judgment.

We notice by the testimony that Marshall denies the statement of Mrs. Bailey. We express no opinion as to the credibility of the witnesses. The question is, if the jury believed Mrs. Bailey's testimony, would the court have been warranted in granting the compulsory nonsuit on the ground that the promise was to answer for the debt or default of another? What was the leading object of Marshall in making the promise by which he lured her to inaction? Clearly, it was not to pay Pennock's debt, nor Mrs. Bailey's claim. His sole purpose was to silence her as an antagonistic bidder at the sheriff's sale. This was no benefit to Pennock, the debtor. It was an advantage to Marshall, and he reaped the full fruits of it. She was silenced by his promise, and he got the property at his own figure. His leading object was to subserve his own interest. In fact, he had no other object. Having accomplished it, he is now called upon to answer not for Pennock's debt, but for his own; and, if Mrs. Bailey be believed, he ought to pay.

The decree of the court below, entering compulsory nonsuit, is reversed, and procedendo awarded.

NOTE

The "leading object" rule is stated in other words in Restatement, Contracts, § 184.

Where the promisor receives a consideration of positive benefit to himself, this constituting the actual moving cause of his promise, as well as the conventional equivalent therefor, his promise is not within the statute, even though performance thereof will also incidentally discharge the duty of a third person to the promisee. To determine "the actual moving cause" is no easier in the law of contracts than in the law of torts. In the following cases the promise was held to create an independent duty, and not to be within the statute: The grantee of mortgaged land who had not assumed payment of the mortgage debt induces the mortgagee to forbear to foreclose by promising him to pay it; *Prime v. Koehler*, 77 N.Y. 91 (1879). The owner of a building in course of construction induces a materialman to continue to supply material to the contractor by promising to pay the bill; *Raabe v. Squier*, 148 N.Y. 81, 42 N.E. 516 (1895)—there are cases contra. An employer induces an employee to render service to him by promising him as part of his compensation to pay for services previously rendered for another; *Davis v. Patrick*, 141 U.S. 479, 12 S.Ct. 58, 35 L.Ed. 826 (1891). One induces another to appoint him as an agent to sell goods on commission by promising to make good any losses to the principal by reason of the failure of purchasers to pay for goods sold on credit; *Swan v. Nesmith*, 7 Pick. (Mass.) 220 (1828); Restatement, Contracts, § 189. One induces another to give a position of trust to an employee by promising to indemnify him against loss through the latter's breach of trust, in return for a premium paid by the employer; *Quinn-Shepherdson Co. v. U. S. Fidelity & G. Co.*, 142 Minn. 428, 172 N.W. 693 (1919)—there are cases contra, and so also is Restatement, § 184.

WALTHER v. MERRELL.

St. Louis Court of Appeals, Missouri, 1878. 6 Mo.App. 370.

BAKEWELL, J. The petition of plaintiff alleged that in March, 1877, and for a long time prior thereto, and after that date, defendant was president of a banking corporation called the Bank of St. Louis, doing a general banking business in St. Louis; that on July 12, 1877, plaintiff had \$4,200 on deposit in said bank, which had been received and deposited by him as receiver in a cause then pending; that "on July 14, 1877, having fears as to the solvency of said bank and the safety of the moneys so deposited, he went to said bank for the purpose of withdrawing said funds from the same, as he had a lawful right to do, and as he could and would have done but that said defendant, who was then the president of said bank, and otherwise largely interested in the same as director, stockholder, and depositor, induced plaintiff not to withdraw the same, and promised and agreed with him

that if he would not withdraw the same, that he (defendant) would pay plaintiff the total amount of his deposit if said bank should close.

"Plaintiff states that he knew or believed that defendant was solvent, and that he was abundantly able to pay plaintiff said money should said bank close up; and relying on the promise of said defendant as aforesaid, and to accommodate him and comply with his request, he did not withdraw said funds from said bank as he had intended to do, and but for said promise should have done, but permitted the same to remain in said bank in consequence of the promises.

"Plaintiff further states that thereafter, on the 16th day of July, A. D. 1877, said bank did close up, and has ever since remained closed; that on or about the 20th day of July, A. D. 1877, plaintiff demanded the amount of said deposits from defendant, who then and there promised to pay the same, but failed, and has ever since failed to pay the same to plaintiff.

"Plaintiff states that he has received on account of said deposit from said bank the sum of \$2,072.75, and no more; that he has been compelled to and has used his own funds to make good said deposit, and is now discharged as receiver, and said funds and moneys now belong to him; that defendant is therefore indebted to plaintiff in the sum of \$2,072.75, with interest from July 20, 1877; for which, with interest, he asks judgment."

The answer of defendant was a general denial. He further answered that the promise set out is within the Statute of Frauds, and that it was not in writing. Plaintiff demurred to the new matter; the demurrer was overruled, and final judgment was entered for defendant, from which plaintiff appeals.

The promise in this case was to pay the debt of another, that existed when the promise was made, and continued to exist after the promise. The statute says that such a promise, unless it be in writing, is void. It by no means follows, however, that this promise, though not in writing, is void; because it is determined by a unanimous course of decisions upon the statute that an oral promise to pay another's debt may in some cases be binding upon the promisor though the debt still exists in full force against the original debtor and in favor of the original creditor. Attempts have been made at various times, by men of great learning and ability, to classify the cases, and to arrange under some general heads those decisions in which it has been held that though there was a promise to pay the debt of another the statute does not apply. The third class of Chancellor Kent in *Leonard v. Vredenburg*, 8 Johns. (N.Y.) 29, 5 Am.Dec. 317, is "where the promise to pay the debt of another arises out of some new consideration of benefit or harm moving between the newly contracting parties." This class of cases, he says is not within the statute. Cases where the promise is collateral to the principal contract, but made at the same

time, and an essential ground of the original credit, and cases in which the collateral undertaking is subsequent to the creation of the debt, and not the inducement to it, though the subsisting liability is the ground of the promise, are the first and second classes, to which, he says, the statute applies. Chancellor Kent does not expressly say that the consideration in the third class of cases must move to the promisor; but if this be added, then, where the main object of the promisor is not to guarantee the debt, but to benefit himself, such cases have been held, in a long line of well-considered cases, not to fall within the statute. On the other hand, the great name of Kent, and the general language of his exception, have bred a class of cases that fly in the face of the letter and the spirit of the statute and leave it nothing on which to operate, by holding, as they do, that if the new promise was supported by any legal consideration, it was not within the law.

The question is not at all whether there was a consideration for defendant's promise. There must always be a consideration to support a promise. That the consideration is coexisting with the promise, and that it moves to the promisor, does not take the case out of the statute; for in all cases where credit is given on the strength of the promise of another to see the debt paid, though this promise forms the consideration for the credit, the contract, if not in writing, is void. Two things are required—a consideration good at common law, and a promise in writing—or the case is within the statute. Consideration alone will not give vitality to a contract to pay another's debt, or the statute has made no change in the law.

The question as to what oral promises are now within the statute has been complicated by a vast number of decisions, which cannot all be reconciled. * * * In some reported cases, the question as to whether or not the oral argument is within the statute is disposed of by saying that the promise is collateral or original, as the case may be, without stating the grounds upon which this conclusion is based; though the question in the case seems to be, what is a collateral and what an original contract. Every contract is original in a certain sense. • • •

The rule laid down in the Massachusetts cases seems to be this: That where the main object of the promise is a benefit accruing directly to the promisor, and which he did not before enjoy, and the promise to pay the debt of another is a mere incident, then the accidental or incidental fact that the promise includes the answering for the debt of another will not bring it within the statute; but where the main object is to obtain the release of the person or property of the debtor, or other forbearance or other benefit to him, then it is within the statute, though a new consideration moves directly to the promisor. *Nelson v. Boynton*, 3 Metc. (Mass.) 396, 37 Am.Dec. 148; *Furbish v.*

Goodnow, 98 Mass. 297. This rule has also been approved in New York, in the case of *Mallory v. Gillett*, 21 N.Y. 412, in which the cases are carefully examined. If we go beyond such peculiar cases, and except from the statute instances in which the debtor alone is interested, and where the debt still subsists, on the ground that there is a consideration to support the contract, we virtually repeal the statute, and leave the law as it was before the act was passed. * * *

In *Barker v. Scudder*, 56 Mo. 272, Barker sold to Scudder, and in part payment took notes of Able, who was insolvent when his note matured. The purchaser guaranteed the notes. It was held that his promise, though oral, was not within the statute. The principle involved here runs through a great number of cases. It has always been held that they are not within the intent of the law. The new and distinct consideration, independent of the debt of the maker, moving directly to the promisor, and being itself the main transaction, takes them out of the statute, within the meaning of Chancellor Kent's exception as interpreted in *Mallory v. Gillett* and the Massachusetts cases cited above. In these cases the promise to pay the debt existing to the promisor, and transferred to the promisee at the time the promise is made. The promise is not made to the party to whom the debt is owing (*Eastwood v. Kenyon*, 11 Ad. & E. 438), and the consideration originates in a new and independent dealing between the promisor and the creditor, the undertaking to answer the debt of another being a mere incident of the transaction. As the note is transferred, the indebtedness to the original creditor is gone, and he can look to the debtor merely as a surety for himself in case he has to take up the note when due. The case comes within a well-known class of cases excepted from the operation of the statute, and noted in the third class of exceptions in *Mallory v. Gillett*. The real substance of the promise here is to pay an obligation of the party making it, though its payment results in the payment of the debt of another. "The rule," says Judge Wagner (46 Mo. 503), "rests on solid ground, that when one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise, the undertaking is not within the statute." * * *

In the case at bar, the promise was to pay the debt of another. Merrell was certainly not the bank. The promise was clearly collateral. Merrell was to pay the deposit to plaintiff if the bank should close; the indebtedness of the bank existed when the promise was made, and still subsisted. Here was no distinctly new consideration moving directly to the promisor, and substantial, so as to be a clearly sufficient motive for the transaction. The main object was forbearance to the bank and any benefit to the promisor was merely incidental. It is true, defendant was an officer and shareholder of the bank, and might be benefited by the action of plaintiff in leaving the

deposit; but that is not enough. A good illustration of the consideration which takes the case out of the statute, as making the new contract the main thing and the promise to pay the debt of another a mere incident, is one of the earlier English cases, *Tomlinson v. Gill*, Amb. 330, cited in *Mallory v. Gillett*. There Gill promised the widow that if she would allow him to administer he would pay all debts of the estate. Here it was held that this was a promise to make the estate produce the debts, in consideration of being allowed to administer. It was a purchase of that privilege, and the debts of the estate became the debt of Gill. Or the case of a factor who gets an increased commission to insure collections or guarantee the sales. There, the factor gets possession of the goods. His object in making the agreement is not the interest of the debtor at all. He makes an independent agreement, solely for his own benefit, that if the goods are delivered to him he will be answerable for the price.

The case made by the petition, on the other hand, seems to be just one of those which the statute was mainly designed to meet, where words of recommendation or of encouragement to forbearance may be exaggerated or misunderstood, and represented as positive contracts, against the intention of the alleged guarantor, and where the law requires the most satisfactory evidence as to the precise language of the promise.

The judgment of the Circuit Court is affirmed. All the judges concur.

NOTE

There are other similar decisions. Compare Restatement, Contracts, § 184, Illustration 4.

Does the application of the statute turn on the motivating cause of the making of the promise to the creditor? If the purpose of the promisor is to induce the creditor to make a new advancement to the debtor or to give him extended credit on a previous debt, the promisor is a "surety," one whose remedy against the debtor in case of settlement with the creditor is limited to exact reimbursement of the outlay so made. If on the other hand, the promise is made as part of a bargain for a beneficial equivalent accruing to the promisor himself, he is not a surety who owes any moral or equitable duty to the debtor or to whom the debtor owes any such duty. On discharging his duty to the creditor, having received the bargained-for equivalent, the promisor has no equitable right of reimbursement by the debtor and he is not the sort of person that the statute was intended to protect. Further, on settling with the creditor, he is privileged to procure an assignment of the debt and to enforce full payment by the debtor without regard to the amount he has paid in the settlement.

The difficulty in applying such a distinction as the foregoing is that human motives are generally mixed and often indistinct. There may be several "motivating causes."

It is perfectly clear that a promise to a creditor to pay the debt of a third party is not required by the statute to be in writing if the payment promised is to be made out of a fund or other property of the third party, that is in the promisor's hands, or if in making the promised payment the promisor will thereby discharge dollar for dollar a debt that he owes to the third party. Restatement, Contracts, § 182.

RIBOCK v. CANNER et al.

Supreme Judicial Court of Massachusetts, 1914. 218 Mass. 5, 105 N.E. 462.

Action by Israel Ribock against Carl Canner and another. There was a verdict for plaintiff, and defendants excepted. Exceptions sustained, and judgment entered for defendants.

SHELDON, J. The plaintiff had begun to do work upon three houses which Hoffman and Pottick (hereinafter called the builders) were erecting in Chelsea; and for this work the builders by a written contract had promised to pay the plaintiff the sum of \$5,150. The defendants had taken from the builders a construction mortgage upon the property for more than \$13,000, which sum they were to advance to the builders in installments as the work progressed. When only a small part of his work had been done, the plaintiff became suspicious of the financial responsibility of the builders, and refused to go on unless they would give him a written order upon the defendants to pay him for his work out of the advances to be made by the defendants on the mortgage. The builders gave him such an order, and he presented it to the defendant Canner for acceptance. Canner refused to accept the order, but in substance, according to the testimony of the plaintiff, which must have been followed by the jury, told the plaintiff "to go ahead with the job" and he would pay him the money; that the plaintiff should have "nothing to do with them builders," but that, whenever the plaintiff was "ready by his paper" to come up with a notice, and he would give the plaintiff a check. This plainly meant that when money became due to the plaintiff by his contract with the builders, Canner would pay him whatever was so due. There was not by any fair construction of the language used a new and independent agreement between Canner and the plaintiff that the plaintiff should go on and do the work upon Canner's credit and that Canner should pay for it, as in *Abbott v. Doane*, 163 Mass. 433, 40 N.E. 197, 34 L.R.A. 33, 47 Am.St.Rep. 465, and other cases relied on by the plaintiff. On the contrary, the contract between the plaintiff and the builders remained in full force; the amounts to become due to the plaintiff were fixed by that contract; and the liability of the builders to the plaintiff was wholly unaffected. Canner's promise was merely a verbal promise to pay to the plaintiff what should become due to him from the build-

ers, and as such came within the statute of frauds. R.L., c. 74, § 1, cl. 2. That defense was set up in the answer. It was a bar to any action upon the promise, even though it could be found that there was a valuable consideration therefor. *Tileston v. Nettleton*, 6 Pick. 509; *Loomis v. Newhall*, 15 Pick. 159, 169; *Ames v. Foster*, 106 Mass. 400, 8 Am.Rep. 343; *O'Connell v. Mt. Holyoke College*, 174 Mass. 511, 513, 55 N.E. 460; *Miles v. Driscoll*, 201 Mass. 318, 87 N.E. 579.

The payments made afterwards from time to time by Canner to the plaintiff in part performance of his verbal promise have no bearing upon this question.

As Canner's promise will not support any action, we need not consider whether the other defendant in any event could have been held thereon.

The case appears to have been fully tried. It comes within the terms of St. 1909, c. 236. The defendants' exceptions must be sustained, and judgment must be entered in their favor.

So ordered.

QUESTION:

Did Canner's contract with the builders give him power to discharge his duty to make advancements to them by paying, without their consent, the debt they owed to Ribock?

SECTION 2.—CONTRACTS IN CONSIDERATION OF
MARRIAGE

DIENST v. DIENST.

Supreme Court of Michigan, 1913. 175 Mich. 724, 141 N.W. 591.

Action by Anna Emily Josephine Jannasch Shortt Dienst against Andrew Dienst. From an order and decree sustaining a demurrer to defendant's cross-bill, he appeals. Affirmed.

MCALVAY, J. Complainant filed her bill of complaint against defendant, praying for divorce on the ground of extreme cruelty. Defendant appeared and filed an answer to said bill of complaint, coupled with a cross-bill, wherein he set up a verbal antenuptial contract, by which it is claimed that she agreed to make provision for him after the marriage by executing a will of all her property in his favor in case he survived her. The relief prayed for in said cross-bill is that com-

plainant produce and file such will, which is claimed to have been made soon after the marriage, and that it be declared binding as a settlement of the property rights of the parties; that in case the will has been destroyed by her she be required to make and execute a duplicate thereof; that in case she refuses so to do within the period of five days after decree, the decree stand in the place and stead of said will and be final; that the rights and interest of defendant in said property be declared fixed, binding, and vested; that complainant be enjoined from disposing of any of her property except in accordance with the agreement claimed, and for general relief. He does not pray for a decree of divorce. Issue was joined by a replication to the answer.

A general demurrer was interposed by complainant to the cross-bill of defendant on the ground of want of equity for several reasons, the chief of which was that the claimed antenuptial contract was within the statute of frauds. This provision of the statute reads: "Every agreement, promise or undertaking, made upon consideration of marriage, except the mutual promises to marry, shall be void unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, signed by the party to be charged therewith." Section 9515, subd. 3, C.L. 1897. * * *

A very brief statement of the circumstances which brought about the marriage between these parties will be made. It appears that in November, 1908, a correspondence between them was begun, the initial letter having been written by complainant. Both were subscribers to the publication of a marriage brokerage called "The Correspondent," in which complainant discovered an attractive description of defendant. Complainant was of the age of 62 years and defendant 66 years. Both had been previously married, and each had been widowed by death. She was possessed of an estate, real and personal, in her own right, of between sixty and seventy thousand dollars. Defendant was penniless. A lurid correspondence, thus began between the parties, of which we are furnished only that of complainant, appears as exhibits to his cross-bill (he modestly withholding his contributions to the same), and within a few months culminated in their engagement, which was speedily followed by a marriage, growing out of which this litigation, to sever the marital relations between them, naturally followed.

Counsel for defendant apparently appreciates and admits that if the agreement sought to be enforced was made and entered into upon consideration of marriage, not having been reduced to writing, it is void under the statute of frauds. However, he contends that the agreement relied upon by him was "not made upon consideration of marriage"; that the agreement was that if defendant would give up his home and employment and abandon prospective political preferment, come to Kalamazoo, marry, and reside with complainant and not return to

Kansas, she would not only support him, but would make a will as already stated. It appears, however, that the only agreement which defendant charges in his cross-bill was entered into by complainant, and which he avers he relied upon, is the agreement set forth in the excerpt from his cross-bill above quoted, to the effect that she "*then and there, as a further consideration for the consummation of such engagement of marriage promised and agreed* that she would, immediately after their said marriage, make such provision that the said defendant would come into possession and ownership of all of her said property upon her death." That this was the inducement appears from his averment as follows: "And that thereupon immediately thereafter, relying upon such representations, promises, and agreements on the part of the said plaintiff, and in consideration thereof, he gave up and abandoned his employment, position, and prospects, * * * which he then and there had, and immediately proposed marriage to the said complainant," which proposal complainant immediately accepted. It is clear to us that this claimed agreement and undertaking between these parties was made upon consideration of marriage, and was within the prohibition of the statute of frauds. It was therefore void and not enforceable.

The other questions discussed in the briefs of the parties do not require consideration.

The order and decree of the circuit court in sustaining the demurrer of complainant is affirmed, and the cross-bill is dismissed, with costs of both courts to complainant. The cause will be remanded, and will proceed in due course.

NOTE

This clause of section 4 has been applied chiefly to bargains for a marriage settlement. An antenuptial bargain that each party to the marriage shall keep his own property, or that one shall make no claim to a share in the other's estate at death, must be in writing. See *Hunt v. Hunt*, 171 N.Y. 396, 64 N.E. 159 (1902); Restatement, Contracts, § 192. A mutual engagement to marry, with no property agreement, is held not to be within the statute.

This clause of the statute may have been intended as a protection against fortune-hunting damsels who marry a rich oldster and after his swift disillusionment or death, allege that he made an oral promise to share the wealth in consideration of the marriage. Query, whether the damsels are not as much in need of protection against oldsters holding out inducements? In spite of divorce opportunities in Nevada, Mexico, and elsewhere, celebration of the marriage is a formidable part performance of the oral antenuptial agreement. Nevertheless, it is generally held not to be such a part performance as will make a defendant's oral promise respecting property to be specifically enforceable. If the actual marriage can be regarded as leaving no executory promise to be enforced, the oral agreement thus fully performed has the same effect as if in writing. In

Weld v. Weld, 71 Kan. 622, 81 P. 183 (1905), a man held a woman's promissory note secured by a mortgage. "Subsequently she married him, in consideration of his parol agreement that the marriage should operate as a satisfaction of the note." In an action brought by him to collect the amount of the note and to foreclose the mortgage, the court held that the debt was discharged by accord and satisfaction. Of course, the woman could establish this defense only by proving the oral agreement as well as the marriage in performance of it. There had been no discharge of the debt by surrender or cancellation of the note or by release of the mortgage.

SECTION 3.—CONTRACTS FOR THE SALE OF LAND

ESTABROOK v. WILCOX.

Supreme Judicial Court of Massachusetts, 1917. 226 Mass. 156, 115 N.E. 233.

Action by Francis S. Estabrook against William G. Wilcox. Judgment for plaintiff, and defendant brings exceptions. Exceptions sustained, and judgment directed to be entered for defendant.

LORING, J. This is an action by which the plaintiff seeks to recover damages for breach of an oral agreement to lay out and construct a street on the defendant's land for the use of the plaintiff as grantee in a deed executed by the defendant. The defense set up was the statute of frauds.

The plaintiff relies upon *Cole v. Hadley*, 162 Mass. 579, 39 N.E. 279, *Drew v. Wiswall*, 183 Mass. 554, 67 N.E. 666, and *Durkin v. Cobleigh*, 156 Mass. 108, 30 N.E. 474, 17 L.R.A. 270, 32 Am.St. Rep. 436. But in those cases the right to have a street laid out over the defendant's land was created in writing. In those cases the deed to the plaintiff referred to a plan to show the land conveyed and on that plan a street was shown on which the premises conveyed abutted. That is to say: in those cases the right to have a street laid out over the defendant's land (that is to say the right to an easement over the defendant's land) was created by an instrument in writing. In the case at bar the only way in which the plaintiff undertook to make out that he had an easement over the defendant's land was by the oral contract. To this the fourth section of the statute of frauds (re-enacted in this commonwealth in R.L. c. 74, § 1, cl. 4) is a defense. Where the plaintiff makes out a right to a street over the defendant's land by deed or by any other writing and then relies on a contract on the defendant's part to do the physical work necessary to construct the street and make the paper street into a real street he has a right of action on that contract

although that contract was made by word of mouth. That was the point decided in the three cases on which the plaintiff relies where the whole matter is fully explained.

It follows that the exceptions must be sustained. And we are of opinion that acting under St. 1909, c. 236, § 1, we should direct judgment to be entered for the defendant. It is

So ordered.

NOTE

The statute includes all contracts for the creation or conveyance of any interest in land, from an estate in fee simple absolute to the smallest of easements, except that an express provision is always found excepting from its operation specified short term leases (these ranging from one year to three years). For definition and illustrations of interests in land, see *Restatement, Contracts*, § 195; also the early sections in *Restatement, Property*.

HOUSTON v. FARLEY et al.

Supreme Court of Georgia, 1917. 146 Ga. 822, 92 S.E. 635.

Suit by W. R. Houston against L. F. Farley and others. Judgment for defendants dismissing the petition on demurrer, and plaintiff brings error. Affirmed.

W. R. Houston and L. F. Farley entered into a verbal contract that Farley was to attend an administrator's sale and purchase thereat a described lot of land if it should sell for less than \$2,000, and, if the land was purchased, to take title to himself and execute to Houston a bond conditioned to make or cause to be made to him good and sufficient title to the property purchased upon his compliance with certain conditions, namely, the payment in cash of the sum of \$100 and the giving of his notes to Farley for the balance due, as follows: \$100 in 12 months, and the balance to become due two years from the date of the contract of purchase; the deferred payments bearing interest at the rate of 8 per cent per annum. The property was purchased by Farley for \$1,441, and the administrator made a deed to him. On the next day, Houston tendered to Farley \$100 in cash, and offered to deliver his promissory notes in accordance with the stipulations of the contract, and demanded a bond for title in compliance with their contract. Farley refused to execute a bond for title, and thereafter sold the property to one Andrews, who was alleged to have purchased with the full knowledge of Houston's right. Upon these allegations, Houston prays specific performance of the parol contract with Farley against the defendants. The court dismissed the petition on demurrer.

EVANS, P. J. (after stating the facts as above). A ground of the demurrer raises the point that the oral contract of which specific per-

formance is sought is within the statute of frauds. The plaintiff contends that the statute does not apply to a case as alleged in the petition. He bases such contention on the dictum of the first headnote in the case of *Chastain v. Smith*, 30 Ga. 96, that: "Where one person agrees, as agent, to buy land for another as his principal, and does buy it, but takes the title in his own name, this title in his hands stands affected with a resulting trust for the benefit of the principal by operation of law, and the case is not within the statute of frauds; resulting trusts being expressly excepted from the operation of the statute."

In discussing this ruling, Bleckley, C. J., said in *Roughton v. Rawlings*, 88 Ga. 819, 16 S.E. 89: "But the facts in *Chastain v. Smith* did not require the court to determine whether there was a resulting trust or not. * * * Strike this fact out of the case, and there would have been a very different question before the court from that on which the decision could be upheld with this fact in it. The case itself was decided correctly, but the reason suggested in the first headnote is not applicable to the facts as a whole, nor sustainable."

There is a clear distinction between cases where equity will enforce a trust at the instance of a principal against his agent who, being commissioned to buy a piece of property, does buy it and takes title in his own name, and cases where a trust results solely by operation of law. In the former case the agent will be compelled to transfer to the principal the benefit of his contract, upon repayment of the purchase money and necessary expenses. *Forlaw v. Augusta Naval Stores Co.*, 124 Ga. 261, 52 S.E. 898 (6). A resulting trust which arises solely from the payment of the purchase price is not created unless the purchase money is paid either before or at the time of the purchase. *Hall v. Edwards*, 140 Ga. 765, 79 S.E. 852. When the person who sets up a resulting trust has in fact paid no part of the purchase money, he will not be allowed, under the statute of frauds, to show by parol that the purchase was made for his benefit. No resulting trust can arise from the payment of money after the purchase has been completed. The plaintiff is not contending that the defendant was to purchase the property in the plaintiff's name, but that the defendant, having purchased the land, would sell it to him on credit according to stipulated terms. Such a contract is within the statute of frauds, which requires every contract for the sale of lands or any interest in or concerning them to be in writing and signed by the party to be charged therewith or some person by him duly authorized. Nor is such contract, under the allegations of the petition, enforceable on the doctrine of trust, or on the ground of fraud and part performance. *Roughton v. Rawlings*, supra; *Lyons v. Bass*, 108 Ga. 573, 34 S.E. 721.

Judgment affirmed. All the Justices concur.

NOTE

Compare the facts of the above case with the following, often recurring cases: (1) A principal orally employs an agent to buy land and gives him the money to pay for it. The agent pays for the land with the principal's money, but takes title in his own name, disregarding his oral promise to procure a conveyance from the seller to his principal. (2) A principal employs an agent on commission, the agent orally promising to procure a conveyance of land from the seller to his principal and to advance the money out of his own pocket as a temporary loan to the principal. The agent likes the land, pays for it, and takes title in his own name.

HIRTH v. GRAHAM.

Supreme Court of Ohio, 1893.

50 Ohio St. 57, 33 N.E. 90, 19 L.R.A. 721, 40 Am.St.Rep. 641.

Action for breach of contract by one Hirth against one Graham. Plaintiff recovered a judgment before a justice of the peace of Morrow county, which, upon error being brought to the court of common pleas, was affirmed. The case was then taken on error to the circuit court, where the judgments of the court of common pleas and of the justice were both reversed, and plaintiff brings error. Affirmed.

BRADBURY, J. The plaintiff in error brought an action before a justice of the peace to recover of the defendant in error damages alleged to have been sustained on account of the refusal of the latter to perform a contract by which he had sold to the plaintiff in error certain growing timber. The defendant attempted to secure the dismissal of the action, on the ground that the justice had no jurisdiction of an action for the breach of such a contract. Failing in this, and the action being tried to a jury, he requested the justice to instruct the jury "that if they find from the evidence that the trees about which this action is brought were at the time of said alleged contract then growing upon the land of defendant, and that no note or contract or memorandum of the contract of sale was at the time made in writing, the plaintiff cannot maintain this action, and your verdict should be for the defendant," which instruction the justice refused to give, but on the contrary gave to them the following instructions on the subject: "This is an action for damage, not on the contract, nor to enforce the same; and if you find that a contract was made verbal or otherwise and the defendant refused or failed to comply with its terms, the plaintiff is entitled to any damage you may find him to have sustained by way of such noncompliance." The defendant in error who was also the defendant in the justice's court, excepted, both to the charge as given and to the refusal to charge as requested; the verdict and judg-

ment being against him, he embodied the charge as given, as well as that refused, in separate bills of exceptions, and brought the cause to the court of common pleas on error, where the judgment of the justice of the peace was affirmed. He thereupon brought error to the circuit court, where the judgments of the court of common pleas and that of the justice were both reversed, and it is to reverse this judgment of the circuit court, and reinstate and affirm those of the court of common pleas and justice of the peace, that this proceeding is pending. * * *

Whether a sale of growing trees is the sale of an interest in or concerning land has long been a much controverted subject in the courts of England, as well as in the courts of the several states of the Union. The question has been differently decided in different jurisdictions, and by different courts, or at different times by the same court within the same jurisdiction. The courts of England, particularly, have varied widely in their holdings on the subject. Lord Mansfield held that the sale of a crop of growing turnips was within this clause of the statute. *Emmerson v. Heelis*, 2 Taunt. 38, following the case of *Waddington v. Bristow*, 2 Bos. & P. 452, where the sale of a crop of growing hops was adjudged not to have been a sale of goods and chattels merely. And in *Crosby v. Wadsworth*, 6 East. 602, the sale of growing grass was held to be a contract for the sale of an interest in or concerning land, Lord Ellenborough saying: "Upon the first of these questions" (whether this purchase of the growing crop be a contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them), "I think that the agreement stated, conferring, as it professes to do, an exclusive right to the vesture of the land during a limited time and for given purposes, is a contract or sale of an interest in, or at least an interest concerning lands." *Id.* 610. Afterwards, in *Teal v. Auty*, 2 Brod. & B. 99, the court of common pleas held a contract for the sale of growing poles was a sale of an interest in or concerning lands.

Many decisions have been announced by the English courts since the cases above noted were decided, the tendency of which has been to greatly narrow the application of the fourth section of the statute of frauds to crops, or timber, growing upon land. Crops planted and raised annually by the hand of man are practically withdrawn from its operation, while the sale of other crops, and in some instances growing timber, also, are withdrawn from the statute, where, in the contemplation of the contracting parties, the subject of the contract is to be treated as a chattel. The latest declaration of the English courts upon this question is that of the common pleas division of the high court of justice, in *Marshall v. Green*, 1 C.P.Div. 35, decided in 1875. The syllabus reads: "A sale of growing timber to be taken away as soon as possible by the purchaser is not a contract or sale of land, or any interest therein, within the fourth section of the statute of

frauds." This decision was rendered by the three justices who constituted the common pleas division of the high court of justice, Coleridge, C. J., Brett and Grove, JJ., whose characters and attainments entitle it to great weight; yet, in view of the prior long period of unsettled professional and judicial opinion in England upon the question, that the court was not one of final resort, and that the decision has encountered adverse criticism from high authority (Benj. Sales [Ed. 1892] § 126), it cannot be considered as finally settling the law of England on this subject. The conflict among the American cases on the subject cannot be wholly reconciled. In Massachusetts, Maine, Maryland, Kentucky, and Connecticut sales of growing trees, to be presently cut and removed by the vendee, are held not to be within the operation of the fourth section of the statute of frauds. *Claffin v. Carpenter*, 4 Metc. (Mass.) 580, 38 Am.Dec. 381; *Nettleton v. Sikes*, 8 Metc. (Mass.) 34; *Bostwick v. Leach*, 3 Day (Conn.) 476; *Erskine v. Plummer*, 7 Me. (7 Greenl.) 447, 22 Am.Dec. 216; *Cutler v. Pope*, 13 Me. 377; *Cain v. McGuire*, 13 B. Mon. (Ky.) 340; *Byassee v. Reese*, 4 Metc. (Ky.) 372, 83 Am.Dec. 481; *Smith v. Bryan*, 5 Md. 141, 59 Am.Dec. 104. In none of these cases, except 4 Metc. (Ky.) 373, and in 13 B. Mon. 340, had the vendor attempted to repudiate the contract before the vendee had entered upon its execution, and the statement of facts in those two cases do not speak clearly upon this point. In the leading English case before cited (*Marshall v. Green*, 1 C.P.Div. 35), the vendee had also entered upon the work of felling the trees, and had sold some of their tops before the vendor countermanded the sale.

These cases, therefore, cannot be regarded as directly holding that a vendee, by parol, of growing timber to be presently felled and removed, may not repudiate the contract before anything is done under it; and this was the situation in which the parties to the case now under consideration stood when the contract was repudiated. Indeed, a late case in Massachusetts (*Giles v. Simonds*, 15 Gray, 441, 77 Am.Dec. 373) holds that "the owner of land, who has made a verbal contract for the sale of standing wood to be cut and severed from the freehold by the purchaser, may at any time revoke the license which he thereby gives to the purchaser to enter his land to cut and carry away the wood, so far as it relates to any wood not cut at the time of the revocation." The courts of most of the American states, however, that have considered the question, hold expressly that a sale of growing or standing timber is a contract concerning an interest in lands, and within the fourth section of the statute of frauds. *Green v. Armstrong*, 62 Am.Dec. 68; 1 Denio (N.Y.) 550; *Bishop v. Bishop*, 11 N.Y. 123; *Westbrook v. Eager*, 16 N.J.L. 81; *Buck v. Pickwell*, 27 Vt. 157; *Cool v. Lumber Co.*, 87 Ind. 531; *Terrell v. Frazier*, 79 Ind. 473; *Owens v. Lawis*, 46 Ind. 488, 15 Am.Rep. 295; *Armstrong v. Lawson*, 73 Ind. 498; *Jackson v. Evans*, 44 Mich. 510, 7 N.W. 79; *Lyle v. Shinnebarger*,

17 Mo.App. 66; *Howe v. Batchelder*, 49 N.H. 204; *Putney v. Day*, 6 N.H. 430, 25 Am.Dec. 470; *Bowers v. Bowers*, 95 Pa. 477; *Daniels v. Bailey*, 43 Wis. 566; *Lillie v. Dunbar*, 62 Wis. 198, 22 N.W. 467; *Knox v. Haralson*, 2 Tenn.Ch. 232.

The question is now, for the first time, before this court for determination; and we are at liberty to adopt that rule on the subject most conformable to sound reason. In all its other relations to the affairs of men growing timber is regarded as an integral part of the land upon which it stands; it is not subject to levy and sale upon execution as chattel property; it descends with the land to the heir, and passes to the vendee with the soil. *Jones v. Timmons*, 21 Ohio St. 596. Coal, petroleum, building stone, and many other substances constituting integral parts of the land, have become articles of commerce, and easily detached and removed, and, when detached and removed, become personal property, as well as fallen timber; but no case is found in which it is suggested that sales of such substances, with a view to their immediate removal, would not be within the statute. Sales of growing timber are as likely to become the subjects of fraud and perjury as are the other integral parts of the land, and the question whether such sale is a sale of an interest in or concerning lands should depend not upon the intention of the parties, but upon the legal character of the subject of the contract, which, in the case of growing timber, is that of realty. This rule has the additional merit of being clear, simple, and of easy application,—qualities entitled to substantial weight in choosing between conflicting principles. Whether circumstances of part performance might require a modification of this rule is not before the court, and has not been considered.

Judgment affirmed.

NOTE

Compare the following cases with the above case and the cases that are stated in the opinion: (1) In consideration of \$100 received from the buyer, the owner of land orally promises to cut down certain trees thereon, saw them up, and deliver them in the form of cord wood to the buyer.

(2) The owner of a tree nursery orally contracts to transplant five small pine trees from his nursery to the buyer's farm for \$5 each to be paid on delivery.

(3) A landowner orally contracts to sell to a buyer a dwelling house, then on its original foundation, the buyer promising to sever and remove it within ten days. See *Wetkopsky v. New Haven Gas Light Co.*, 88 Conn. 1, 90 A. 30 (1914). Also, *Restatement, Contracts*, § 195.

Are growing trees and a solidly attached building chattels if the seller and buyer intend to treat them as such? Would not a contract for their sale be required by the statute, sections 4 and 17, to be in writing, whether they are held to be chattels (goods, wares, and merchandise) or land (lands, tenements, or hereditaments)?

ZWICKER v. GARDNER.

Supreme Judicial Court of Massachusetts, 1912.
213 Mass. 95, 99 N.E. 949, 42 L.R.A., N.S., 1160.

Action by Sam Zwicker against Edwin S. Gardner, executor. Finding for plaintiff, and defendant brings exceptions. Exceptions overruled.

MORTON, J. The plaintiff mortgaged certain premises to the defendant. The defendant instituted foreclosure proceedings and the plaintiff alleges that the defendant agreed that if he, the plaintiff, would not bid at the foreclosure sale or procure other persons to bid, he, the defendant, would bid the premises in and sell them at private sale and pay over to the plaintiff any balance that remained after deducting the mortgage, interest and expenses. The plaintiff alleges that he refrained from bidding or procuring others to bid at the foreclosure sale, and the defendant bid the premises in and afterwards sold them at private sale for a sum in excess of the mortgage, interest and expenses. This is an action to recover such excess. The case was sent to an auditor, who found the facts to be as alleged by the plaintiff, and was heard by the court without a jury upon the auditor's report. The court ruled and found in favor of the plaintiff. The case is here on exceptions by the defendant to the refusal of the court to rule as requested by the defendant that the contract was within the statute of frauds and the plaintiff could not recover. It was agreed that the contract, if there was one, was not in writing, and that there was no note or memorandum thereof in writing signed by the defendant's testator, or by any one by him thereunto lawfully authorized.

We think that the ruling and finding of the court were right. This is not an action to enforce an oral contract for the sale of land or an interest in or concerning the same. The land has been sold and nothing remains to be done except for the defendant to account for and pay over the excess. That part of the contract is separable from the rest of the contract and the rest of the contract having been performed there is no reason why this part of it should not be enforced. And to that effect see the cases which we cite. *Trowbridge v. Wetherbee*, 11 Allen, 361; *Graffam v. Pierce*, 143 Mass. 386, 9 N.E. 819; *Page v. Monks*, 5 Gray, 492. The case of *Kennerson v. Nash*, 208 Mass. 393, 94 N.E. 475, cited by the defendant, is entirely different from the case before us. It is not necessary to consider whether, if the contract did come within the statute of frauds, it would have been taken out of the statute by part performance.

Exceptions overruled.

QUESTIONS:

1. Observing that the performance promised involved no conveyance of any interest in land from either party to the other, was not the contract enforceable while entirely executory?
 2. Is the following contract unenforceable: A pays to B (thought to be an undesirable neighbor) \$1,000 and B promises orally to sell his house and lot at public auction and to vacate within three months?
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MAGUIRE v. KIESEL.

Supreme Court of Errors of Connecticut, 1913. 86 Conn. 453, 85 A. 689.

Action by Charles F. Maguire against E. Kiesel to recover damages for breach of an oral contract respecting real estate. From a judgment for plaintiff assessing his damages at \$1,100, defendant appeals. Affirmed.

The following facts are established by the finding of facts and the finding of the issues in favor of the plaintiff:

About January 1, 1911, the plaintiff and defendant entered into an oral agreement to share equally in the profits that should be made from the purchase of a lot of land, the building and rental of a house thereon, and the sale thereof, if an opportunity to sell should be had. No time limit was placed upon the continuation of the agreement, but it might have been fully performed within one year. It was a part of the agreement that the defendant should have the title of the land conveyed to himself and the plaintiff jointly. Each party undertook to do certain things to carry out the agreement and necessary to complete the transaction. The plaintiff agreed to pay one-half of the price of the lot, to wit, \$1,200, render or cause to be rendered certain services in connection with the enterprise, and contribute \$900 toward the cost of erection of the building which was to cost \$7,800. The defendant was to contribute \$600 in money toward the purchase of the lot, his services as builder or contractor, and also \$900 toward the cost of the building, and, in addition, pay any excess in the cost of the building over \$7,800. The plaintiff performed or caused to be performed at his expense the services which he undertook to render, and either did or offered to do, and was at all times able and willing to do all the other things required of him to be performed under the terms of the contract. The defendant purchased the lot, taking title in his own name, and paying the entire purchase price, although plaintiff stood ready and willing to contribute his share thereof. The same day he conveyed the property to his wife, in whose name it has stood ever since. Thereafter the defendant stated to the plaintiff that he had procured the money for the purchase of the lot from his wife, and that, when the building had proceeded, he would turn over the plaintiff's

share to him upon the plaintiff paying his share of the money. This explanation satisfied the plaintiff. Thereafter, in pursuance of the partnership agreement between them, the plaintiff and defendant agreed to erect a six-family house upon said lot. The defendant subsequently refused to allow the plaintiff to contribute the \$900 agreed upon, although he offered to do so, and repudiated the agreement, and then and ever since has refused to abide by it. A building was erected upon the land by defendant, pursuant to and in substantial accordance with the plans and specifications agreed to by the plaintiff, which was completed and ready for occupancy August 1, 1911. The rental profit of the building was estimated by the parties to be and in fact was at the rate of \$800 per year. The value of the property at the time of the completion of the property was and remained \$1,500 more than its cost. The allegation of the complaint was that "the plaintiff entered into an agreement by parol whereby they were to purchase real estate jointly and construct a building thereon and to share in the profits arising therefrom."

PRENTICE, J. (after stating the facts as above). The plaintiff sues to recover for damages alleged to have been suffered by him from the breach of an agreement between himself and the defendant for the conduct of a joint enterprise, and for services claimed to have been rendered and expenses incurred by him in compliance with the terms of the agreement and in aid of the joint undertaking, the benefit of which has been appropriated by the defendant as a consequence of his wrongful conduct in the breach of the agreement. The agreement which is thus made the basis of recovery was an oral one, and is found to have been one "to share equally in the profits that should be made from the purchase of a lot of land, the building of a house thereon and the sale thereof, if an opportunity to sell should be had." Four of the reasons of appeal charge the trial court with error in the rendition of its judgment upon the ground that the agreement was not actionable by reason of two provisions of the statute of frauds. In the brief and argument the only provision of the statute relied upon is that which makes nonactionable any agreement not in writing "for the sale of real estate or any interest in or concerning it." General Statutes, § 1089. * * *

The agreement was not within the operation of the statute. The statute "contemplates only a transfer of lands or some interest therein." *Bostwick v. Leach*, 3 Day, 476, 484; *Hall v. Solomon*, 61 Conn. 476, 483, 23 A. 876, 29 Am.St.Rep. 218. The subject-matter of the agreement was not land or any interest therein. It was a fund of money representing profits from a joint enterprise in the nature of a partnership. *Bunnel v. Taintor*, 4 Conn. 568, 573. This enterprise, to be sure, was one which contemplated and involved a real estate transaction, and the fund to be divided was to be derived from that source.

But that touching which the agreement was made, and in which by reason of the agreement the plaintiff claims an interest, was the fund. *Bunnel v. Taintor*, supra, presented a situation strikingly similar in its details to the present, and having the same essential features, and we there held that the contract was not within the statute, 4 Conn. 568, 573. The overwhelming weight of authority in other jurisdictions is to the same effect, that an agreement for a joint enterprise in the nature of a copartnership which has for its purpose the purchase, improvement, and sale of real estate for the profit arising therefrom to be divided among the joint undertakers as among partners, and which does not undertake to operate upon the ownership of or title to the realty, or anything annexed thereto as a part or parcel of it and transferable alone by deed, is not within the statute. • • •

QUESTIONS:

1. Why does the court say that the "subject-matter of the agreement" was a non-existent "fund" instead of the "lot of land, the building of a house thereon and the sale thereof" ?
 2. Is an oral agreement between adjoining landowners settling a boundary dispute and marking the line within the statute? A like agreement between tenants in common for a specific partition? See Restatement, Contracts, § 196.
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NOTE ON PART PERFORMANCE

After an oral contract that is within the statute of frauds has been fully performed by both parties, the resulting legal effects are identical with what they would have been if no such statute existed.

After actual conveyance of the land has been executed by the vendor in an oral contract of purchase and sale, and nothing remains but the payment of the price, he can get judgment for the price in an ordinary common law action therefor. It was never necessary for him to resort to equity for specific performance.

If the oral contract was one for the exchange of lands and an actual conveyance has been fully executed by one of them, he can get a decree for specific performance by the other party. If he prefers a quasi-contractual remedy, he can compel restitution of the land that he has conveyed to the defendant who is refusing the return conveyance. Restatement, Restitution, § 180.

Under what has come to be called the "Part Performance Doctrine," one that in some states has been specifically enacted as a part of the statute, a person who has promised orally to convey land will be

decreed to perform specifically by making the promised conveyance if the promisee has reasonably changed his position, in reliance on the oral promise and without notice of its repudiation, in such manner that it is now regarded as "a virtual fraud" for the promisor to refuse conveyance and retain the land. A study of many cases in many states is necessary before attempting to describe what are the changes of position that will induce this specific enforcement. The fact that in most states the statute contains no such "part performance" provision has not prevented its extensive and liberal application in many hundreds of cases. The doctrine was the creation of courts of equity; and in very few cases has it been held that "part performance" justifies a judgment for damages for breach of the promise to convey.

Restatement, Contracts, sec. 197, states the rule thus: "Where, acting under an oral contract for the transfer of an interest in land, the purchaser with the assent of the vendor

(a) makes valuable improvements on the land, or

(b) takes possession thereof or retains a possession thereof existing at the time of the bargain, and also pays a portion or all of the purchase price.

the purchaser or the vendor may specifically enforce the contract."

A reading of representative cases throughout the country demonstrates that this is an inadequate statement of existing case law, although as an affirmatively stated rule it is thoroughly supported and the illustrative cases stated under it are well decided. Kinds of "part performance" other than those mentioned in clauses (a) and (b), however, have been held to justify specific enforcement of the promise to transfer land in far too many cases to be disregarded. The most numerous of these cases are those in which the promisee has rendered personal services of such a character that their value cannot be estimated fairly by a court or jury, and the court believes that justice will be denied if the remedy is restricted to a judgment for reasonable compensation in money.

Before a court will decree specific performance of the oral promise, two requirements must be satisfied. (1) The case must be such that remedies of a restitutionary character are not adequate to do justice. (2) The fact that the oral promise was made and its terms must be proved by strong and convincing evidence, not merely by the testimony of interested parties. In the Missouri cases especially will be found a detailed statement of the evidence on which the court's decision is based.

It should be observed that the "part performance" that makes the doctrine applicable includes much that is not any part of the consideration for which the promisor bargained. Permanent improvements on the land are an important illustration of this. Moreover,

there are numerous cases in which an oral promise to transfer land as a gift has been specifically enforced because of changes of position in reliance on the promise. These clearly illustrate the rule in Restatement, Contracts, § 90.

In four states (Ky., Miss., N.C., Tenn.) the courts have often said that they do not recognize the "part performance" doctrine. Some cases can be found there, however, that appear to be inconsistent with the statement.

In any case in which the promisor has received a bargained-for performance of pecuniary value and yet refuses to perform his oral promise, the promisee can get judgment for restitution of the value so received from him; for this purpose the statute of frauds nowhere prevents proof of the terms of the oral contract. In an appropriate case, the promisee can get a decree for the specific restitution of property that he has transferred. See Restatement, Contracts, §§ 354, 355.

SECTION 4.—CONTRACTS NOT TO BE PERFORMED WITH- IN ONE YEAR

PETER v. COMPTON.

In the Court of King's Bench, 1694. Skin. 353, 90 Eng.Rep. 157.

The question upon a trial before Holt, Chief Justice, at Nisi Prius, in an action upon the case, upon an agreement, in which the defendant promised for one guinea, to give the plaintiff so many at the day of his marriage, was, if such agreement ought to be in writing, for the marriage did not happen within a year: the Chief Justice advised with all the Judges, and by the great opinion (for there was diversity of opinion, and his own was *e contra*) where the agreement is to be performed upon a contingent, and it does not appear within the agreement, that it is to be performed after the year, there a note in writing is not necessary, for the contingent might happen within the year; but where it appears by the whole tenour of the agreement, that it is to be performed after the year, there a note is necessary; otherwise not.

PETERS v. INHABITANTS OF WESTBOROUGH.

Supreme Judicial Court of Massachusetts, 1837. 19 Pick. 364, 31 Am. Dec. 142.

Assumpsit for expenses incurred &c. in the support of Catharine Ladds, from March 2d, 1835, until her death.

At the trial in the Common Pleas, before Strong, J., it appeared, that the plaintiff was an inhabitant of Westborough; that Catharine Ladds was the daughter of John Ladds, who resided in a neighbouring town; that she came into the family of the plaintiff in March, 1834, when she was eleven or twelve years of age, and remained there until her death, which took place on the 31st of May, 1835, after a sickness of four or five months; that, on the 2d of March, 1835, the plaintiff gave notice of her illness to one of the overseers of the poor of Westborough, and requested that she might be supported by the town; but that no action was taken by them on the subject.

The counsel of the defendants then proposed to show by parol evidence, that a short time before Catharine went into the plaintiff's family, it was agreed between him and her father, that the plaintiff should take her into his family and employment, for one month, on trial, and if, at the end of the month, he was not satisfied with her, he might return her to her father, but that, otherwise, he should support her until she was eighteen years of age, and should not return her for any cause but bad conduct on her part; that, in pursuance of this agreement, she went into the family of the plaintiff, and that at the end of the month the plaintiff expressed himself to be satisfied with her, and never offered to return her to her father.

The plaintiff objected to the introduction of this evidence, on the ground that the contract, not being in writing, was void by the statute of frauds.

The judge ruled that, as this contract was by parol, it was competent for the plaintiff to put an end to it at any time, and that, after the notice given to the overseer on the 2d of March, 1835, the plaintiff ceased to be liable for the support of the pauper; and the evidence was accordingly rejected.

The jury returned a verdict for the plaintiff. The defendants excepted to the ruling of the judge.

WILDE, J. This case depends on the question, whether the plaintiff was not, by his contract, as it was offered to be proved by the defendants, bound to support the pauper, for the expenses of whose support the defendants are charged; and we are of opinion that he was so bound by his contract with the pauper's father. This was clearly a valid contract, unless, being by parol it was void by the statute of frauds, as an agreement not to be performed within the space of one

year from the making thereof. St. 1788, c. 16, § 1. But this clause of the statute extends only to such agreements as, by the express appointment of the parties, are not to be performed within a year. If an agreement be capable of being performed within a year from the making thereof, it is not within the statute, although it be not actually performed till after that period. 1 Com. on Contr. 86. On this construction of the statute it was decided, in an anonymous case in 1 Salk. 280, that a parol promise to pay so much money upon the return of a certain ship, was not within the statute, although the ship happened not to return, within two years after the promise was made; for that, by possibility, the ship might have returned within a year. So, in the case of *Peter v. Compton*, Skin. 353, it was decided that a promise to pay money to the plaintiff on the day of his marriage, was not within the statute, though the marriage did not happen within a year. And it was held by a majority of the judges, that where an agreement is to be performed upon a contingency, and it does not appear in the agreement, that it is to be performed after the year, there a note in writing is not necessary; for the contingency might happen within the year.

This construction of the statute is fully confirmed by the case of *Fenton v. Emblers*, 3 Burr. 1278. In that case the defendant's testator had promised the plaintiff, that if she would become his housekeeper, he would pay her wages after the rate of £6 per annum, and give her, by his last will and testament, a legacy or annuity of £16 by the year, to be paid yearly. The plaintiff, on this agreement, entered into the testator's service, and became his housekeeper, and continued so for more than three years. And the contract, though by parol, was held to be valid and not within the statute. Mr. Justice Dennison declaring his opinion to be (in which opinion the other judges coincided) that the statute of frauds plainly means an agreement not to be performed within the space of a year, and expressly and specifically so agreed, that a contingency was not within it, nor any case that depended on a contingency, and that it did not extend to cases where the thing might be performed within the year.

But if it appears clearly, that an agreement is not to be performed within a year, and that such is the understanding of the parties, it is within the statute of frauds, although it might be partly performed within that period. Such was the decision in *Boydell v. Drummond*, 11 East, 142. But the performance of the agreement in that case did not depend on the life of either party, or any other contingency. The defendant had agreed to take and pay for a series of large prints from some of the scenes in Shakespeare's plays. The whole were to be published in numbers; and one number, at least, was to be published annually after the delivery of the first. The whole scope of the undertaking shows, as Lord Ellenborough remarks, that it was not to be performed within a year; and if, contrary to all physical probability,

it could have been performed within that time, yet the whole work could not have been obtruded upon the subscribers at once, so as to have entitled the publishers to demand payment of the whole subscription from them within the year.

From these authorities it appears to be settled, that in order to bring a parol agreement within the clause of the statute in question, it must either have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year. And this stipulation or understanding is to be absolute and certain, and not to depend on any contingency. And this we think is the clear meaning of the statute.

In the present case, the performance of the plaintiff's agreement with the child's father, depended on the contingency of her life. If she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year.

Judgment of the Court of Common Pleas reversed, and a new trial granted.

NOTE

The contract was held not to be within the statute in the following cases: *Warner v. Texas & P. R. Co.*, 164 U.S. 418, 17 S.Ct. 147, 41 L.Ed. 495 (1896), contract to maintain a switch as long as needed held valid in an action for a breach 13 years later; *Cline v. Southern R. Co.* 110 S.C. 534, 96 S.E. 532 (1918), to employ as long as work is satisfactory; *Kent v. Kent*, 62 N.Y. 560, 20 Am.Rep. 502 (1875), contract to be performed at death.

DOYLE v. DIXON.

Supreme Judicial Court of Massachusetts, 1867. 97 Mass. 208, 93 Am.Dec. 80.

Action by John Doyle against John Dixon for breach of a contract by which the defendant, on selling his stock of groceries and good will to the plaintiff, agreed not to go into the grocery business in Chicopee for a period of five years. The defendant contended that the agreement was within the statute of frauds as an agreement not to be performed within a year, and that, as it was not in writing, the plaintiff could not recover; but the judge ruled the contrary. There was a verdict for the plaintiff, and the defendant excepted.

GRAY, J. It is well settled that an oral agreement which according to the expression and contemplation of the parties may or may not be fully performed within a year is not within that clause of the statute of frauds, which requires any "agreement not to be performed

within one year from the making thereof" to be in writing in order to maintain an action. An agreement therefore which will be completely performed according to its terms and intention if either party should die within the year is not within the statute. Thus in *Peters v. Westborough*, 19 Pick. 364, 31 Am.Dec. 142, it was held that an agreement to support a child until a certain age at which the child would not arrive for several years was not within the statute, because it depended upon the contingency of the child's life, and, if the child should die within one year, would be fully performed. On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute. It was therefore held in *Hill v. Hooper*, 1 Gray, 131, that an agreement to employ a boy for five years and to pay his father certain sums at stated periods during that time was within the statute; for although by the death of the boy the services which were the consideration of the promise would cease, and the promise therefore be determined, it would certainly not be completely performed. So if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. It has accordingly been repeatedly held by this court that an agreement not hereafter to carry on a certain business at a particular place was not within the statute, because, being only a personal engagement to forbear doing certain acts, not stipulating for anything beyond the promisor's life, and imposing no duties upon his legal representatives, it would be fully performed if he died within the year. *Lyon v. King*, 11 Metc. 411, 45 Am.Dec. 219; *Worthy v. Jones*, 11 Gray, 168, 71 Am.Dec. 696. An agreement not to engage in a certain kind of business at a particular place for a specified number of years is within the same principle; for whether a man agrees not to do a thing for his life, or never to do it, or only not to do it for a certain number of years, it is in either form an agreement by which he does not promise that anything shall be done after his death, and the performance of which is therefore completed with his life. An agreement to do a thing for a certain time may perhaps bind the promisor's representatives, and at any rate is not performed if he dies within that time. But a mere agreement that he will himself refrain from doing a certain thing is fully performed if he keeps it so long as he is capable of doing or refraining. The agreement of the defendant not to go into business again at Chicopee for five years was therefore not within the statute of frauds. * * *

Exceptions overruled.

QUESTION:

If Dixon had died within a year would any part of his promised performance have been left to be rendered by his executor or administrator?

NOTE

There are some decisions in conflict with the above; and see Restatement, Contracts, § 198, Illustration 4. It has been held in a good many cases that a promise to forbear is not brought within the statute by the fact that no time limit is specified and the promised personal forbearance is to be forever.

HANAU v. EHRLICH.

Court of Appeal. [1911] 2 K.B. 1056.

FLETCHER MOULTON, L. J. When the Legislature passes a statute, it is the duty of the Courts to interpret that statute and to enforce it. But in the case of statutes which were passed long ago there may gradually accumulate a succession of decisions as to their interpretation which may, and sometimes do, so bind later Courts that they cannot treat the question as *res integra* but must accept the construction already judicially determined, whether they approve of it or not. There is no better example than this very provision of section 4 of the Statute of Frauds which requires a written memorandum of contracts which are not to be performed within a year. In my opinion little is left of the statute. The Courts are bound by decisions which they may well think to be out of harmony both with the spirit and the letter of the enactment. For instance, in very early decisions the Courts, influenced by the fear that the statute would otherwise work injustice, decided that a contract was to be performed within a year if one of the contracting parties could perform his part within a year. The result is that a contract which obviously cannot be completely performed within twenty years must be treated as a contract to be performed within a year, if on one side it can be so performed.

A further question as to the meaning of a contract which is not to be performed within a year arose soon after the passing of the statute. There are two possible lines of interpretation: the one that in order to be outside the statute a contract must be such that it necessarily must be performed within a year; the other, that it was sufficient if it might be, or was capable of being, performed within that time. The Courts have held that the latter view is the correct one. In *McGregor v. McGregor*, 21 Q.B.D. 424, the Court of Appeal gave what is in my judgment an authoritative interpretation of this provision of the statute. In that case *Lindley and Bowen, L. JJ.* (and *Lord Esher, M. R.*, does not differ from them), laid down clearly their interpretation of the provision. A husband had there agreed to allow his wife a weekly sum for

maintenance; obviously the idea was that it would continue for her life. The Court had to consider whether a contract running with the life of the wife was one which might be wholly performed within a year, and Lindley, L. J., said: "The effect of these decisions is that, if the contract can by possibility be performed within the year, the statute does not apply"; while Bowen, L. J., after saying that he approved of the decision in *Peter v. Compton*, Skin. 353, proceeds thus: "It was held that 'an agreement that is not to be performed within the space of one year from the making thereof' means in the Statute of Frauds an agreement which appears from its terms to be incapable of performance within the year." The seal of the Court of Appeal was thereby finally put on the interpretation that, if a contract might under any possible circumstances be performed within the year, it was not within the Statute of Frauds. We are bound by this decision, although it takes all contracts of personal service out of the Act, whatever be the term of service and even though the consideration is such that it cannot be performed within the year.

Turning to the agreement in the present case, I find it to be an agreement for two years, subject to a six months' notice on either side which may be given at any time, and I ask myself whether it is incapable of performance within the year, or whether, in the words of Lindley, L. J., it can by possibility be performed within the year. If I were free to answer that question, I should say that beyond all question it might possibly be performed within the year. The period of two years has no higher contractual sanction than the effect of the six months' notice, and such six months' notice may be given at any time. It is impossible to predicate that the period of the performance of this contract is more than a year. Moreover, supposing the notice to be given, then six months after that date the contract is wholly performed. There is no ghostly survival of the contract for the remainder of the two years; the contract is wholly performed when the notice has expired. I have, therefore, no hesitation in saying that, if I were free to use my own intellect and must be guided by the authoritative utterance of the Court of Appeal in *McGregor v. McGregor*, 21 Q.B.D. 424, I should certainly allow this appeal; but I am obliged to remember that, side by side with the decisions which have led up to *McGregor v. McGregor*, 21 Q.B.D. 424, there has been a parallel series of decisions which have dealt with one special class of contract, one where a fixed period longer than a year has been named in the contract not as a fixed period of the contract, but only as the period during which the contract lasts in one alternative. The only cases dealing with this point to which I need refer are *Dobson v. Collis*, 1 H. & N. 81, *Ex parte Acraman*, 31 L.J. (Ch.) 741, and *Lavalette v. Riches*, 24 Times L.R. 336. In those decisions it is laid down that where a contract specifies a fixed time for its performance which is longer than a year, and contains what is called a defeasance

stipulation which might terminate the contract within the year, it is within the Statute of Frauds; that is to say, a contract like the present one, which is for two years, subject to a power on either side to give the six months' notice which terminates the period of the contract and limits the obligations of parties on either side, is nevertheless within the statute. I cannot reconcile those decisions with *McGregor v. McGregor*, 21 Q.B.D. 424, but I can apply both sets of decisions, for I can say that in the smaller and more specific class to which *Dobson v. Collis*, 1 H. & N. 81, applies there are decisions which forbid me to apply the general test laid down in *McGregor v. McGregor*, 21 Q.B.D. 424. I must obey both sets of decisions as far as I can, and when I find a general rule laid down in the one which is contrary to the specific rule laid down for the specific class in the other, I am obliged to regard such decisions as that in *Lavalette v. Riches*, 24 Times L.R. 336, as establishing an exception to the general rule laid down in *McGregor v. McGregor*, 21 Q.B.D. 424, which exception, although not noticed in the last-named case, must have been intended to be included, because there are co-ordinate decisions which lay it down distinctly. I come to this conclusion with regret. I cannot see why the fact that you mention a maximum term to a contract, which only runs for that term if certain contractual powers are not exercised by the parties, should be held to override the contract to such an extent that, although it can be performed within the year, it is my duty to say that it cannot. But I am bound by the authorities, and agree that this appeal must be dismissed.

NOTE

The concurring opinions of Vaughan Williams and Buckley, L. JJ., are omitted. Buckley, L. J., said: "It is now two centuries too late to ascertain the meaning of section 4 by applying one's own mind independently to the interpretation of its language. Our task is a much more humble one; it is to see how that section has been expounded in decisions and how the decisions apply to the present case."

The decision was affirmed in the House of Lords, [1912] A.C. 39. An excellent case contra is *Blake v. Voigt*, 134 N.Y. 69, 31 N.E. 256 (1892).

BROADWELL v. GETMAN.

Supreme Court of New York, 1846. 2 Denio, 87.

Error to the Oneida common pleas. Getman sued Broadwell before a justice of the peace, and upon a trial by jury recovered \$25 besides costs, and this judgment was affirmed by the C. P. upon certiorari. The plaintiff's claim was principally for damages for the non-performance of a contract respecting the clearing of land. This contract was entered into on the first day of January, 1841, and was reduced to writ-

ing at the request of the parties and agreed to by them, but was not signed. By its terms the defendant agreed to clear off a piece of wood land belonging to the plaintiff, and make a fence two logs high on one end of it, which fence the plaintiff was to complete. The job was to be done by the spring of 1842, in season to put in a spring crop that year; and the defendant was to have for his compensation all the wood and timber growing on the premises, except what should be necessary for the fence, and also the first crop, which he was to put in in the spring of 1842. Both parties gave evidence upon the question whether the defendant had fully cleared off the land and as to the amount necessary to complete it. Before the cause was submitted to the jury, the defendant's counsel requested the justice to charge, that if a longer time was given by the contract to complete the work than one year from the time of making thereof, it was void; but he refused so to charge.

By the Court, BEARDSLEY, J. The special agreement between these parties was to endure for nearly two years. It was made on the first of January, 1841, and although the clearing was to be done by a year from the next spring, the defendant was to have the use of the land for a crop to be put in by him at that time.

By the statute every agreement which by its terms is not to be performed within one year from the making thereof, is declared to be void, unless in writing and subscribed by the party to be charged therewith. 2 R.S. 135, § 2, subd. 1. Agreements which may be completed within one year are not within the statute; it extends to such only as by their express terms are not to be, and cannot be carried into full and complete execution until after the expiration of that period of time. *Fenton v. Emblers*, 3 Burr, 1278; *Boydell v. Drummond*, 11 East, 142; *Bracegirdle v. Heald*, 1 Barn. & Ald. 723; *Chit. on Cont.* 67; 1 *Smith's Leading Cases and Notes* (Phil.Ed.) 143; *Lockwood v. Barnes*, 3 Hill, 128, 38 Am.Dec. 620; *Russell v. Slade*, 12 Conn. 455.

The word "agreement," as used in this section, signifies "a mutual contract on consideration between two or more persons," and *ex vi termini*, includes the several parties to the contract and their respective stipulation: every thing, indeed, which is to be done on both sides. *Wain v. Warlters*, 5 East, 10; *Sears v. Brink*, 3 John. 210, 3 Am.Dec. 475; *Sherburne v. Shaw*, 1 N.H. 157, 8 Am.Dec. 47; *Champion v. Plummer*, 1 New R. 252; 2 *Stark Ev.* 482 (Phil.Ed. of 1842). In this case there were mutual stipulations between the parties: the defendant was to clear the land and in part make a fence at one end of the lot. This fence was to be completed by the plaintiff; and he stipulated that the defendant should have all the timber cut on the land except what might be required for the fence, and also the use of the land for a summer crop in 1842. As this agreement was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed, was

void. Upon this point it would seem difficult to raise a doubt upon the terms of the statute. An agreement is an entire thing, and where that cannot be completely executed, on both sides, until more than a year has elapsed, the case falls within the express words of the enactment. It is also within its spirit, for "the mischief meant to be prevented by the statute, was the leaving to memory the terms of a contract for longer time than a year. The persons might die who were to prove it; or they might lose their faithful recollection of the terms of it." Bailey, J., 11 East, 159; 1 Ld.Raym. 316.

The general principle is firmly settled that although the agreement requires a part performance within a year, and is so far faithfully executed, still it is void, unless reduced to writing, if other stipulations remain to be executed after the close of the year. *Lockwood v. Barnes*, supra. But notwithstanding the apparent universality and soundness of this position, it is laid down by some elementary writers that the statute does not extend to contracts, "where all that is to be done by one of the parties is to be done within a year." 2 Leigh's N.P. 1045; Chit. on Cont. 69; Long on Sales, 56. This distinction had been suggested in *Boydell v. Drummond* and *Bracegirdle v. Heald*, supra, and was finally acted upon in the case of *Donellan v. Read*, 3 Barn. & Adol. 899, which was decided in 1832. In the last case, Littledale, J., who delivered the opinion of the court said, "as to the contract not being to be performed within a year, we think that as the contract was entirely executed on one side within a year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the statute of frauds does not extend to such a case. In case of a parol sale of goods, it often happens that they are not to be paid for in full till after the expiration of a longer period of time than a year; and surely the law would not sanction a defense on that ground, when the buyer had had the full benefit of the goods on his part." See also *Holbrook v. Armstrong*, 10 Me. 31. The principle affirmed in these cases has no application to the present case; for here the party seeking to enforce the contract was not to perform all its stipulations, on his part, within the year: he was to permit the defendant to occupy and use the land through the season of 1842, which time did not commence until more than a year after the contract had been entered into. But I would not be understood as yielding my assent to the principle stated. It seems to me in plain violation of the statute. Every verbal contract which is not to be performed within a year from the making thereof, is declared to be void. Although the terms of the agreement may require full performance on one side within a year, I do not see how this can exclude it from the statute, the other side being incapable of execution until after the year has elapsed. The agreement is entire, and if it cannot be executed fully, on both sides, within the year, I think it is void. What difference does it make that one party can, while the other cannot, com-

plete the contract within a year? Such an agreement is not, in terms, excepted from the statute, and the reason for the enactment applies to it with full force. But it is unnecessary to pursue this subject; and I dismiss it with the remark that although where one party has fully performed on his part within the year, the agreement may notwithstanding be void, still he is not remediless, for he may maintain a general *indebitatus assumpsit* against the party who refuses to proceed further under the contract, and thus recover a compensation for what has been advanced and received upon it. *Lockwood v. Barnes*, *Holbrook v. Armstrong*, *supra*. See also *Smith's Leading Cases*, as referred to above; *Mavor v. Pyne*, 2 Car. & Payne, 91, and 3 Bing. 285.

The contract was void and the plaintiff should not have recovered, as he did, for its violation.

Judgment reversed.

NOTE

On the issue discussed in the above opinion, the decisions can not be reconciled. In *Restatement, Contracts*, § 198, the rule is adopted that, even if a bargain is within the one-year clause of the statute, full performance by one of the parties makes the promise of the other enforceable without regard to the time required for performance. Here again the tendency is evidenced to disregard the words of the statute when the oral bargain is partly performed and injustice would otherwise be suffered. According to the *Restatement*, no unilateral contract, and no bilateral contract that has become unilateral by full performance on one side, is within the "one year" clause of the statute.

An oral contract of employment for exactly one year is enforceable if the "one year" period will be completed by the end of the anniversary of the day on which the contract is made. This is true whether performance is to begin at the instant the contract is made or on the succeeding day. If service for a few hours more than 365 days is included, the court will disregard this fraction of a day. *Prokop v. Bedford Waist & D. Co.*, 105 Misc. 573, 173 N.Y.S. 792 (1919, S.Ct.); *Smith v. Gold Coast & A. Expl.* [1903] 1 K.B. 285. A writing is required if performance can not be completed before the end of the first anniversary.

ADAMS v. UNION CINEMAS [1939] 3 All Eng. 136. The plaintiff sued for damages for breach of an oral contract of employment. The defendant pleaded the statute of frauds and that the employment was for two years. The defendant had promised to reduce the contract to writing, both parties expecting that the two year term would be included. The trial court found that the only existing contract was an oral one, for an indefinite period that would last only until a writing was executed, although the plaintiff had stated his claim as based on a two year contract. The Court of Appeal sustained a judgment for the plaintiff. *DuParcq, L. J.*, said: "The much abused statute of frauds has no application in this case." Also, that he would hate to have to explain to an "intelligent foreigner" who should ask, "Why is it that counsel for the defendants was much more anxious even than counsel for the plaintiff

that his client had entered into an agreement to employ the plaintiff for a longer time at a larger salary? Is it because of undue generosity on his part?"

SECTION 5.—THE CHARACTER OF THE MEMORANDUM REQUIRED

SANBORN et al. v. FLAGLER.

Supreme Judicial Court of Massachusetts, 1864. 9 Allen, 474.

Contract, brought originally by the plaintiffs, who were partners under the firm of Sanborn, Richardson & Co., against John H. Flagler and ——— Holdane, as partners under the firm of Holdane & Co. The writ was served only upon Flagler, and he alone appeared to defend the action. The plaintiffs alleged that the defendants had refused to deliver to them fifty tons of best refined iron, in accordance with the terms of a written agreement entered into between them.

The defendant in his answer set up, among other defences, the statute of frauds.

At the trial in the superior court, before Morton, J., Josiah B. Richardson, one of the plaintiffs, was called to the stand, and produced, to be offered in evidence, a paper, of which the following is a copy as near as can be made:

"Will deliver S. R. & Co. Best Refined Iron 50 tons within 90 days—at 5 ct p lb 4 of cash. Plates to be 10 to 16 inches wide and 9 ft to 11 long. This offer good till 2 o'clock Sept. 11, 1862. J. H. F. J. B. R."

The witness was proceeding to testify in relation to the execution and delivery of the same, when the defendant objected that the paper was not on its face or in fact any sufficient note or memorandum in writing of the alleged bargain signed by the party to be charged, and that parol evidence was not admissible to add to, modify or explain the paper, so as to make it such a memorandum as could be admitted. But the judge ruled that the paper was a sufficient note or memorandum under the statute, and would bind the defendant if he was a member of the firm of Holdane & Co. The witness then testified that the agreement was written by him, and that he and the defendant signed their initials, the defendant writing the initials "J. H. F." and he the initials "J. B. R.," and that before two o'clock on the day named, and before the defendant left the plaintiff's office, he accepted the proposition, and so stated to the defendant verbally. The witness also testified that he signed his initials on behalf of the plaintiffs, and

that he understood the defendant to sign for the firm of Holdane & Co. This evidence was not controverted by the defendant.

The judge ruled that said paper, with the explanations given, if Richardson was believed, was a sufficient note or memorandum, and was binding on the defendant, if the jury found him to be a partner as alleged.

The jury found a verdict for the plaintiffs, and the defendant alleged exceptions.

BIGELOW, C. J. The note or memorandum on which the plaintiffs rely to maintain their action contains all the requisites essential to constitute a binding contract within the statute of frauds. It is not denied by the defendant that a verbal acceptance of a written offer to sell merchandise is sufficient to constitute a complete and obligatory agreement, on which to charge the person by whom it is signed. In such case, if the memorandum is otherwise sufficient when it is assented to by him to whom the proposal has been made, the contract is consummated by the meeting of the minds of the two parties, and the evidence necessary to render it valid and capable of enforcement is supplied by the signature of the party sought to be charged to the offer to sell. Indeed, the rule being well settled that the signature of the defendant only is necessary to make a binding contract within the provisions of the statute relating to sales of merchandise, it necessarily follows that an offer to sell and an express agreement to sell stand on the same footing, inasmuch as the latter, until it is accepted by the other party, is in effect nothing more than a proposition to sell on the terms indicated. The acceptance of the contract by the party seeking to enforce it may always be proved by evidence aliunde.

The objections on which the defendants rely are twofold. The first is, that the note or memorandum does not set forth upon its face, in such manner as to be understood by the court, the essential elements of a contract. But this position is not tenable. The nature and description of the merchandise, the quantity sold, the price to be paid therefor, the terms of payment and the time within which the article was to be delivered, are all clearly set forth. But it is urged that the paper does not disclose which of the parties is the purchaser and which the seller, and that no purchaser is in fact named in the paper. This would be a fatal objection, if well founded. There can be no contract or valid memorandum of a contract, which does not show who are the contracting parties. But there is no such defect in the note or memorandum held by the plaintiffs. The stipulation is explicit to deliver merchandise to S. R. & Co. It certainly needs no argument to demonstrate that an agreement to deliver goods at a fixed price and on specified terms of payment is an agreement to sell. Delivery of goods at a stipulated price constitutes a sale; an agreement for such delivery is a contract of sale. Nor can there be any doubt raised as

to the intrinsic import of the memorandum concerning the character or capacity in which the parties are intended to be named. A stipulation to deliver merchandise to a person clearly indicates that he is the purchaser, because in every valid sale of goods delivery must be made by the vendor to the vendee. We can therefore see no ambiguity in the insertion of the name of the purchaser or seller. The case is much stronger in favor of the validity of the memorandum, in this respect, than that of *Salmon Falls Manuf. Co. v. Goddard*, 14 How. 446, 14 L.Ed. 493. There only the names of the parties were inserted, without any word to indicate which was the buyer and which was the seller. It was this uncertainty in the memorandum which formed the main ground of the very able dissenting opinion of Mr. Justice Curtis in that case. So in the leading case of *Bailey v. Ogden*, 3 Johns. 399, 3 Am.Dec. 509; there was nothing in the memorandum to show which of the two parties named agreed to sell the merchandise. But in the case at bar, giving to the paper a reasonable interpretation, as a brief document drawn up in the haste of business, and intended to express in a few words the terms of a bargain, we cannot entertain a doubt that it indicates with sufficient clearness that the plaintiffs were the purchasers and the defendant the seller of the merchandise, on the terms therein expressed. Indeed, we can see no reason why a written agreement by one party to deliver goods to another party does not as clearly show that the latter is the purchaser and the former the seller as if the agreement had been in express terms by one to sell goods to the other.

The other objection to the memorandum is, that the name of the party sought to be charged does not appear on the face of the paper. If by this is meant that the signatures of all the persons who are named as defendants are not affixed to the memorandum, or that it is not signed with the copartnership name under which it is alleged that the persons named as defendants do business, the fact is certainly so. But it is not essential to the validity of the memorandum that it should be so signed. An agent may write his own name, and thereby bind his principal; and parol evidence is competent to prove that he signed the memorandum in his capacity as agent. On the same principle, a partner may by his individual signature bind the firm, if the contract is within the scope of the business of the firm, which may be shown by extrinsic evidence. *Soames v. Spencer*, 1 D. & R. 32; *Long on Sales*, 38; *Browne on St. of Frauds*, § 367; *Higgins v. Senior*, 8 M. & W. 834; *Williams v. Bacon*, 2 Gray, 387, 393. Besides, in the case at bar, the action is in effect against Flagler alone. He only has been served with process and appears to defend the action. Whether he signed as agent for the firm or in his individual capacity is immaterial. In either aspect, he is liable on the contract.

It is hardly necessary to add that the signature is valid and binding, though made with the initials of the party only, and that parol evi-

dence is admissible to explain and apply them. *Phillimore v. Barry*, 1 Camp. 513; *Salmon Falls Manuf. Co. v. Goddard*, ubi supra; *Barry v. Coombe*, 1 Pet. 640, 7 L.Ed. 295.

Exceptions overruled.

NOTE

Sufficiency of signature: A memorandum signed by one party only may be sufficient in case the party so signing is the party to be charged—the party now repudiating the contract; mutuality in this respect is not required. *Restatement, Contracts*, § 211; *Justice v. Lang*, 42 N.Y. 493, 1 Am.Rep. 576, Id., 52 N.Y. 323 (1873).

In *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 177 P. 818 (1919), the following memorandum, delivered to Wright, was held sufficient to bind the Grocery Company, although its name was merely printed at the top: "Seattle Grocery Company (Incorporated) Corner Western Avenue and Columbia Street. Phone Main 842. Seattle, Wash., April 6, 1917. Sold to Chauncey Wright, L. C. Smith Bldg., Seattle, Wash., Coffee, Spices, 'Halcyon' Food Products, 1 car Gold Medal flour, \$2,790.46."

Signature by agent: *Restatement, Contracts*, § 207. A few states have statutes requiring the agent to have written authority.

A power of attorney to an agent, stating the terms of a bargain he is thereby authorized to make, is not a sufficient memorandum.

A common agent may be authorized to sign for both parties; but it is well settled that one party cannot sign as agent for the other and thus satisfy the statute. *Restatement, Contracts*, § 213.

The memorandum of an auctioneer made at time of the sale binds both parties. *Restatement, Contracts*, § 212. His power to bind the seller lasts a reasonable time after the sale.

KILDAY v. SCHANCUPP.

Supreme Court of Errors of Connecticut, 1916.
91 Conn. 29, 98 A. 335, L.R.A.1917A, 151.

Action by Annie Kilday against Jacob Schancupp. Judgment for plaintiff, and defendant appeals. Affirmed.

On August 5, 1914, the plaintiff orally agreed to sell the defendant the two lots, 38 and 40 Emmett avenue, in Derby, Conn., for \$4,350, payable, \$50 in cash, the assumption of a mortgage for \$2,000 upon the property, and a note for \$1,500 secured by a second mortgage on the property, and the balance in cash at delivery of deed on or before September 1, 1914. In the afternoon of this day the defendant presented to the plaintiff and requested her signature, which she made, to the following instrument:

"J. Schancupp, Dealer in Diamonds, Watches and Jewelry, 222 Main Street.

"Derby, Conn., Aug. 5, 1914.

"Sold to J. Schancupp #38—40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150, next to second house for the sum of forty-three hundred and fifty dollars. Received by check deposit on the above \$50.00, same to apply to purchase price. Assuming mortgage of \$2,000 held by the Derby Savings Bank, and agree to take a second mortgage of \$1500.00 for three years at 5%. Balance of purchase price to be paid in cash on delivery of deeds. Deeds to pass hands on or before the first of September, 1914.

"[Signed] Mrs Annie Kilday.

"In the presence of

"Etta Kilday.

"S. Liftig."

The defendant directed his daughter to make a copy of this paper and give the same to the plaintiff. He himself kept the original, and did not sign it, unless his name in the body of the instrument is held to be a signing. The defendant at the delivery of the instrument to him gave the plaintiff his check for \$50, written as follows:

"Deposit on house and extra lot.

"Birmingham National Bank, Derby, Conn.

"Aug. 5, 1914.

"Pay to the order of Mrs. Kilday fifty and 00/100 dollars.

"J. Schancupp."

—and the plaintiff cashed this. On August 6, 1914, the defendant told the plaintiff he did not intend to buy the property. On August 31, 1914, the plaintiff tendered the defendant a warranty deed of the premises and the mortgage deed required to be executed by him in accordance with said instrument, and requested the payment of the balance of the purchase price and the performance by the defendant of his part of the agreement. This the defendant refused to do, and declined to accept the deed. On August 5, 1914, plaintiff, believing she had sold her property to the defendant, moved out of the house and lived elsewhere for eight months. She then returned and resumed possession. On August 5, 1914, the plaintiff's property, which defendant agreed to pay \$4,350 for was worth \$4,000.

WHEELER, J. (after stating the facts as above). The trial court held that there was no sufficient memorandum in writing to support a decree for specific performance, but that the plaintiff was entitled to a judgment for damages based upon the agreement for the sale of land. General Statutes, § 1089, provides that:

"No civil action shall be maintained * * * upon any agreement for the sale of real estate, or any interest in or concerning it * * *

unless such agreement, or some memorandum thereof, be made in writing, and signed by the party to be charged therewith, or his agent."

We have said that our statute does not make agreements not made in this way invalid, but prevents their proof unless by such a writing. *Fisk's Appeal*, 81 Conn. 433, 438, 71 A. 559.

It is immaterial whether the action be one for specific performance, or for damages for the breach of a contract of sale of land. The proof must be in the manner provided by our statute. And the agreement, in its essentials, must be the same in either action. Lord Farwell succinctly stated the principle in *Wild v. Woolwich Borough Council*, 1 Ch.Div. 35, 42: "It is perfectly clear that if there was no contract, there can be no damages for breach of contract, and any claim to compensation is out of the question."

But before specific performance will be decreed, something further must be shown than that the contract is made in accordance with the requirements of law. It must, in addition, be one of such a character as that the court will enforce its performance. The governing principles are clearly specified in our decisions. *Patterson v. Bloomer*, 35 Conn. 57, 63, 95 Am.Dec. 218; *Platt v. Stonington Savings Bank*, 46 Conn. 476, 478.

The conclusion of the learned trial court is not necessarily erroneous, though the reason given may be.

If the memorandum by which the agreement was proved meets the requirements of the statute, a contract within the requirements of the statute has been established sufficient to support the action for damages, or the action to secure specific performance, in the absence of equitable considerations which would lead a court in the exercise of its discretion to refuse to issue its decree.

The memorandum upon which the case must stand or fall is Exhibit B. When analyzed it discloses the parties to a contract of sale of land, the subject of sale described, a consideration, the terms of the sale, and the time of delivery of the deed. When the agreement was offered in evidence, the defendant duly excepted to its admission.

In two particulars only does the appellant attack the agreement: (1) Because of indefiniteness; (2) because it was not signed by the defendant.

The claimed indefiniteness of this agreement rests upon the description of the subject of the sale, viz.—"#38—40 Emmett avenue three tenement house and lot 50 front by 150 deep, and one empty lot 50 by 150 next to second house."

In the body of the agreement the locality of Emmett avenue is not given. But the agreement bears date at Derby, Conn., and from this the inference of fact follows, in the absence of evidence to the contrary,

that the property described in the agreement is located in Derby, Conn. This inference is rebuttable by parol proof, for example, that there was no such avenue or street in Derby. *Mead v. Parker*, 115 Mass. 413, 415, 15 Am.Rep. 110; *Kraft et al. v. Egan*, 76 Md. 243, 252, 25 A. 469; *Shelinsky v. Foster*, 87 Conn. 90, 97, 87 A. 35, Ann.Cas. 1914C, 1007; *Hodges v. Kowing*, 58 Conn. 20, 21, 18 A. 979, 7 L.R.A. 87.

The agreement must have been signed by this defendant, since he is the party to be charged. This agreement was caused to be prepared by the defendant, and it begins, "Sold to J. Schancupp." This is the written declaration of the defendant himself that the plaintiff has sold him the property described upon the terms described, and likewise it is his written declaration of purchase of this property upon the named terms. The statute is intended to relieve against fraud. To hold that this defendant by writing his name in the body of this instrument instead of at its end did not sign the instrument would help perpetrate, instead of prevent, a wrong.

An instrument, signed by one in any part of it after the body of it is written, or signed in any part and when completed produced from his custody, must be taken to be the instrument of the party so signing. Under these circumstances he authenticates by his signature, or by the signature to the instrument produced from his custody, the instrument so signed, and such a signature fully meets the requirements of the statute of frauds. *New England, etc., Co. v. Stand. Worsted Co.*, 165 Mass. 328, 331, 43 N.E. 112, 52 Am.St.Rep. 516; *Penniman v. Hartshorn et al.*, 13 Mass. 87; *Cal. Canneries Co. v. Scatena*, 117 Cal. 447, 49 P. 462; *Drury et al. v. Young*, 58 Md. 553, 42 Am.Rep. 343.

The authorities are equally decisive that the signature may be printed or written. *Schneider v. Norris*, 2 M. & S. 286; *Drury et al. v. Young*, 58 Md. 554, 42 Am.Rep. 343. And we have held that a signature by a rubber stamp, made by an agent duly authorized, is a signature within the statute. *Deep River Nat. Bank's Appeal*, 73 Conn. 341, 346, 47 A. 675.

Exhibit B was properly admitted in evidence; it was not indefinite, and it was duly signed by the defendant.

No facts are found which would prevent a court of equity decreeing specific performance. Therefore the trial court would have been justified in decreeing specific performance, and was justified in rendering a judgment for damages upon the second prayer for relief.

There is no error. The other Judges concurred.

NOTE

The description must identify the property sold; but it is not insufficient by reason of being cryptic and abbreviated. Supplementary parol evi-

dence is admissible to show its application to the subject matter. Restatement, Contracts, § 207.

A signature may be anywhere on the document; but it must be written there as an authentication of the contents or adopted as such a signature and not merely to identify the party who is contracting. See Restatement, Contracts, § 210.

The memorandum may consist of several separate documents, no one of which would be sufficient standing alone. Some courts are inclined to require that the document signed by the party to be charged must identify by an internal reference the other documents and thus authenticate them; but the reference need not be in express words, and most courts are very liberal in admitting parol evidence to identify and connect. See Restatement, Contracts, § 208. In the case above, could not Schancupp's signed check be used to supply a proper signature?

A signed letter, acknowledging that the contract was made and stating its terms, either expressly or by reference to another document, is a sufficient memorandum, even though it expressly repudiates and refuses to be bound by the contract. Restatement, Contracts, § 209.

SCHAFFER v. FAYLOR.

Court of Appeals of Ohio, 1944. 74 Ohio App. 533, 60 N.E.2d 339.

CARTER, Judge. This is an action for specific performance, which has for its basis the following instrument:

"Jan. 29, 1943

"Received of Stanley C. Schaffer one hundred \$100 cash. Payment on 83 acres farm in Brimfield Twp. \$2,900 to be paid within 60 day balance of \$6,000 to be paid at 30 per month at 4½% interest every six month. Total price \$9,000.

"Arthur Faylor

"Stanley C. Schaffer."

Certain evidence was introduced by plaintiff over objection by defendant, and some evidence was introduced by defendant. The trial court found in favor of plaintiff and ordered specific performance. A motion for new trial was overruled and appeal on questions of law and fact is prosecuted to this court.

First of all, a reading of the memorandum in question without the aid of other evidence, clearly and conclusively shows that defendant sold or contracted to sell a farm of about eighty-three acres in Brimfield township; that plaintiff purchased same; that \$100 down payment was made by plaintiff; that \$2,900 was to be paid within sixty days from date of the signing of the memorandum; and that the balance of \$6,000 was to be paid at the rate of \$30 per month at 4½% interest every six months, total purchase price being \$9,000. What

other construction can possibly be placed on this written memorandum? It is certainly more than a receipt for money.

In his answer to the first amended petition defendant admits that he is the *owner* of land in *Brimfield township*, but avers that he is unable to state from the description given of the property in the petition, whether it correctly describes the real estate, and for want of information denies that the description as set out in the amended petition correctly describes the real estate owned by defendant in *Brimfield township, Portage county, Ohio*. He further denies each and every allegation not admitted to be true. * * *

Is the memorandum of agreement, as above indicated, signed by each of the parties, a sufficient note or memorandum under the provisions of Section 8621, General Code, which section provides as follows:

"No action shall be brought whereby to charge * * * a person * * * *upon a contract or sale of lands, tenements, or hereditaments, or interest in, or concerning them, * * * unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized.*" (Italics ours.)

Clearly under such section, if the agreement rested in parol, no action could be brought upon it. This action is not based on a parol contract. The written memorandum or note of the agreement contains the date when executed, and shows partial payment by plaintiff, receipt by defendant of partial payment on farm in Brimfield township, a further amount of \$2,900 to be paid within sixty days, when and how balance is to be paid, rate of interest, when interest is to be paid, and total purchase price. Does this note or memorandum set out the essential terms required under the statute of frauds? If not, then this action must fail as the note or memorandum of the agreement must contain the essential terms thereof.

We are frank to say that solution of this question has given us considerable difficulty due to the diversity and irreconcilability of holdings of the courts in this state and throughout the United States generally as well as in the English courts. However, each case stands upon its own bottom. Rarely, if ever, as in construction of wills, does one find two cases identically parallel, and we have examined many cases arising in this state and throughout the country in order to reach a conclusion reasonably satisfactory.

What was the underlying and fundamental reason for the enactment of the statute of frauds and perjuries? Prior to the enactment of the statute of frauds, land could be transferred by parol with livery of seizin. Due to this method of transfer attempts were often made to require transfer by false and fraudulent means, and for this

reason the English statute of frauds was enacted requiring a conveyance, or contract to convey, real estate or interest therein to be in writing, and if not so evidenced, such agreements could not be enforced. Subsequent to this enactment, title to real estate could not pass by parol. In other words, if one sold his land or agreed to sell same, such sale, or contract to sell, must be evidenced by writing. Later, in some instances in equity, part performance or fraud required a modification of the strict letter of the statute.

One of the leading cases in Ohio dealing with this question is that of *Kling, Adm'r, v. Bordner*, 65 Ohio St. 86, 61 N.E. 148, wherein the court said: "The memorandum in writing which is required by the statute of frauds (section 4199, Rev.St.) is a memorandum of the agreement between parties, and is not sufficient unless it contains the essential terms of the agreement, expressed with such clearness and certainty that they may be understood from the memorandum itself, or some other writing to which it refers, without the necessity of resorting to parol proof." * * *

In the case at bar are the essential terms included in the memorandum? In other words, is it essential that it states therein when possession by the seller is to be given, who is to pay the taxes and assessments which are a lien on the property at the time, what sort of a deed is to be executed, whether warranty or quit claim, that a mortgage is or is not to be executed by the purchaser to the seller to secure the balance of the purchase price, and a specific description of the land. If any or all of the above enumerated items are essential terms to be included in the memorandum, then plaintiff is not entitled to specific performance of the contract under the holding in *Kling, Adm'r, v. Bordner*, supra. * * *

Now as to the claim that this note or memorandum is not sufficient under the statute of frauds in that, first, there is nothing stated therein as to when possession was to be given. There is testimony in the record as to when possession was to be given. We are of the view that the time of taking possession is not such an essential term of the contract that it is required to be included therein. All the details of the transaction need not be included in the contract of sale or contract to sell. The question is: "Was there a sale or contract to sell, and if so is there sufficient in the memorandum to disclose that fact?" Such are the essential terms to be included in the note or memorandum. However, eliminating all the parol testimony and evidence as to possession, and nothing appearing in the memorandum to the contrary, we think we may properly assume that possession was to be given at the time of the final closing of the transaction, to wit, on execution and delivery of the deed, such being customary when nothing referable thereto is included in the contract. However we think time of possession, if there was an agreement relative thereto, may be established by parol.

As to payment of taxes, we think this item was not an essential term required to be included in the memorandum. Browne on Statute of Frauds, 3d Ed., 273, Section 269, states: “* * * Nor is there any reason why the statute should be held to cover mere arrangements as to the payment of taxes.” We think this item may be established by parol. However, if we are in error concerning the admission of parol evidence to establish this item in the absence of anything in the memorandum to the contrary, it would be the duty of the seller to pay such taxes or special assessments, if any, that were a lien on the property at the time.

As to the character of deed to be executed. We make the same observation as above that in the absence of any provision to the contrary a warranty deed would be required. We think that if any specific agreement was entered into as to the character of the deed to be delivered, such could be established by parol. We are of the view that such details have nothing to do with the question as to whether defendant entered into a contract to convey real estate. These are matters incidental to such contract.

As to whether a mortgage was to be given to secure the purchase money, no such provision is found in the memorandum. Plaintiff is making no complaint on this score, and appears to be satisfied to execute a mortgage to defendant to secure the deferred payments. Certainly it is not prejudicial to defendant to have this done. * * *

The remaining question relates to the identification and description of the land. This particular question has given us some concern for the reason that the authorities appear to hold that in an action for specific performance of a contract for the conveyance of real estate it is essential that the complaint specifically define the property agreed to be conveyed or at least state sufficient facts to establish the basis upon which such description may be made certain by extraneous evidence. Surely every detail relating to the description of the land is not required. In regard to the question, can the land with reasonable certainty be identified, we think that parol evidence is admissible to show the *surrounding circumstances and conditions* existing at the time in order that the trial court may be reasonably satisfied. • • •

Decree for the plaintiff.

QUESTION:

What should the court hold as to the sufficiency of the memorandum if the defendant, admitting that an oral contract was made, offered testimony to the effect that it contained express provisions as to delivery of possession, payment of taxes, and mortgage security, at the same time refusing to tell what they were?

MARKS v. COWDIN et al.

Court of Appeals of New York, 1919. 226 N.Y. 138, 123 N.E. 139.

Action by Leon Marks against John E. Cowdin and another. From a judgment of the Appellate Division (175 App.Div. 700, 162 N.Y. S. 567) reversing a judgment in favor of the plaintiff and dismissing the complaint, plaintiff appeals. Reversed, and new trial granted.

CARDOZO, J. The action is one by employ  against employer for wrongful discharge.

The plaintiff entered the defendants' service in 1910. The defendants wrote him that his employment was to continue for two years from January 1, 1911, at an annual salary of \$15,000. The hope was expressed that at the end of the term he might be accepted as a partner. He was given the privilege of starting his employment earlier if he pleased. In point of fact, he did start it in July, 1910. He took the place of another man, then leaving the defendants, who had acted as general manager. At once, the defendants gave written notice to their salesman. They wrote that the plaintiff was about to join their staff. "He will become our sales manager." And again: "We feel confident that with him in command, we will not only keep up our business, but will increase it to the largest dimensions."

The plaintiff's position is thus described in letters signed by the defendants. Its range is sketched in outline. The picture is completed when we view the course of dealing. The defendants were manufacturers, importers and sellers of ribbons. The plaintiff took charge of the selling department. He supervised and directed the salesmen. He helped the defendants themselves in selecting designs and fixing prices. He made trips abroad, inspected the foreign styles, and purchased the foreign merchandise. His position was one of general supervision. The partners were his sole superiors.

At the beginning of 1913 there was a renewal of the employment for three years, but at a larger compensation. The new contract was made by word of mouth. Nearly a year later its terms were put in writing. Some of the defendant's salesmen had expressed hostility toward the plaintiff. The defendants reproved him, and said that he would have to leave. The disagreement, though amicably adjusted, seems to have been a warning to the plaintiff that his tenure was insecure. Thus warned, he requested and received the following memorandum:

"New York, December 22, 1913.

"It is understood between Johnson Cowdin & Co. and Leon Marks that the arrangements made for employment of Leon Marks in our business on January first, 1913, for a period of three years from that date at a salary of \$15,000.00 (fifteen thousand) per year plus five

(5%) per cent of the gross profits earned in our business which we agree shall be not less than \$5,000 00/100 per year—continues in force until Jan. 1st, 1916.

Johnson Cowdin & Co.

“John E. Cowdin.

“E. N. Herzog.”

For a time the plaintiff's services continued unchanged. The trouble began in the summer of 1914. Some of the events of that season are in dispute. We state the plaintiff's version, for it was accepted by the jury. One of the defendants said to the plaintiff: “I am going to put Mr. McLaren, who has been assisting you, in your position.” The plaintiff was notified in writing: “The selling department will be in the hands of Mr. McLaren, and you will naturally report to him.”

The title of sales manager, which had once been his, was thenceforth to be another's. In the past the chief business had been the sales to dealers in ribbons. One of the minor incidents had been the sales to manufacturers of dresses, underwear, and other articles, who used ribbons incidentally in making up their products. The plaintiff was directed in the future to attend to this trade exclusively. According to his testimony, he was to do the work of salesmen who had formerly been paid at the rate of \$25 a week. According to the testimony of the defendants, he was to have salesmen under him, and was to develop a new branch of trade. Over him, however, was to be McLaren, with general power of control. The plaintiff protested that the defendants in thus changing his duties were changing his position. His refusal to submit to the change was followed by his discharge, and the discharge by this lawsuit. The plaintiff had a verdict of \$24,794.52. The Appellate Division reversed the judgment and dismissed the complaint.

The chief question in the case grows out of the statute of frauds. The contract of employment was not to be performed within a year. There is need, therefore, of a note or memorandum of its terms, subscribed by the parties to be charged. Personal Property Law, § 31; Consol.Laws, c. 41. The defendants signed a memorandum which continued an existing employment, but which did not describe its duties. The question is whether the position may be identified by proof of the surrounding circumstances. The employment under the new contract began in January. The memorandum was not signed till the following December. It assumes the existence of a position which the plaintiff is then filling. It says that the employment shall be continued for a term and at a salary prescribed. A position then held is carried forward and preserved. The tests to be applied in order to identify the employment are thus embodied in the writing. We are not left to gather the relation between the parties from executory promises. We are informed that the relation then existing is the one to be maintained. If A. agrees to sell to B. “the house and lot now occupied by

the seller," the description is not void because the bounds of occupation must be established by parol. *Doherty v. Hill*, 144 Mass. 465, 467, 11 N.E. 581; *Hurley v. Brown*, 98 Mass. 545, 96 Am.Dec. 671; *Mead v. Parker*, 115 Mass. 413, 15 Am.Rep. 110; *Shadlow v. Cottrell*, L.R. 20 Ch.D. 90; *Plant v. Bourne*, 1897, 2 Ch. 281; *Cave v. Hastings*, 7 Q.B. D. 125; *Carr v. Lynch*, 1900, 1 Ch. 613; *Catling v. King*, 5 Ch.D. 660; *Hodges v. Kowing*, 58 Conn. 12, 18 A. 979, 7 L.R.A. 87; *Richards v. Edick*, 17 Barb. 260, 269. It is not otherwise where A agrees with B. that a position in A.'s service then held shall be continued. "I will keep you until January 1, 1916, at so much a year, in your present place." By necessary implication, by inevitable construction, that is what this memorandum says. It makes no difference whether the place is land to be occupied or a relation of employment to be filled. Whether it is the one or the other, we do not violate the statute when we fit the description to the facts. In thus identifying the position we are not importing into the contract a new element of promise. We are turning signs and symbols into their equivalent realities. This must always be done to some extent, no matter how many are the identifying tokens. "In every case, the words used must be translated into things and facts by parol evidence." *Holmes, J., in Doherty v. Hill*, supra, 144 Mass. 468, 11 N.E. 583; *Mead v. Parker*, supra, 115 Mass. 415, 15 Am.Rep. 110; 4 *Wigmore on Evidence*, § 2454.

How far the process may be extended is a question of degree. *Doherty v. Hill*, supra, 144 Mass. 469, 11 N.E. 581. We exclude the writing that refers us to spoken words of promise. We admit the one that bids us ascertain a place or a relation by comparison of the description with some "manifest, external, and continuing fact." *Doherty v. Hill*, supra, 144 Mass. 469, 11 N.E. 584. The statute must not be pressed to the extreme of a literal and rigid logic. Some compromise is inevitable if words are to fulfill their function as symbols of things and of ideas. How many identifying tokens we are to exact, the reason and common sense of the situation must tell us. "What, then, is a sufficient description in writing? No one can say beforehand." *Jessel, M. R., in Shadlow v. Cottrell*, supra. "You cannot have a description in writing that will shut out all controversy, even with the help of a map." *Id.* "In every case it must be considered what is a sufficient description with reference to the surrounding circumstances and the facts." *Jessel, M. R., in Catlin v. King*, supra, p. 664. Some description there must be. Its adequacy depends upon the degree of certainty attained when the words are applied to things. From correspondence we infer identity. *Beckwith v. Talbot*, 95 U.S. 289, 292, 24 L.Ed. 496. A. has been employed by B. as a bookkeeper and accountant. He receives a writing to the effect that his employment, which is stated to have begun some years before, is continued, for a given term. We shall make a farce of the statute if we say that

oral evidence is incompetent to show that A. is not expected to do the work of a porter. "There is no mystery about the statute of frauds." Chitty, L. J., in *Plant v. Bourne*, supra. The memorandum which it requires, like any other memorandum, must be read in the light of reason. *Id.*

In this case the plaintiff does not need the aid of one spoken word of promise to identify his place. His first contract was for two years, from January 1, 1911, to January 1, 1913. During that period, writings subscribed by the defendants attest the nature of his position. The memorandum exacted by the statute does not have to be in one document. It may be pieced together out of separate writings, connected with one another either expressly or by the internal evidence of subject-matter and occasion. *Ridgway v. Wharton*, L.R. 6 H.L.C. 238; *Cave v. Hastings*, L.R. 7 Q.B.D. 125; *Oliver v. Hunting*, L.R. 44 Ch.D. 205; *Bibb v. Allen*, 149 U.S. 481, 496, 13 S.Ct. 950, 37 L. Ed. 819; *Peck v. Vandemark*, 99 N.Y. 29, 34, 1 N.E. 41; *Coe v. Tough*, 116 N.Y. 273, 22 N.E. 550; *Levin v. Dietz*, 106 App. Div. 208, 211, 94 N.Y.S. 419; *Title G. & T. Co. v. Lippincott*, 252 Pa. 112, 97 A. 201; *Pollock, Contracts* (8th Ed.) p. 171. It is not even necessary that they be writings from the promisor to the promisee. They may be from the promisor to his own agent. *Gibson v. Holland*, L.R. 1 C.P. 1; *Townsend v. Hargraves*, 118 Mass. 325, 335; *Argus Co. v. Mayor, etc., of Albany*, 55 N.Y. 495, 505, 14 Am.Rep. 296; *Peabody v. Speyers*, 56 N.Y. 230, 237; *Browne, Statute of Frauds*, § 354a.

Tested by these rules, the first contract is plainly valid. The second must be interpreted in the light of what had gone before. The circumstances are persuasive in their collective force. We see this when we put them together. There is a note or memorandum in writing that the plaintiff was employed in 1911 to act for two years as the defendants' sales manager. There is evidence, not contradicted, that for two years he did occupy that position. There is evidence, again uncontradicted, that after the expiration of his first contract, he occupied the same position. And there is a note or memorandum in writing that in December, 1913, the position then filled was continued for a term of years. To give heed to these things is not to ignore the rule that the writing must contain all the material terms of the agreement. It is to explain the memorandum without changing or enlarging it. We think the process is one that is justified by precedent. * * *

The judgment should be reversed and a new trial granted, with costs to abide the event.

NOTE

Maljamar Oil & Gas Corp. v. Malco Refineries, 155 F.2d 673 (1946, C.C.A.). A written memorandum of a contract for the sale of oil provided that payment should be "on the same price practices as heretofore in vogue". The court held that this satisfied the requirements of the stat-

ute even though what the previous "price practices" had been would have to be proved by supplementary evidence. The opinion in *Marks v. Cowdin* was quoted and approved in the belief that its facts were "indistinguishable from the facts in this case in principle." The court said: "As in the *Marks* case, so here the parties were dealing with an existing relationship. They had an established price practice which had been in effect between them without interruption from the inception of their relationship until the time of the execution of this contract. When the parties agreed in writing that they 'will continue to pay for such crude oil as you buy from us out of the Maljamar pool on the same price practice as heretofore in vogue,' they were dealing with a reality—with an established practice, and bringing it out in detail by establishing by parol testimony what this practice was, no more imported a new element into their contractual relationship than developing a negative brings into the portrait new elements not existing in the negative itself."

In determining the sufficiency of an informal "note or memorandum" one should always bear in mind the true purpose for which the statute exists. This purpose is the prevention of successful fraud by inducing the enforcement of contracts that were never in fact made. It is not to justify the nonperformance or to prevent the enforcement of oral contracts that have in fact been made; it is not to create a loophole of escape for dishonest repudiators. Therefore, we should always be satisfied with "some note or memorandum" that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborating and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement. When the mind of the court has reached such a conviction as that, it neither promotes justice nor lends respect to the statute to refuse enforcement because of informality in the memorandum or its incompleteness in detail.

SECTION 6.—THE LEGAL OPERATION OF THE STATUTE

PHELAN et al. v. CAREY.

Supreme Court of Minnesota, 1946. 222 Minn. 1, 23 N.W.2d 10.

OLSON, Justice. This was an action to enforce payment of a check for \$500 issued and delivered by defendant to plaintiffs, payable to them as payees, or their order, on April 6, 1944. It was given in part payment of the purchase price of plaintiffs' home in Minneapolis. The deal, an oral one, was at the agreed price of \$2,500, of which the check constituted the down payment. Of the remaining \$2,000, \$600 in cash was to be paid on April 8 and \$1,400 by defendant's assumption to pay that sum as the unpaid balance owed by plaintiffs under

their contract of purchase from the owner. Defendant concedes that her defense is "want of consideration." She submits that there is only one question here for decision, namely: "Is an oral contract to sell land consideration for a check given *in part payment?*" (Italics supplied.) In her reply brief, defendant puts the issue this way:

"In any event there is but *one* point [in the case]. [Italics by defendant.] *That is the matter of consideration for the check given in payment of an oral contract for sale of land.* The question is whether such oral contract, violating the statute of frauds, is such consideration, * * *." (Italics supplied.)

When both parties rested, the court granted plaintiffs' motion for a directed verdict in their behalf. Judgment was entered pursuant thereto, and defendant appeals. * * *

The statute upon which defendant relies, Minn.St.1941; § 513.05, Mason St.1927, § 8460, provides:

"Every contract for the * * * sale of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing and subscribed by the party by whom the * * * sale is to be made, * * *."

Defendant's counsel, in his statement to the court after plaintiffs rested and in support of his motion to dismiss on the ground that the quoted statute stood firmly in plaintiffs' way, said "* * * there can be no doubt as to the intention of these parties in this transaction, namely, the intention on the part of one to sell a house, and upon the other to buy it." Nor is there any dispute or doubt as to price, the terms, or the amount of the cash payment defendant was to make. As to that, defendant testified:

"A. Well, they figured they wanted to get as much down as they possibly could.

"Q. What did she say [referring to plaintiff Dorothy Phelan]?
A. She said, 'I would like to get down as much as I can, as much cash as I can.' I said, 'Well, I can give you a check for \$500.00.'

"Q. What did they say? A. She said, 'That will be fine.'

* * *

"Q. * * * What did you give them the check for \$500 for?
A. I suppose it would be part payment."

In respect to the sale price, defendant testified:

"Q. So that there may be no misunderstanding, the agreement that you had was, as the Phelans contend, the purchase price was to be \$2,500? A. Right." * * *

Nor does defendant dispute the rule long established in this state, as restated in *Holford v. Crowe*, 136 Minn. 20, 23, 161 N.W. 213, 214:

"* * * in this state it is settled law that, if one party to a parol agreement void under the statute has paid money in performance

thereof, such money cannot be recovered back by him when the other party to the agreement has not defaulted, but stands ready, willing, and able to perform according to the terms thereof." (Citing our prior cases.)

Examination of our later cases discloses that this rule has been followed and applied in our subsequent cases. Cf. *Haraldson v. Knutson*, 142 Minn. 109, 171 N.W. 201; *Welsh v. Estate of Welsh*, 148 Minn. 235, 240, 181 N.W. 356, 358, 13 A.L.R. 267. In *Oxborough v. St. Martin*, 169 Minn. 72, 73, 210 N.W. 854, 49 A.L.R. 1115, we said: "* * * It is not morally wrong to make or keep an oral agreement that falls within the statute of frauds, nor is there any statute which forbids entering such a contract."

We now come to the crucial question, i.e., whether the check given in the circumstances here related operates to the same extent and accomplishes the same general purpose as if defendant had paid cash. It is interesting to note in this connection that defendant had only \$15 in cash with her when she made her bargain, and this sum she paid plaintiffs. Later and on the same day, she added \$30 thereto, having borrowed this from a friend. In both instances, receipts were issued showing the respective payments and their general purpose. The next day, April 6, defendant again appeared on the scene, and then executed and delivered the \$500 check presently involved, she having in the meantime made arrangements at her bank to have the money available there. The former receipts were then surrendered or destroyed. * * *

[A case in point] is *Garbarino v. Union S. & L. Ass'n*, 107 Colo. 140, 109 P.2d 638, 132 A.L.R. 1480, where the court held that a check given by an intending purchaser as earnest money on an oral contract for the sale of real estate is not void for want of consideration, so as to be unenforceable against the maker, because the contract of purchase was unenforceable against the seller, there being no written memorandum of the transaction so as to take the case out of the statute of frauds. In that case as in this, defendant contended that the oral contract was absolutely void under the Colorado statute and that therefore the check given by him to the plaintiff in the transaction was without consideration. The supreme court, in upholding the trial court, which had found for plaintiff, was of the opinion that (107 Colo. 147, 148, 109 P.2d 642, 132 A.L.R. 1485)—

"defendant is in the same position, legally, as if he was seeking to recover \$1,000 paid on the purchase price, instead of resisting payment of the check given for such purpose."

The general rule to be applied in cases of this type is that where the vendor, under an oral agreement to sell land, is ready, willing and able to perform, the purchaser's check or other negotiable instrument given in part payment of the purchase price constitutes adequate con-

sideration and operates the same as if cash had actually been paid. That is the rule in New York, as evidenced by the following cases: *Fleischman v. Plock*, 19 Misc. 649, 44 N.Y.S. 413; *Murman v. Manning*, 125 Misc. 830, 211 N.Y.S. 575. And in *Schierman v. Beckett*, 88 Ind. 52, 54, where the court held—

“that the defence to the note in such case [action on note given in part payment under an oral contract to sell land] must be, not upon the statute of frauds, but want or failure of consideration; which can not be made out if the vendor show his ability and willingness to perform.”

Other cases upholding the enforcement of payment of checks or notes given in part payment of an oral contract for the sale of land hold that the action, being founded upon the check or note, is not basically founded upon the oral contract, but upon the agreement expressed in the negotiable instrument itself. For that reason, lack of consideration must be shown by the drawer or maker. If the vendor is ready, willing, and able to perform, then there is consideration, and the defense fails. • • •

Judgment affirmed.

QUESTIONS:

1. Would the statute of frauds be a good defense if the plaintiff tenders a deed and sues for the balance of the price?
2. Having been compelled to pay the \$500, can the purchaser now compel the vendor to execute a conveyance?
3. If the vendor now refuses to convey, can the purchaser compel restitution of the \$500?
4. The Minnesota statute says that in the absence of a writing the “contract . . . shall be void.” Was the bargain in this case “void”?

NOTE

If the defendant's negotiable check had been transferred to a purchaser for value without notice of defenses, the latter could have compelled payment by the defendant even if there had been no consideration of any kind given for it. The “implied” promise of the drawer of the check that it will be honored on due presentation would then be quite independent of the rest of the transaction as a part of which it was delivered. As long as the check is in the hands of the original payee the “implied” promise of the drawer is a part of the contract for the sale of the land. A statement that the delivered check “operates the same as if cash had actually been paid” is incorrect in several important respects. If the purchaser had paid \$500 in cash the vendor would not have had to bring suit; he would be privileged to keep the money as long as he is ready and willing to convey the land as agreed. In the above case, the court enforced the purchaser's executory promise to pay part of the price. This is not to disapprove the decision; it is only to call attention to the way in which

the court prevented the statute of frauds from making the oral bargain wholly unenforceable.

Observe that in the above case the defendant's evidence and argument in court fully admitted the making of the bargain and its exact terms. There are excellent decisions that in such a case the statute of frauds is no defense. They ought to be followed. See *Trossbach v. Trossbach*, 42 A.2d 905 (Md.1945).

BIRCH v. BAKER et al.

Court of Errors and Appeals of New Jersey, 1914.

85 N.J.L. 660, 90 A. 297, L.R.A.1916D, 485.

BERGEN, J. The plaintiff and the five defendants, being residents of the town of Dover, were interested in procuring the Sims-Kent Company to locate there a manufacturing plant, and to accomplish this entered into negotiations with the company, which resulted in a written agreement between the plaintiff and the defendants, as joint contractors, and the company, in which the plaintiff and the defendants agreed "to secure and convey to said company in fee simple the title of said land and premises from the said Foster F. Birch," the premises being a tract of land in Dover belonging to the plaintiff. In consideration of this conveyance, to be without cost to it, the Sims-Kent Company agreed to erect its factory on the lands. The plaintiff subsequently conveyed the land to the company, and it erected thereon its factory. The plaintiff, claiming that the defendants, to induce him to make the conveyance to the Sims-Kent Company according to their contract, promised orally to pay him \$2,000 of the consideration price, upon their refusal to pay, brought his suit against the defendants on their oral promise. There was evidence from which it could be inferred that the defendants, to induce plaintiff to enter into the contract, and subsequently convey the land to the Sims-Kent Company, promised to pay him \$2,000.

The trial court ordered a judgment of nonsuit from which plaintiff appeals, and the defendants now seek to sustain the nonsuit upon the ground that the oral promise was one concerning the sale of lands, and, not being in writing, void under the statute for the prevention of frauds and perjuries (Comp.St. 2610), section 5 of which prohibits an action to charge any person "upon any contract or sale of lands, tenements or hereditaments, or any interest in, or concerning them," unless the agreement be in writing, signed by the person charged.

This case was before the Supreme Court on a rule to show cause, where it was held that such a promise was within the statute (79 N. J.L. 10, 74 A. 151), and on the second trial, the judge at circuit, following the judgment of the Supreme Court, ordered the nonsuit. The plaintiff having appealed from the judgment of nonsuit, the question

presented is whether a promise, not in writing, to pay the owner of lands an agreed consideration if he convey the land to one in performance of a written contract by the promisor to secure such conveyance, and the owner does convey as requested, relying upon such promise, is enforceable as not being barred by the statute of frauds.

That a vendor may recover in assumpsit upon an oral promise by the vendee to pay the consideration agreed upon for land conveyed, and that such promise is not within the statute, has the sanction both of legal reasoning and adjudged cases. It was so held by the Supreme Court of this state in *Murray v. Schuldt*, 73 N.J.L. 489, 63 A. 904, where the court said "that, the property having been conveyed to the defendant, the plaintiff's action was not upon the express contract of sale, but upon the debt which arose upon the conveyance," and that such promise was not within the statute. * * *

In the case under review, the defendants had in writing contracted to "secure and convey to said company in fee simple" land the title to which was vested in the plaintiff. This was a binding contract which the defendants fulfilled by inducing plaintiff to convey upon their oral promise to pay him a portion of the consideration money. He, relying upon that promise, parted with his land to the party the defendants had contracted with, thus completing for them the sale they had in writing agreed to secure, and thereby relieving them from their obligation to the vendee concerning the sale of the land, or of any interest therein, which is a sufficient and legal consideration for their promise. Having by their promise to plaintiff been enabled to fulfill their written obligation, binding under the statute, it would further the perpetration of a fraud of most flagrant character to allow the defendants to escape carrying out their bargain with the landowner, and this ought not to be permitted, unless their promise is barred by the statute, and we think it is not. If the conveyance had been made to the defendants, their promise, although oral, to pay the consideration would not be within the statute, and their legal obligation to the vendor is not altered because he conveys to their nominee instead of to them, for they get a benefit from the conveyance in either event, and it is illogical to argue that what the plaintiff did for the defendants at their request was not a performance of their contract by the plaintiff, who advanced his land for their exoneration. Whether it was money or land which they had contracted to supply, and which the plaintiff supplied for them, is of no consequence, for, as was well said by Chief Justice Hornblower in *Linn v. Cook*, 19 N.J.L. 11, whenever the plaintiff has discharged an obligation of the defendant "to any other person, by applying his own money, goods, chattels, securities, or land to such discharge, he may recover the amount so paid or satisfied, in an action of general indebitatus assumpsit for money paid." * * *

We have no doubt that where a sale of land is executed by delivery and acceptance of a conveyance passing the title, a previous oral promise to pay the consideration, whether the conveyance be to the promisor or to his nominee, is not within the statute of frauds, for the consideration of the promise is executed, and the law implies a debt recoverable in assumpsit, when there has been a previous request by the defendant to convey to him, or his nominee, coupled with circumstances showing that both parties expected that plaintiff would be recompensed for complying with such request, and the action is not limited to cases where money alone has been expended, but extends to those where goods, securities, or land have been parted with on a previous express request. * * *

In this case there was testimony from which may be inferred, not only a request to convey, but a promise by the defendants to pay a part of the value of the land, which at their request the plaintiff conveyed to their nominee in satisfaction of their contract, and when plaintiff advanced his land to relieve these defendants, at their request, the law raised an implied promise by the defendants so benefited to reimburse him, a promise which has no concern with the sale of land or of any interest therein. The sale was closed when plaintiff conveyed, and nothing remained to be done to complete the sale of the land. The promise which induced the conveyance became a debt of those who agreed to pay the consideration, enforceable as an implied obligation arising in part from what the plaintiff did under the influence of the contract. * * *

Reversed.

NOTE

The oral promise of the defendants to pay \$2,000 in return for a conveyance of land is not prevented from being within the statute of frauds by the fact that the conveyance was to be made to a third party. Restatement, Contracts, § 193. If the defendants had repudiated their oral promise to the plaintiff before he made conveyance of his land, he could have maintained no suit against them.

One who renders a performance for which the other party bargained in an oral contract that is unenforceable by reason of the statute can maintain a restitutionary action for the reasonable value of the performance so rendered and received. It is only the "special promise" that the statute declares to be unenforceable. But in the above case the plaintiff gets judgment for the exact amount promised, and it was for property that was not conveyed to the defendants. They were benefited by the plaintiff's conveyance to the Company because it discharged their duty to that Company; but this suit is not for the amount of that benefit. To hold that "the law raised an implied promise by the defendants" to pay the exact amount that they orally promised to pay is to hold that their oral promise became enforceable. After the plaintiff has conveyed his land at their request, it would indeed be the equivalent of "fraud" to uphold their repudiation.

The so-called "part performance" doctrine is applied for the specific enforcement of oral promises in cases where the court believes that non-performance of the oral promise would perpetrate a "virtual fraud" and the common law gave no adequate remedy. Equity would not permit a statute for the prevention of fraud to defeat its own ends. But the above case is not regarded as an illustration of the "part performance" doctrine. If it were, the suit would have been in the New Jersey Court of Chancery for specific performance. The action is in the common law court. After actual conveyance of land as agreed, the common law courts sustained an action for payment of the price as orally agreed.

Crosby v. Sproul, 17 F.2d 325 (1927, D.C.). A guardian borrowed money from his ward's estate, orally promising to hold his own land in trust as security. Later, he sold this land and paid the money received for it into the ward's estate. This payment was held not to be one that operated as a fraud on his other creditors. The oral promise created a legally recognizable duty even though not enforceable by "action." The court said: "Such an agreement, if executory, would be within the statute of frauds and unenforceable. But when an oral agreement relating to land has been executed, questions under this statute disappear."

SMITH v. MOTT.

Supreme Court of California, 1888. 76 Cal. 171, 18 P. 260.

Replevin by George G. Smith to recover a piano pledged by his wife for a loan to her of \$200 from defendant, J. H. Mott. Judgment for defendant, and plaintiff appeals.

HAYNE, C. Replevin for a piano. The plaintiff was the owner of the piano. His wife pledged it without his knowledge or consent, to secure a loan to her from the defendant. When the plaintiff learned of the whereabouts of the piano, he went to the defendant, and, after being informed of the position of affairs, made a parol promise to pay the interest and storage within a few days and the principal in three or four months, if the defendant would wait that time, which the defendant agreed to do and did do. The court below sustained the validity of the pledge on the theory that there was a ratification. It is probably not technically correct to speak of a "ratification" where the transaction was by one who neither was nor assumed to be an agent, but who acted on her own account. And it may be conceded that the parol promise of the plaintiff to pay the debt was within the statute of frauds, and void, so far as his personal liability to pay was concerned. See Crooks v. Tully, 50 Cal. 255. But we think that what occurred amounted to an agreement between the parties that the property should remain in pledge for the wife's debt. This agreement was collateral to, and distinct from, the contract to pay, and was not required to be in writing. Jones, Pledges, § 5; Civil Code, § 2986.

The property being already in possession of the defendant, no redelivery to him was necessary. Jones, Pledges, § 36. And the agreement for forbearance of the wife's debt was sufficient consideration. 1 Pars.Cont. *443. We therefore advise that the order denying the motion for new trial be affirmed.

We concur. BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is affirmed.

QUESTIONS:

1. Could Mott get judgment against Smith for the amount of money lent to the wife?
2. If the debt is not paid by anybody, could Mott get a decree that the piano be sold and the proceeds paid to him?

In *Thompson v. Hazelwood Savings & Trust Co.*, 234 Pa. 452, 83 A. 284 (1912), the plaintiff deposited \$10,000 with the defendant and agreed in consideration of the defendant's renewing the note of a third person not to withdraw the deposit until the note should be paid. This was held to be a pledge of the money as collateral, executed by the actual deposit, and not within the statute of frauds. Contra: *Jones v. Citizens' State Bank*, 103 Kan. 297, 173 P. 977 (1918).

An oral promise within any of the clauses of the statute is not void of all effect. A pledge of goods as security, executed by delivery along with oral words, is legally effective even though the oral promise that the pledge was given to secure is not directly enforceable by action. See *Restatement, Contracts*, §§ 14, 173, with the Comment.

IMPERATOR REALTY CO., Inc., v. TULL.

Court of Appeals of New York, 1920. 228 N.Y. 447, 127 N.E. 263.

Action by the Emperor Realty Company against Samuel P. Tull. From a judgment of the Appellate Division, First Department (179 App.Div. 761, 167 N.Y.S. 210), reversing on questions of fact and law a judgment of the Trial Term in favor of plaintiff, and dismissing the complaint, plaintiff appeals. Reversed, and judgment of the Trial Term affirmed.

CHASE, J. The parties to this action entered into a written contract under seal for the exchange of pieces of real property in the city of New York. On the day fixed therein for carrying out the contract and making the conveyances, the defendant deliberately defaulted. The action was brought to recover damages alleged to have been sustained by the plaintiff.

At the trial the jury determined all of the issues in favor of the plaintiff and rendered a verdict for it. The defendant appealed from the judgment entered upon such verdict, and the Appellate Division reversed the judgment and dismissed the complaint. *Imperator Realty Co., Inc., v. Tull*, 179 App.Div. 761, 167 N.Y.S. 210.

One of the provisions of the contract is: "All notes or notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by any department of the city of New York against or affecting the premises at the date hereof, shall be complied with by the seller and the premises shall be conveyed free of the same."

There were several notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by a department of the city of New York against or affecting the premises to be conveyed by the plaintiff at the date of the contract which, although aggregating an amount that is comparatively very small, were not satisfied or discharged on the day when the property was to be conveyed. The plaintiff sought to avoid the failure to procure the discharge of such violations by an alleged modification of the contract pursuant to a conversation between the president of the plaintiff and the defendant in which it is claimed that there were reciprocal promises. The president of the plaintiff testified that after the making of the contract, and on the same day thereof, it was agreed between the parties to the contract that either party in place of satisfying any of the so-called violations that might be filed against the pieces of real property therein mentioned might deposit with the New York Title Insurance Company a sufficient amount of cash to pay and discharge the same. There is evidence in the record to show that the plaintiff was able and willing on the day and at the time and place for closing the contract to carry out the same as therein provided except that he could not convey the property to be transferred by him free from such violations, and there is also evidence that he was able and willing to deposit a sufficient amount of cash to comply with and free the property from the violations as required by such oral agreement between the parties. * * *

CARDOZO, J. (concurring in result). The statute says that a contract for the sale of real property "is void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the * * * grantor, or by his lawfully authorized agent." Real Property Law (Consol.Laws, c. 50) § 259 (statute of frauds). In this instance, each party was a grantor, for the sale was an exchange. I think it is the law that, where contracts are subject to the statute, changes are governed by the same requirements of form as original provisions. *Hill v. Blake*, 97 N.Y. 216; *Clark v. Fey*, 121 N.Y. 470, 476, 24 N.E. 703. Abrogated by word of mouth such a contract may be (*Blanchard v. Trim*, 38 N.Y. 225), but its obligation

may not be varied by spoken words of promise while it continues undissolved. A recent decision of the House of Lords reviews the English precedents, and declares the rule anew. *Morris v. Baron & Co.*, 1918, A.C. 1, 19, 20, 31. Oral promises are ineffective to make the contract, or any part of it, in the beginning. *Wright v. Weeks*, 25 N.Y. 153; *Marks v. Cowdin*, 226 N.Y. 138, 123 N.E. 139. Oral promises must also be ineffective to vary it thereafter. *Hill v. Blake*, *supra*. Grant and consideration alike must find expression in a writing. *Real Prop. Law*, § 259; *Consol. Laws*, c. 50.

Some courts have drawn a distinction between the formation of the contract and the regulation of performance. *Cummings v. Arnold*, 3 Metc. (Mass.) 486, 37 Am. Dec. 155; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Whittier v. Dana*, 10 Allen (Mass.) 326; *Hastings v. Lovejoy*, 140 Mass. 261, 2 N.E. 776, 54 Am. Rep. 462; *Wood on Statute of Frauds*, p. 758. The distinction has been rejected in many jurisdictions. See cases cited *supra*; also, L.R.A. 1917B, 141 note. It has never been accepted by this court, and the question of its validity has been declared an open one. *Thomson v. Poor*, 147 N.Y. 402, 408, 42 N.E. 13, characterizing as dicta the statements in *Blanchard v. Trim*, *supra*. I think we should reject it now. The cases which maintain it hold that oral promises in such circumstances constitute an accord, and that an accord, though executory, constitutes a bar if there is a tender of performance. *Cummings v. Arnold*; *Whittier v. Dana*, *supra*. There seems little basis for such a distinction in this state where the rule is settled that an accord is not a bar unless received in satisfaction. *Reilly v. Barrett*, 220 N.Y. 170, 115 N.E. 453; *Morehouse v. Second Nat. Bank of Oswego*, 98 N.Y. 503, 509; cf. *Ladd v. King*, 1 R.I. 224, 51 Am. Dec. 624; *Pollock on Contracts* (3d Am. Ed.) p. 822. But there is another objection, more fundamental and far-reaching. I do not know where the line of division is to be drawn between variations of the substance and variations of the method of fulfillment. I think it is inadequate to say that oral changes are effective if they are slight and ineffective if they are important. Such tests are too vague to supply a scientific basis of distinction. "Every part of the contract in regard to which the parties are stipulating must be taken to be material." Per Parke, B., *Marshall v. Lynn*, 6 M. & W. 116, 117; 1 Williston on Contracts, § 594. The field is one where the law should hold fast to fundamental conceptions of contract and of duty, and follow them with loyalty to logical conclusions.

The problem thus approached, gains, I think, a new simplicity. A contract is the sum of its component terms. Any variation of the parts is a variation of the whole. The requirement that there shall be a writing extends to one term as to another. There can therefore be no contractual obligation when the requirement is not followed. This is not equivalent to saying that what is ineffective to create an

obligation must be ineffective to discharge one. Duties imposed by law irrespective of contract may regulate the relations of parties after they have entered into a contract. There may be procurement or encouragement of a departure from literal performance which will forbid the assertion that the departure was a wrong. That principle will be found the solvent of many cases of apparent hardship. There may be an election which will preclude a forfeiture. There may be an acceptance of substituted performance, or an accord and satisfaction. *McCreery v. Day*, 119 N.Y. 1, 9, 23 N.E. 198, 6 L.R.A. 503, 16 Am.St. Rep. 793; *Swain v. Seamen*, supra; *Long v. Hartwell*, supra; *Ladd v. King*, supra. What there may not be, when the subject-matter is the sale of land, is an executory agreement, partly written and partly oral, to which, by force of the agreement and nothing else, the law will attach the attribute of contractual obligation.

The contract, therefore, stood unchanged. The defendant might have retracted his oral promise an hour after making it, and the plaintiff would have been helpless. He might have retracted a week before the closing, and, if a reasonable time remained within which to remove the violations, the plaintiff would still have been helpless. Retraction even at the very hour of the closing might not have been too late if coupled with the offer of an extension which would neutralize the consequences of persuasion and reliance. *Arnot v. Union Salt Co.*, 186 N.Y. 501, 79 N.E. 719; *Brede v. Rosedale Terrace Co.*, 216 N.Y. 246, 110 N.E. 430. The difficulty with the defendant's position is that he did none of these things. He had notified the plaintiff in substance that there was no need of haste in removing the violations, and that title would be accepted on deposit of adequate security for their removal in the future. He never revoked that notice. He gave no warning of a change of mind. He did not even attend the closing. He abandoned the contract, treated it as at an end, held himself absolved from all liability thereunder, because the plaintiff had acted in reliance on a consent which, even in the act of abandonment, he made no effort to recall.

I do not think we are driven by any requirement of the statute of frauds to sustain as lawful and effective this precipitate rescission, this attempt by an *ex post facto* revocation, after closing day had come and gone to put the plaintiff in the wrong. "He who prevents a thing from being done may not avail himself of the nonperformance, which he has, himself, occasioned, for the law says to him, in effect: 'This is your own act, and, therefore, you are not damnified.'" *Dolan v. Rodgers*, 149 N.Y. 489, 491, 44 N.E. 167, quoting *West v. Blakeway*, 2 M. & Gr. 751. The principle is fundamental and unquestioned. *U. S. v. Peck*, 102 U.S. 64, 26 L.Ed. 46; *Gallagher v. Nichols*, 60 N.Y. 438; *Risley v. Smith*, 64 N.Y. 576, 582; *Gen. El. Co. v. Nat. Contracting Co.*, 178 N.Y. 369, 375, 70 N.E. 928; *Mackay v. Dick*, 6 App.Cas. 251;

New Zealand Shipping Co. v. Societe des Aletiers, etc., 1919 A.C. 1, 5. Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. *Gallagher v. Nichols*; *Gen. El. Co. v. Nat. Contr. Co.*; *Thomson v. Poor*, *supra*. We need not go into the question of the accuracy of the description. *Ewart on Estoppel*, pp. 15, 70; *Ewart on Waiver Distributed*, pp. 23, 143, 264. The truth is that we are facing a principle more nearly ultimate than either waiver or estoppel, one with roots in the yet larger principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong. *Riggs v. Palmer*, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340, 12 Am.St.Rep. 819. The statute of frauds was not intended to offer an asylum of escape from that fundamental principle of justice. An apposite precedent is found in *Thomson v. Poor*, 147 N.Y. 402, 42 N.E. 13. In deciding that case, we put aside the question whether a contract within the statute of frauds could be changed by spoken words. We held that there was disability, or, as we styled it, estoppel, to take advantage of an omission induced by an unrevoked consent. Cf. *Swain v. Seamens*, *supra*, 9 Wall. at page 274, 19 L.Ed. 554; *Arnot v. Union Salt Co.*, *supra*; *Brede v. Rosedale Terrace Co.*, *supra*; 1 Williston on Contracts, § 595. A like principle is recognized even in the English courts, which have gone as far as those of any jurisdiction in the strict enforcement of the statute. They hold in effect that, until consent is acted on, either party may change his mind. After it has been acted on, it stands as an excuse for nonperformance. *Hickman v. Haynes*, L.R. 10 C.P. 598, 605; *Ogle v. Lord Vane*, 2 Q.B. 275; 3 I.B. 272; *Cuff v. Penn*, 1 Maule & S. 21; *Morris v. Baron & Co.*, 1918 A.C. 1, at page 31. The defendant by his conduct has brought himself within the ambit of this principle. His words did not create a new bilateral contract. They lacked the written form prescribed by statute. They did not create a unilateral contract. Aside from the same defect in form, they did not purport to offer a promise for an act. They did, however, constitute the continuing expression of a state of mind, a readiness, a desire, persisting until revoked. A seller who agrees to change the wall paper of a room ought not to lose his contract if he fails to make the change through reliance on the statement of the buyer that new paper is unnecessary and that the old is satisfactory. The buyer may change his mind again and revert to his agreement. He may not summarily rescind because of the breach which he encouraged. That is what the defendant tried to do. When he stayed away from the closing and acted upon an election to treat the contract as rescinded, he put himself in the wrong.

I concur in the conclusion that the judgment must be reversed.

QUESTION:

Is this a case in which the defendant prevented the performance of a condition of his contractual duty to convey his land and thereby eliminated the condition?

NOTE

The fact that a contract is in writing does not deprive the parties of the power to alter it or to rescind it by a subsequent oral agreement. It is often said, however, that if the written contract happens to be one that the statute makes unenforceable in the absence of a writing it can not be altered by oral agreement, although it is almost invariably held that it can be rescinded in that manner. The statement needs amendment. The new oral agreement is not enforceable as a contract if its terms are such as to make the statute applicable to it. But if its terms are otherwise, so that the new agreement in its entirety is not itself within the statute, it is enforceable as in the case of other similar contracts. To the extent that it then differs from the previous written contract, it is a valid substitute therefor and a discharge pro tanto. Restatement, Contracts, § 223; also § 222 as to rescission.

If a promisor prevents the performance of a condition of his legal duty, such prevention being by an expression of "waiver" or otherwise, he will remain bound by his promise in spite of the nonperformance so caused. This is true whether or not the contract is in writing or required to be so by the statute. If the contractual duty is thereby altered from a conditional duty to an unconditional one, the statute does not prevent such an alteration. Restatement, Contracts, sec. 224; *Van Iderstine Co. v. Barnet Leather Co.*, 242 N.Y. 425, 152 N.E. 250 (1926).

If the requirements of the statute are not satisfied, with respect to a contract that is within its terms, the remedies available for its enforcement are greatly curtailed; but it is incorrect to describe the contract as totally "invalid" or as entirely "void" of legal effect. It has validity and legal operation in the following respects: (1) After a full performance by both parties, it determines their legal relations just as it would if the statutory requirements had been complied with. (2) In innumerable cases the contract has been enforced by equitable remedies because of various kinds of "part performance" that have occurred. (3) It creates legal relations between the contractors and third persons in many respects identical with those created by completely valid contracts. (4) It often creates a privilege of taking certain action that otherwise would have been tortious and forbidden. (5) It often operates as a defense in a quasi-contractual action, the defendant being ready and willing to perform as agreed. (6) If security is given for its performance, by mortgage, pledge, or personal suretyship, that security is enforced just as if the primary contract were perfectly valid. (7) It is admissible in evidence in a dozen instances to establish other operative facts. (8) It creates in the party to be charged a power to make it completely operative against himself by signing a sufficient memorandum; the contract may therefore be described as "validatable." (9) If a debtor owes two debts to a creditor, one of which is unenforceable by reason of the statute, and

makes a payment without directing its application, the creditor has power to apply it to the debt that is within the statute.

Some of the state re-enactments of the statute, including New York, declare that a contract not satisfying its requirements shall be "void." Courts occasionally assert that this makes a difference; but the cases are few indeed in which the contract has been denied any of the legal effects enumerated above on such a ground.

Carpenter v. Murphy, 40 S.D. 280, 167 N.W. 175 (1918), is a case that makes application of a statute declaring certain oral contracts to be "invalid" and asserts that this is materially different from other statutes in its effects. In the case before it, however, the court merely refused specific enforcement of a contract for the sale of land for the reason that the vendor's promise to convey was expressly conditional on closing the deal with full payment by May 1, this condition not having been performed. There was a written receipt for a part payment, signed by the vendor, in which nothing was said of the foregoing condition. The court rightly held that this did not prevent the defendant from proving by oral testimony that the receipt was not a sufficient memorandum of the agreement that had been actually made, or that an express condition of his duty assumed by that agreement had not been performed. The decision should be no different under any of the forms in which the statute may be found.

Note the difference in wording between section 4 and section 17, printed at the beginning of this Chapter. The first declares that "no action shall be brought whereby to charge;" the second says that "contracts . . . shall not be allowed to be good." The English courts held that they were alike in legal operation. *Morris v. Baron* [1918] A.C. 1.

There has been much litigation with respect to the legal operation of the statute in a great variety of situations. See the rules laid down in *Restatement, Contracts*, §§ 214-224. The problems to which these rules apply are often complex and difficult.

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1953 SUPPLEMENT
TO
CORBIN'S
CASES ON CONTRACTS

By
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AMERICAN CASEBOOK SERIES
WARREN A. SEAVEY
GENERAL EDITOR

ST. PAUL, MINN.
WEST PUBLISHING CO.
1953

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INTRODUCTORY NOTE

A few recent cases are here added for two purposes: (1) to give to the student some additional material for analysis and interpretation of complex transactions and of the modes of expression (always unique and often doubtful) used by businessmen; (2) to indicate the necessity of keeping right down to date in learning and applying the working rules of our continuously developing system of law.

A. L. C.

February, 1953.

Chapter 1

FORMAL MEMORIAL CONTEMPLATED

STATE ex rel. APPLEMAN v. LAKE CIRCUIT COURT et al.

Supreme Court of Indiana, 1952. 108 N.E.2d 898.

EMMERT, C. J. * * * The contract which was the foundation of the action for specific performance recited the existence of the partnership, that the partners agreed to a dissolution, that the continuing partner should purchase from the retiring partner all of his right, title and interest in the partnership, that "this short form of memorandum agreement for dissolution be drafted pending the adjustments of all details and the execution of a detailed dissolution agreement." The body of the contract in substance stated the agreement between the partners that the partnership be dissolved as of the 15th day of March, that the continuing partner pay the retiring partner the sum of \$80,000 for the retiring partner's right, title and interest in and to the property and assets of the Preferred Oil Company, said payment to be made by (a) a transfer of title to a Gary building at a valuation of \$20,000, and (b) \$60,000 by promissory notes payable in five years and forty weeks from the date of dissolution, at the rate of \$200 or more per week, drawing 5% interest per annum, said notes to be secured by certain chattel mortgages on personal property and equipment of the Preferred Oil Company, a real estate mortgage on real estate held by the continuing partner, the assignment of rents and profits by the continuing partner plus an assignment of all interest in real estate in which the continuing partner might have an interest as continuing partner. The continuing partner also promised to secure a policy of life insurance payable to the retiring partner on the life of the continuing partner in the amount to be agreed upon. The continuing partner also promised to assume all liabilities existing or hereafter created by reason of the operation of the Preferred Oil Company. The retiring partner agreed that all profits past and future should belong to the continuing partner and the continuing partner agreed to indemnify the retiring partner from certain federal income taxes stated in the agreement. Both parties agreed that the withdrawal of funds of the partnership since January 1, 1952, should be equalized as of March 15, 1952. The two remaining paragraphs of the memorandum agreement are as follows:

"5. It is contemplated that the parties will negotiate for a lease of the Gary property by retiring partner to the continuing partner.

"6. It is agreed that this agreement is a memorandum agreement only, and does not include in a detailed manner all of the terms of the

dissolution agreement subsequently to be negotiated, drafted and executed. It is contemplated that the final dissolution agreement shall be made pursuant to the terms of this agreement and shall include in addition such terms as are ordinarily included in a dissolution agreement."

As we construe the entire contract, there is nothing in it that evidences an intention that the memorandum so signed by the parties was not to be considered a binding contract as it then existed, although the first sentence of Item 6 stated, "It is agreed that this agreement is a memorandum agreement only and does not include in a detailed manner all the terms of the dissolution agreement subsequently to be negotiated, drafted and executed." The preceding items contained the promises of the parties, did cover everything necessary for a dissolution agreement, and, in spite of the recital in Item 6, the promises were stated in a detailed manner. We believe the test set forth in 1 Williston, Contracts (Rev.Ed.) § 28, p. 61, is correct. Professor Williston states the rule as follows: "As has been pointed out previously, the intention to make a legal obligation is not necessary for the existence of a contract though an expressed intent that there shall be no legal obligation is effective to prevent one. In the absence of such an expressed intent, mutual assent, informally given, to make an exchange of acts or promises is sufficient. Consequently, if such assent exists, to avoid the conclusion that a contract has been formed it must be found as a fact that at least one of the parties has then expressed the intention not to be bound until the writing shall have been executed. The prima facie case is made out by proving the assent to the exchange." See also §§ 25 and 26 of Restatement, Contracts. • • •

QUESTIONS:

1. Is the question here a question of fact or a question of law?
2. Why are there so many cases deciding the question in opposite ways?

GRUMBLING ACCEPTANCE

BRAUN v. CAMAS PRAIRIE R. CO.

Supreme Court of Idaho, 1951. 72 Idaho 83, 237 P.2d 604.

GIVENS, Chief Justice. Respondent claimed that appellant negligently killed his registered milking Shorthorn cow with her sucking calf, and one heifer, of the reasonable value of \$1100, December 5, 1946.

Questioning the asserted value of the animals, negotiations were carried on between respondent, and in the later stages, his attorney, and appellant's claim agents, culminating in appellant's grudging letter of February 10, 1949, containing nevertheless a complete and definite offer to pay \$400.00.¹

March 4, same year, respondent's attorney, by what the authorities deem a grumbling or complaining letter, accepted the offer.²

1. "Lewiston, Idaho Feb 10, 1949.
"Mr. Samuel Swayne, Attorney,
Orofino, Idaho.
Re: Carl P. Braun vs Camas Prairie
R. R.

"Dear Sir;

"Sorry to have kept you waiting so long but in the meantime, Mr. Rolland Little, has been contacted and more data received on the case.

"It is true that Mr. Braun purchased two pedigreed animals from Mr. Little, but, also the only way animals can be definitely identified is by the branding marks, which in this case seem badly mixed up.

"In case of court procedure, it might be extremely difficult and doubtful for your client to have his contention sustained, that the particular animal claim is made for, is the same animal killed. You must remember that your client is making a claim for a cow tattooed LE 50, whereas the cow that was killed was tattooed LE 20. I do not doubt that your client is honest in his opinion that it is one and the same cow, but the doubt remains.

"Even with this doubt existing, I am willing to compromise if your cli-

ent is, and in the interest of good will, the offer of \$400.00. is made with the understanding that this amount covers all animals included in his claim.

"Please inform me your decision.

Yours truly
s/ J. M. McBride
Claim Agent"

Ptfs. Ex. 1.

March 4th, 1949.

2.

"Mr. J. M. McBride,
Claims Agent,
Camas Prairie Railroad,
Lewiston, Idaho.

Re: Carl Braun

"Dear Mr. McBride:

"At my instance, Mr. Carl Braun will accept the Four Hundred Dollars (\$400) as settlement for the destruction of his cattle by your locomotive.

"However, I wish you would reconsider and at least split the difference with him for the following reasons:

"There is no doubt as to the identity of this animal, and I believe it could be established by Affidavits of fifteen or twenty persons. I happen to live next door to Mr. Little and am personally acquainted with many of

March 10, 1949, the claim agent, in a letter to respondent's attorney, attempted to revoke the offer.³

Appellant refused to pay and suit was instituted. At the trial appellant sought to introduce all of the prior and subsequent correspondence between the parties. The trial court sustained respondent's objection on the ground the offer and acceptance letters constituted a complete contract, and refused appellant's requested instructions and directed and instructed verdict in favor of respondent for \$400.

None of the correspondence or any offered evidence showed that respondent had acquiesced in or accepted appellant's attempted revocation.

The sole question involved is whether the letter of respondent's attorney of March 4, 1949, constituted a definite acceptance, appellant contending it was conditional and contemplated further negotiations.

• • •

The letter herein, though indicating that \$500 would be fair to appellant and inadequate to Braun, concluded: "Never the less under the duress of bundlesome litigation, Mr. Braun, at my insistence, will accept the Four Hundred Dollars (\$400)."

The letter constituted a sufficient acceptance to make a complete contract. *Foster v. West Pub. Co.*, 77 Okl. 114, 186 P. 1083; *Home Gas Co. of Cushing v. Magnolia Petroleum Co.*, 143 Okl. 112, 287 P. 1033;

the facts of this case. I also raise Registered Short Horn Cattle and in my judgment, the compensation is inadequate for the animal, not to mention others that were killed with it.

"I also have personally tattooed these animals, and I am not so sure there is any discrepancy in the identity. If you will examine the enclosed piece of paper, it will illustrate my point. I have placed the number fifty (50) and twenty (20) on the paper with the X beside the twenty (20). Hold it up to the light and read it through the paper and you will understand how a five could appear as a two if read from the opposite side of the ear, which might easily happen if the punch penetrates clear through the ear, as frequently is the case.

"If you have the ears in your possession, I suggest that you examine and see if this is not what happened.

"I repeat that I think under the circumstances that Five Hundred Dollars (\$500) is very fair to you and

wholly inadequate to Mr. Braun. Never the less under the duress of bundlesome litigation, Mr. Braun, at my insistence, will accept the Four Hundred Dollars (\$400).

Yours very truly,
Ptfs. Ex. 2. s/ Samuel F. Swayne"

3. "Lewiston, Idaho, Mar. 10, 1949.
"Mr. Samuel Swayne,
Attorney,
Orofino, Idaho.

Re: Carl Braun

Dear Sir:

"This letter is to advise you that the offer of settlement in the Carl Braun claim, on the date of February 10, 1949, is withdrawn.

"As you are no doubt aware the Idaho statute limits the time of action to eighteen (18) months, where animals are killed on the Railroad right of way and I doubt very much if any grounds remain on which to base a payment to Mr. Braun.

s/ J. M. McBride
Dfts. Ex 5. Claim Agent"

Vol. 1, Williston on Contracts, Rev. Ed., p. 230, Sec. 79; Vol. 1, Corbin on Contracts, p. 266, Sec. 84.

Respondent treated the matter as not settled until he received his money, but not otherwise.

The authorities cited by appellant do not controvert the above proposition as applied to a so-called grumbling or complaining acceptance, and furthermore, indicate that the acceptance to be nugatory must contain a specific condition and one which the acceptor offers as a definite alternative of or in lieu of the offer. * * *

Judgment affirmed.

CONDITIONAL ACCEPTANCE—OPTION (ALSO
INTERPRETATION; TENDER; PREVEN-
TION BY DEFENDANT)

HOLT et ux. v. STOFFLET et ux.

Supreme Court of Michigan, 1952. 334 Mich. 272, 54 N.W.2d 593.

NORTH, Chief Justice. On June 30, 1948, George M. Holt and Dorothy E. Holt, husband and wife, plaintiffs and appellants herein, entered into a written lease of a certain parcel of land located in Marshall, Michigan, for the term of 3 years, with Lawrence M. Stofflet and Patricia Stofflet, husband and wife, defendants and appellees herein. Plaintiffs were the lessees and defendants were the lessors. This lease contained the following option to purchase:

"The parties of the first part hereby give unto the parties of the second part an option to purchase the said premises for the sum of Ten Thousand (\$10,000.00) Dollars upon the written request of the second parties made at any time within one month of the expiration of the said lease term. If the said second parties should elect to exercise this option then the first parties covenant and agree to credit one-half of all installments made by the second parties hereunder toward the said purchase price, provided however that there be no arrears of rent due at such time."

On the 28th of May, 1951, 1 month and 3 days prior to the expiration of the lease, plaintiffs served upon the defendants a written notice that they were exercising their option. The pertinent portion of said notice is quoted:

"* * * this is your written notice that the said lessees are exercising their option of purchase as so provided, and request that you have the deed of purchase and the abstract of title in their hands in ample time before the first day of June, 1951, in order that same may be examined."

Defendants refused to recognize this notice as being a legally effective exercise of plaintiffs' option. Plaintiffs brought suit for specific performance. After hearing on defendants' motion to dismiss, an order was entered granting defendants' motion. From that order this appeal was taken.

The first question to be considered is whether the plaintiffs' alleged exercise of their option was legally effective to bind the defendants in a contract to convey. We are constrained to hold that it was. The time limit in the option as to when it could be exercised is ambiguous. The words "at any time within one month of the expiration of the said lease term," could, standing alone, reasonably be interpreted to mean either

that the option could be exercised at any time prior to one month after the expiration of the lease, or at any time within the period of one month before and one month after, or at any time prior to one month before the expiration of the lease. We conclude that the latter interpretation is the most reasonable. To hold otherwise would deprive plaintiffs of the option which both parties intended plaintiffs should have, and which plaintiffs have diligently and in good faith sought to exercise.

"An option to purchase, being inserted in the lease for the benefit of the tenant, must be construed with that purpose in view." 51 C.J.S., *Landlord and Tenant*, § 81, page 638, citing *Barnhart v. Stern*, 182 Wis. 197, 196 N.W. 245.

The trial judge held that the exercise of option was ineffectual because plaintiffs had not accepted it according to its terms, in that they demanded an abstract of title when the option itself did not call for one. We do not so construe plaintiffs' acceptance. Rather, we construe plaintiffs' statement "and request that you have the deed of purchase and the abstract of title in their hands in ample time before the first day of June, 1951," as a mere request, which defendants were free to grant or refuse.

Defendants also contend, and the trial judge so held, that plaintiffs' exercise of option was not legally effective because no effective tender was made at the time notice of exercise of option was given. With this we cannot agree. The option itself was silent on the question of when tender of the purchase price should be made. On May 29, 1951, plaintiffs placed in escrow with the Michigan National Bank, of Marshall, Michigan, an amount claimed to be due as the full purchase price under plaintiffs' option to purchase; and sent a registered letter to defendants notifying them of such fact. In this letter plaintiffs stated that they had agreed with the Michigan National Bank that they would assume the mortgage on the property, to which the bank had agreed. Defendants refused to accept this registered letter, so they had no way of knowing whether the amount deposited in escrow was the correct amount due or not. Defendants' refusal to so accept the registered letter makes it appear that they were intent on refusing to acknowledge a tender, even if it were in the proper amount. Under the circumstances we cannot say that plaintiffs failed to make a proper tender, and thereby lost their right to take up the option. Since this is an equity case and plaintiffs have shown that they were and are ready to pay the proper amount of the purchase price, they are entitled to a deed upon paying into court the correct purchase price to be determined by the trial court. Defendants are not entitled to \$92 for the last month's rent, because at the time the option was exercised on May 28, 1951, the relation of landlord and tenant ceased and the obligation to pay rent with it. See 51 C.J.S., *Landlord and Tenant*, § 82, page 640.

The decretal order of the trial court is reversed and a decree will be entered in this court remanding the case to the trial court with instructions to proceed in accordance with this opinion. Costs of both courts to appellants.

QUESTIONS:

1. Was the "option" of the lessees revocable by the lessors?
2. Did the court "make a contract" for the parties?

Chapter 2

CONSIDERATION; MUTUALITY

DI BENNEDETTO v. DI ROCCO et ux.

Supreme Court of Pennsylvania, 1953. 372 Pa. 302, 93 A.2d 474.

HORACE STERN, Chief Justice. In this action for specific performance of a contract for the sale of real estate the court below—in our opinion erroneously—held that the agreement was lacking in mutuality of obligation; accordingly it sustained preliminary objections and dismissed plaintiff's bill in equity.

In the written agreement between the parties, dated March 11, 1949, defendants, the owners of premises 6441 Haverford Avenue, Philadelphia, agreed to sell that property to plaintiff for the sum of \$8,500, of which \$100 was to be paid, and was paid, at the time of the signing of the agreement, and the balance of \$8,400 in cash at the settlement; by written addition to the agreement made June 21, 1949, plaintiff was to pay a further sum of \$602. There were two provisions in the agreement which have given rise to the present controversy. The one was that "In the event that the buyer *cannot* make the settlement, he may cancel this agreement, without any further liability on his part, and deposit money returned." The other was that "It is hereby further agreed that the purchaser will give to the seller six (6) months notice prior to July 1, 1951, of his intention to exercise the herein agreement to purchase, * * *." Settlement was to be made on or before July 1, 1951, said time to be the essence of the agreement. The agreement was signed by plaintiff and by one P. DiBenedetto as agent for defendants, but defendants themselves added: "we hereby approve the above contract," and signed the agreement with seals opposite to their names.

On December 7, 1950, plaintiff's attorneys, acting on his behalf, wrote to defendants advising them that, in accordance with the clause as to the giving of six months' notice prior to July 1, 1951 of plaintiff's "intention to exercise the agreement to purchase," they thereby gave notice of his intention to make settlement on that date or the nearest legal date thereto. On June 20, 1951, the same attorneys wrote to defendants, enclosing settlement certificate and informing them that arrangements had been made for settlement at the Broad Street Trust Company on Friday, June 29, 1951, at 3 p. m. On that day and at that time plaintiff appeared at the Trust Company, ready, willing and able to carry out the terms of the agreement on his part to be performed, but defendants failed to appear and have ever since refused to convey title.

The first question in the case is whether plaintiff, by reason of the first of the two clauses above quoted, had an absolute, arbitrary right to cancel the agreement without any further liability on his part. We think that he had no such right. The determinative, crucial word in that regard is "*cannot*". "Cannot" connotes, not unwillingness, but inability. Cf. *Hannock v. Tope & Tope*, 77 Pa.Super. 101, 104; *Wilker v. Jenkins*, 88 Pa.Super. 177. If defendants had brought action against plaintiff to compel performance of his agreement to purchase the property he could have successfully defended only by proving that he was *unable* to complete the transaction, not merely that he did not *desire* to do so. Plaintiff, however, by notifying defendants more than six months prior to the time fixed for settlement that it was his intention to make settlement at the time specified, admitted thereby that he was *not unable* to make settlement and therefore that he had no *right* to cancel the agreement. The agreement constituted, therefore, a contract binding on both parties alike, and did not lack mutuality of obligation.

Even were we to assume, however, that the agreement did not obligate plaintiff from the very beginning but should be interpreted as the mere grant of an *option* to him to purchase the property, he certainly became bound when the notice of December 7, 1950, was given. The agreement being under seal, and accompanied by the payment of \$100 at the time of its execution, there was consideration sufficient to entitle him to the right to exercise the option, and even had there been no consideration the exercise of the option before any revocation of it by defendants converted it into a contract with mutuality of obligation. *Driebe v. Fort Penn Realty Co.*, 331 Pa. 314, 200 A. 62, 117 A.L.R. 1091; 17 C.J.S., Contracts, § 100 d, P. 449.

Defendants question the legal sufficiency of the notice of December 7, 1950, on the ground that it was not shown that the agents who wrote the letter were authorized so to do by plaintiff in writing. This overlooks the well established principle that the Statute of Frauds does not require an agreement for the sale of real estate to be signed by the purchaser but only by the "parties making or creating" the interest in the land. *Stevenson v. Titus, Administrators*, 332 Pa. 100, 2 A.2d 853.

Decree reversed and the record remanded with a procedendo; costs to abide the event.

QUESTIONS:

1. Did plaintiff have an option to buy or an option to cancel?
2. Did the seller have power of revocation before December 7, 1950?
3. Suppose that buyer had become unable to raise the money after December 7, 1950?

CONSIDERATION; ILLUSORY PROMISES

NAT NAL SERVICE STATIONS, Inc. v. WOLF et al.

Court of Appeals of New York, 1952. 304 N.Y. 332, 107 N.E.2d 473.

CONWAY, Judge. This is an action to recover upon an agreement which is set out in the following paragraph of the complaint. "Fourth: That heretofore the defendants duly entered into an agreement with the plaintiff, wherein and whereby the defendants promised and agreed to and with the plaintiff that so long as plaintiff purchased from Socony Vacuum Oil Company or the Standard Oil Company or either or both, its requirements for gasoline at its place of business through the defendants and the defendants accepted the same, the defendants would pay to the plaintiff an amount equal to the discount allowed to defendants by said Socony Vacuum Oil Company and Standard Oil Company or either or both of them, on each gallon of gasoline so purchased."

The defendants answered, denying each and every allegation of the paragraph quoted, and pleaded as a separate defense, that the oral agreement alleged "by its terms was not to be performed within one year from the making thereof".

A motion was then made by defendants for summary judgment under rule 113 of the Rules of Civil Practice. The affidavit in support of the motion was made by the individual defendant but surprisingly stated no facts. Since summary judgment dismissing the complaint has been granted, we must look, therefore, to the allegations of the complaint and the affidavit of the president of the plaintiff corporation in opposition to the motion. The portion of that affidavit which is material states the following facts: "The plaintiff has a garage and gas station at 14 Second Avenue, in the Borough of Manhattan, City of New York, for the purpose of the sale of gas thereat. The defendant Wolf and the corporate defendant had an arrangement with various oil companies supplying oil, under which the defendants received a discount or allowance based upon the number of gallons of gasoline purchased by or through them from the companies. In order to obtain a greater allowance, the defendants desired to increase the volume of their orders for gasoline, and hence came to me with the proposition that if I would give my orders for gasoline through them, thereby increasing their volume, they would pay to me an amount equal to the discount received by them from the oil companies upon whatever orders I gave to them, and if they accepted my orders. I did give the defendants orders which they accepted and then transmitted in their name to the oil companies, under which they received a discount of at least one cent a gallon. Throughout the period I purchased from and

through them some 907,115 gallons of gasoline, on orders which they accepted * * *."

Subdivision 1 of section 31 of the Personal Property Law, Consol. Laws, c. 41, has been so construed as to apply only to agreements which *by their terms* do not admit of performance within one year from the time of their making and if performance be possible within the year, however unlikely or improbable that may be, the agreement does not come within the proscription of the statute.

The agreement alleged here was clearly one at will and for no definite or specific time and thus by its terms did not of necessity extend beyond one year from the time of its making. It is clear from the complaint and affidavit that neither party obligated itself to do anything. Unless and until plaintiff had offered to place an order for gasoline and the defendants had accepted such offer and filled the order, only then did there come into existence a legal obligation, viz., the obligation of defendants to pay the agreed discount. The promise by defendants to allow plaintiff a discount on purchases by plaintiff if made through them did not obligate plaintiff to buy its gasoline requirements through defendants. The plaintiff could have purchased the same gasoline through someone other than defendants. On the other hand if the plaintiff placed an order the defendant was under no obligation to accept it. Neither party was obligated to deal with the other. Each time the plaintiff offered to buy gasoline from defendants and the defendants accepted the offer and sold gasoline, there was concluded a separate contract and there became due from defendants the discount specified, but neither party was ever obligated to enter into another such contract. The discounts received by defendants from the named oil companies as received "became due and owing by the defendants to the plaintiff" and the plaintiff so pleaded in paragraph "Seventh" of the complaint. In reality the plaintiff is suing to recover the discounts due from a series of completed and executed, independent contracts. When defendants accepted an order placed by plaintiff they became bound to grant the discount. The acceptance of an order conferred upon plaintiff the right to the discount and imposed upon defendants the duty to pay it to plaintiff. Until and unless an order was offered by plaintiff and accepted by defendants, neither party had any rights or duties. As has been indicated above by the terms of the alleged oral agreement defendants could at any time refuse to accept an order and thereby avoid payment of a discount. On the other hand plaintiff was not obligated at any time to place any orders with defendants. Since neither party was under any contractual obligation to enter into a new contract with respect to each succeeding order for gasoline it seems quite clear, in the words of the dissenting Justice below, that "both parties retained the power to bargain fully concerning its [a future order] terms." 279 App.Div. 206, 211, 108 N.Y.S.2d 816, 821.

Thus defendants were free at any and all times to discontinue payment of a discount either by refusing to accept an order or by notification to plaintiff that thenceforth no discounts would be paid. Plaintiff was at all times free to place all its orders for gasoline elsewhere or to notify defendants that no further orders would be offered to them for acceptance. We are confronted with an alleged contract by the terms of which neither party was bound to do anything at any time, and consequently there is nothing in its terms to bring it within the Statute of Frauds.

* * *

Here, neither party has, nor is it possible for them under the terms of the alleged agreement, to furnish consideration through performance which will bind the other party for a period beyond the offering and acceptance of a particular order. Plaintiff need never perform at all. If plaintiff chooses to perform by placing an order the defendants are not bound to accept it. If defendants perform by acceptance of an order they do not bind themselves as to any future order. It is clear that each order and acceptance is a separate contract and that the parties herein have *performed and executed* a series of contracts.

The judgment of the Appellate Division should be reversed and the order of Special Term affirmed, with costs in this court and in the Appellate Division.

Three judges concurred; three others dissented.

QUESTIONS:

1. Were the orders given by plaintiff and accepted by defendant so given and accepted in pursuance of a previously made contract?
2. Did the defendant make a promise to pay money to the plaintiff?
If so, when?
3. If defendant made a promise, how and where are its terms to be found?
4. Did the parties make only one contract or many contracts, either unilateral or bilateral?

Chapters 1 and 2

OFFER AND ACCEPTANCE; CONSIDERATION

AUTOGRAPHIC REGISTER CO. v. PHILIP HANO CO., Inc.

United States Court of Appeals, First Circuit, 1952. 198 F.2d 208.

WOODBURY, Circuit Judge. This is an appeal from a final judgment in a suit for patent infringement wherein the court below dismissed the plaintiff's complaint and also its counterclaim for an accounting and royalties, and awarded the defendant \$6,999.49, with interest at 6 per cent from June 29, 1950, and costs, on its counterclaim for certain royalties which it alleged it paid the plaintiff "under protest and without prejudice" under circumstances to be presently described. * * *

It appears from the findings of the court below, as to which there is no real dispute, that on July 21, 1942, the plaintiff granted the defendant a non-exclusive non-transferable license to manufacture, use and sell the devices covered by the Brenn and Johnson patents in suit, and three other patents. The defendant as licensee agreed, *inter alia*, that during the term of the license it would not "directly or indirectly attack or question the validity" of any of the patents included in the license, and, absent the licensee's insolvency, the license was to continue in force until October 7, 1958. There was no provision for earlier termination of the license by either party. Apparently the license was lived up to by both parties without question until the patents in suit were held invalid by the United States District Court for the Northern District of Illinois in 1949 in the Uarco case cited above. [Autographic Register Co. v. Uarco, Inc., D.C.N.D.Ill.1949, 86 F.Supp. 730, affirmed, 7th Cir.1950, 182 F.2d 353.] The defendant was not a party or a privy in that litigation, but when it learned of the judgment therein its counsel communicated with the plaintiff for the purpose of repudiating the license agreement of 1942. Defendant's counsel talked with Mr. C. W. Brenn, the plaintiff's vice president and general manager, over the telephone and said that in view of the Uarco decision the defendant did not consider itself liable for any future royalty payments. Mr. Brenn expressed confidence that the District Court's judgment in the Uarco case would be reversed on appeal, and defendant's counsel then suggested that royalty payments accruing in the future should be paid to some third party "in part or in full in escrow" subject to refund if the District Court's judgment in the above case should be affirmed. Mr. Brenn did not accept or reject this proposal out of hand but said he would have the plaintiff's patent attorney, Mr. A. A. Johnson, who is not a member of the bar, communicate in reply. Mr. John-

son did so by telephone later that day and defendant's counsel repeated the substance of his earlier conversation with Mr. Brenn, and added that so far as the defendant was concerned the license agreement "stood denounced, so that defendant could be sued as an infringer." However, defendant's counsel said that he would advise his client "to offer future royalty payments on the understanding that if the plaintiff declined to agree to contingent refund, it should return the checks, whereupon the defendant would make no further payments." Moreover, counsel for the defendant stated that if the plaintiff should accept and retain royalty payments made as above, "such retention would constitute an undertaking to repay" in the event that the plaintiff was unsuccessful in its appeal from the District Court's judgment in the Uarco case. Mr. Johnson replied that if the plaintiff "was not entitled to the royalties," defendant's counsel "would have his relief whether they were paid under protest or not."

Following this conversation, in October 1949, the defendant sent the plaintiff a check bearing the legend "this payment is made under protest and without prejudice," and with the check it sent a letter reading: "In conformity with the telephone conversation had between our attorney, Mr. Maurice V. Seligson of New York, and your attorney, Mr. A. A. Johnson, enclosed herewith please find royalty check which is paid under protest and without prejudice." The check and the letter were brought to the attention of Mr. Brenn, and by him discussed with Mr. Johnson. The court below found that Mr. Brenn "was aware of the defendant's last proposal and understood that the check was submitted as an offer pursuant thereto." The plaintiff accepted and retained the proceeds of the check without communicating with the defendant. In January and again in May, 1950, the defendant, "believing that its offer had been accepted," to quote again from the findings of the court below, sent the plaintiff checks bearing the same legend, with similar covering letters, and the plaintiff again appropriated the proceeds of the checks without communicating with the defendant. The checks sent as above totaled \$6,999.49 which is the amount with interest thereon which the defendant seeks to recover under its counterclaim.

On May 25, 1950, (rehearing denied June 29, 1950) the Court of Appeals for the Seventh Circuit handed down its decision affirming the District Court's judgment in the Uarco case, and the defendant on the day rehearing was denied made demand on the plaintiff for repayment of the amount of the three checks. The plaintiff refused, and then the parties entered into a written agreement terminating their 1942 license as of June 28, 1950, without prejudice to the "obligations of the parties under the said license agreement which existed prior to the cancellation thereof."

On the facts outlined above the court below held that the parties in 1949, by their properly constituted agents, had orally modified their

license agreement of 1942 whereby the defendant acquired the right to recover the amount of the royalties it had paid to the plaintiff "under protest and without prejudice." That court said:

"I conclude and rule that an offer was made by the defendant to the plaintiff on September 7, 1949, which was intended to effect a modification of the original license agreement. The plaintiff through Mr. Johnson did not reject this offer and the subsequent act of the plaintiff in cashing the checks and retaining the proceeds therefrom constituted an acceptance of it. The license agreement was thereby modified and the obligations of the parties thereto were correspondingly changed. The plaintiff, therefore, is obligated to the defendant in the amount of \$6,999.49 with interest from June 29, 1950, the date of the defendant's demand therefor."

The defendant rests its counterclaim upon the theory adopted by the court below, that is, upon the theory of an oral modification of a pre-existing licensing contract whereby royalties paid thereunder from and after the date of the District Court's judgment in the Uarco case would be refunded by the plaintiff in the event that that judgment should be affirmed by the Court of Appeals for the Seventh Circuit. • • •

Massachusetts, in conformity with the usual rule (see Am.Law Inst., Restatement, Conflict of Laws § 332) refers to the law of the place of contracting to determine the validity and effect of a promise in the respects with which we are here concerned, *Adamowski v. Curtiss-Wright Flying Service, Inc.*, 1938, 300 Mass. 281, 15 N.E.2d 467 and the place of contracting was New Jersey where the plaintiff has its principal office, for that is where the plaintiff by its silent appropriation of the defendant's checks accepted the defendant's offer, if its act amounted to acceptance, and the contract amending the 1942 license agreement came into being if any such contract ever came into being at all. Am.Law Inst., Restatement, Conflict of Laws § 327.

Two questions of New Jersey law arise. The first is whether the plaintiff's acceptance of the defendant's checks and its appropriation of the proceeds thereof without communicating with the defendant constitute an acceptance of defendant's offer to modify the pre-existing license agreement of 1942. And second, if it did, was there any valid consideration flowing from the defendant to the plaintiff to support the undertaking of the latter to refund the royalties paid "under protest and without prejudice" in the event that the District Court's judgment in the Uarco case should be affirmed on appeal?

There is no finding by the court below, perhaps on the evidence there could be none, that the plaintiff acting through its president and general manager by silent acceptance and appropriation of the defendant's checks intended as a matter of fact to accept the defendant's offer for modification of the license agreement. On the other hand, there is no finding of a contrary intention. However, a

finding of positive intention to accept an offer is not always necessary to the creation of a contract. It is elementary that an offer may be accepted by performing or refraining from performing a specified act as well as by an affirmative answer, [Am.Law Inst., Restatement, Contracts § 29], and it is stated in Am.Law Inst., Restatement, Contracts, § 72(2) as the general rule that "Where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance." See also 1 Williston, Contracts, (Rev. Ed.) §§ 91, 91D. Furthermore, silent acceptance of a check sent in payment of a disputed claim, even in the absence of a finding of mental assent, is now generally held by parity of reasoning to constitute an accord and satisfaction of the claim. See 6 id. § 1854 wherein with full citation of cases, including *Decker v. George W. Smith & Co.*, 88 N.J.L. 630, 96 A. 915, it is said that the "great and increasing" weight of authority in the United States "as a matter of law regards the use and retention of the check by the creditor, with knowledge of the condition, as assent to it. It is said that the acceptance of the check necessarily involves an acceptance of the condition upon which it was tendered." New Jersey law appears to be in accord with the above. *Columbia Rolling Mill Co. v. Beckett Foundry Co.*, 55 N.J.L. 391, 26 A. 888. At least we find no New Jersey cases to the contrary, so we answer the first question in the affirmative.

Thus we come to the question whether the plaintiff's implied undertaking to refund the royalties under consideration in the event of an affirmance by the Court of Appeals in the *Uarco* case was supported by adequate consideration. The plaintiff contends that it was not. The argument is that the defendant in paying those royalties was only performing a clear obligation imposed upon it by the licensing contract, and hence the payment will not support the plaintiff's conditional promise to refund for the reason that performance of a previously existing contractual obligation is not a sufficient consideration. 1 Williston, Contracts, (Rev.Ed.) § 130; see also 1 Am.Law Inst., Restatement, Contracts § 76(a). We do not agree for the reason that the defendant's contractual duty to pay royalties after the District Court's decision in the *Uarco* case was not clear but on the contrary open to honest and reasonable dispute.

In *Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc.*, 1st Cir.1949, 176 F.2d 799, affirmed 339 U.S. 827, 70 S.Ct. 894, 94 L.Ed. 1312, rehearing denied, 1950, 340 U.S. 846, 71 S.Ct. 13, 95 L.Ed. 620, this court had occasion to consider at some length the question of a non-exclusive licensee's duty to pay royalties after the patent, or some of the patents covered by the license, had been held invalid in litigation between the patentee-licensor and third parties. There is no occasion here to go over the ground again. It will be enough to say

that the discussion in the above case and the texts therein cited * * * clearly indicate that the law on the matter is, in general, unsettled, and that we have been able to find no clear and unequivocal holding in New Jersey that on no theory whatever may a non-exclusive licensee be excused from further payment of royalties by a holding in other litigation that the licensed patent is invalid. Thus the defendant forbore exercise of its right to litigate its duty to pay royalties following the District Court's decision in the Uarco case, and this forbearance, even though only temporary, being a detriment to it constituted sufficient consideration for the plaintiff's promise to repay the royalties in the event of an affirmance on appeal of the District Court's judgment in the Uarco case, 1 Williston, Contracts, (Rev.Ed.) § 103F. * * *

The judgment of the District Court is affirmed.

QUESTIONS:

1. Did the licensee offer a promise for an act, an act for a promise, or a promise for a promise?
2. Is this a case where silence was acceptance?
3. What promise by either party can you find "by implication"?
4. What "forbearance" was there, if any, on the part of the licensee?
5. Is this a case in which there was action in reliance on a promise but no bargained-for exchange?
6. Did the licensee do anything that was not within his already existing legal duty?

Chapters 1, 2, and 6

OPTIONS; CONSIDERATION; CONDITIONS

In re ROMIG'S ESTATE.

Appeal of READING TRUST CO. et al.

Superior Court of Pennsylvania, 1953. 93 A.2d 884.

HIRT, Judge. In March 1945 Irvin B. Romig along with C. Raymond Cleaver and Katherine G. Cleaver, his wife, bought a tract of about 4½ acres of land partly in the Borough of St. Lawrence and extending into Exeter Township in Berks County. Romig paid \$450, being one-half of the purchase price, and the Cleavers paid a like amount; the land was conveyed to them as tenants in common, the Cleavers together taking an undivided one-half interest by entireties. After the purchase of the land Romig on April 9, 1945, entered into a written agreement with the Cleavers providing: " * * * it is now agreed by and between the said parties to these presents that in the event of the death of either the party of the first part or the party of the second part the survivor shall have the option of purchasing the decedent parties interest in said tract for the sum of four hundred and fifty dollars (\$450.00) this being one half of the original purchase price of nine hundred dollars (\$900.00)." On June 2, 1945, a second writing was executed by the same parties which provided that in the event of the death of either Romig or both of the Cleavers " * * * the survivor shall upon thirty days' notice from the legal representative of the deceased, pay to the estate of the deceased the sum of Four Hundred Fifty (\$450) Dollars, * * * and receive thereof a quit-claim deed from the legal representative of the estate of the deceased to all right, title and interest in said land * * *."

Irvin B. Romig died testate on December 11, 1949; Reading Trust Company was appointed administrator c. t. a. of his estate. Under the will Leroy H. Romig, son of decedent, received a one-half interest in the residuary estate after the payment of specific legacies. On February 18, 1950, the Cleavers tendered \$450 to the Reading Trust Company and demanded a conveyance to them of decedent's one-half interest in the land. On the refusal of the Trust Company as administrator to comply with the demand, the Cleavers in this proceeding petitioned the court to decree specific performance of decedent's contract. All parties in interest under his will were given notice of the petition by citation, in accordance with § 18 of the Fiduciaries' Act of June 7, 1917, P.L. 447, 20 P.S. c. 3, Appendix, §§ 611-616, then applicable. The court, after hearing, ordered specific performance of the contract as prayed

for. Both the administrator of the estate of Irvin B. Romig and Leroy H. Romig, residuary legatee, have appealed.

It is now, for the first time, asserted that the contract between the Cleavers and Irvin B. Romig did not give them the right to buy after his death, but on the contrary gave the representative of his estate the option of offering to sell his interest in the land to the Cleavers and compelling them to buy for \$450 upon 30 days notice. The original agreement of April 9, 1945, was drawn by a justice of the peace. There is evidence that, as drawn, the agreement was criticized by appellant Leroy H. Romig on behalf of his father and that after consulting with the Cleavers, he drew the contract of July 2, 1945, principally to put a time limit of 30 days after notice, on the right of a survivor to exercise the option to buy. He inserted other provisions not in issue here which admittedly clarified the understanding of the parties. He testified that Mrs. Cleaver asked him to draw another contract because the original agreement was not sufficiently specific and was not complete. The second contract clearly was intended to supplement and not supplant the first. That is clearly indicated by this recital in the second agreement: "• • • it being the intention of this agreement to modify and supplement a similar agreement entered into between said parties under date of April 9th, 1945 • • •." The parties during the life of Irvin B. Romig, and certainly after his death up to the time of this appeal, construed the agreement as giving the Cleavers the option to buy the decedent's interest in the land.

In interpreting the written agreements our endeavor should be to effectuate the intention of the parties. *Hess v. Jones*, 335 Pa. 569, 7 A.2d 299. And since both the parties to the agreement placed the interpretation upon it, contended for by the petitioners, that meaning is to be adopted as a manifestation of their agreement. Cf. *Restatement, Contracts*, § 235(e). • • •

The option given to the Cleavers to purchase was an interest in the land dating from the time when the option was given by Irvin B. Romig in the original agreement. Appellant, Leroy H. Romig had full knowledge of the option so given and therefore could not acquire the status of a bona fide purchaser without notice of the prior interest in the land acquired by the Cleavers. *People's St. Ry. Co. v. Spencer*, 156 Pa. 85, 27 A. 113; *Kerr v. Day*, 14 Pa. 112. For this reason any rights under his asserted agreement would have been unenforceable against the option in the Cleavers to purchase decedent's interest under their contract.

The lower court upon sufficient competent evidence found that the Cleavers had an enforceable option to buy the interest of the decedent under a contract complete and certain in all essential elements. The court therefore properly gave effect to the option, when exercised in ac-

cordance with the agreement, by ordering specific performance of the contract.

Decree affirmed at the costs of the estate.

QUESTIONS:

1. Did Irvin B. Romig ever have an option to buy Cleaver's interest or an option to sell his own?
2. What promise (if any) did Irvin B. Romig make and what consideration was given for it (if any)?
3. Were the written agreements of April 9 and June 2 both valid contracts, enforceable after Romig's death?
4. What "interest in the land" did Cleaver have before Romig's death (that is, in Romig's "half interest")? After Romig's death? After tender of \$450 to the Reading Trust Co.?

Chapters 1 and 3

CONDITIONAL ACCEPTANCE; ACTION IN RELIANCE

R. J. DAUM CONST. CO. v. CHILD et al.

Supreme Court of Utah, 1952. 247 P.2d 817.

WADE, Justice. Was there evidence from which it could reasonably be found that there was a meeting of the minds, thence a binding contract, is the question which this appeal presents. * * *

Prior to June 20, 1950, Richard C. Riding, appellant's superintendent of construction for this area, asked Thomas B. Child, one of the partners of respondent Thomas B. Child & Company, to submit a bid on the masonry work of a government construction job at the Ogden General Depot, on which appellant intended to submit a bid as general contractor. Riding furnished Child with the plans and specifications except addendum No. 1, and later Child phoned to Riding's home his bid for \$91,392. This was the lowest bid which appellant received for that work and it was used in figuring appellant's bid on the entire job at \$190,392. The Government opened the bids on June 22, 1950, and found that appellant had submitted the lowest bid on the entire job. Within a few days Child was notified of these facts and given to understand that when and if the contract was awarded to appellant, a sub-contract for the masonry work would probably be submitted to respondents, and he was asked to furnish a written verification of his bid which he furnished by a letter dated June 23, 1950. By a contract dated June 29, 1950, appellant was awarded this job; thereafter appellant mailed from its California office a proposed sub-contract which was dated July 11, 1950, for the masonry work. This proposed contract was signed by the vice-president of that company and respondents were requested to sign and return one copy thereof. Thereafter, Child objected to some of the terms of the proposed written contract and unqualifiedly refused to do this masonry work. Appellant sued for \$79,500 damages.

Appellant claims (1) that the evidence would reasonably sustain a finding that appellant unconditionally accepted respondents' bid, and (2) that respondents are by their actions estopped from denying that there was a contract.

Appellant's contention (1) presents two problems: (a) Was there an oral acceptance? and (b) Was the proposed written contract an acceptance or was it a rejection and counter-offer? We consider these questions in the order stated.

All of the negotiations between these parties were between Thomas B. Child and Richard C. Riding, except that appellant's California office drew up, executed and sent to Child the proposed written contract. The deposition of each of these persons was taken and is a part of this record. The evidence of an oral acceptance is substantially as follows: Appellant received only two bids on this brick work before submitting its bid to the Government. One was for \$151,743; since respondents' bid was much lower, it was used by appellant in figuring its bid to the Government. On the same day and immediately after the Government had opened the bids, appellant received a third bid on the brick work for \$105,000, and after respondents had refused to do this work, appellant sought and obtained a fourth bid for this work of \$95,000, which it accepted. Shortly after the Government opened the bids, Child and Riding talked together over the telephone, in which conversation Child was informed that appellant was the low bidder and that respondents' bid for the brick work was the lowest bid and had been used by appellant in figuring its bid to the Government, and Child was asked to furnish a written confirmation of their bid which he did by a letter dated June 23, 1950, only one day after the bids were opened. To this confirmation a postscript was attached in the handwriting of Child, which read: "Add for each fire door if filled \$175.00." Riding testified that this postscript covered part of the specifications of addendum No. 1, that he could not remember having talked with Child about this, that he had not shown Child a copy of that addendum, but felt that it was clear that he must have talked with Child about that addendum for otherwise Child would not have written that postscript.

Riding further testified that sometime after the above conversation, he called Child on the telephone and asked him how he wanted to handle the reinforcing steel, whether respondents would place it or appellant should do that through another sub-contractor, and that Child told him that he would rather place it provided it was all bent, cut and designed properly. He further testified that at the time of this conversation appellant did not have any contract with the Government, had not given Child any contract or accepted his proposal, that up to that time it was all just preliminary negotiations, and that prior to mailing to respondents the proposed written contract appellant's office had not confirmed or accepted respondents' bid.

There is no material conflict between the testimony of Riding and Child. Child's version was that there was only one telephone conversation between him and Riding after the bids were opened until about July 14, after he had received the proposed contract from the California office, and that in that conversation all the matters detailed above were discussed, and his testimony does not materially disagree with Riding's testimony as to what was said about such matters. He

testified that Riding told him that they were the low bidder, that they expected to get the job, that "it takes the Government quite a while to decide what they want, but after we have got fixed up for it we will give you a form of contract". • • •

If appellant unconditionally accepted respondents' offer before it was withdrawn, there was a binding contract. Such an acceptance requires manifestation of unconditional agreement to all of the terms of the offer and an intention to be bound thereby. Such manifestation may be either written or oral or by actions and conduct or a combination thereof, but regardless of the form or means used, there must be made manifest a definite intention to accept the offer and every part thereof and be presently bound thereby without material reservations or conditions. [Restatement, Contracts, § 26, is here quoted.]

It is clear that no binding contract was intended unless and until the Government awarded to appellant the general contract. But this does not prevent a binding contract from coming into effect upon the happening of that event if such was the manifested intention of the parties. *Frederick Raff Co. v. Murphy*, 110 Conn. 234, 147 A. 709. There is no claim that the offer was withdrawn before appellant was awarded the general contract so we do not have to consider whether the offer could have been withdrawn after it had been accepted conditioned only on appellant being awarded the general contract.

There is no claim that appellant expressly accepted respondents' offer either orally or in writing prior to appellant's proposed written contract. Child testified that he was told that if appellant was awarded the Government contract he would probably be furnished a form of contract. Riding testified positively that the last negotiations before the proposed written contract was received by Child were only preliminary, and no contract had been agreed upon. This evidence not only shows that there was no express acceptance but both parties considered that there had been no implied acceptance.

With this evidence in mind conversations and surrounding facts and circumstances do not show an acceptance. Neither the fact that appellant used respondents' bid in figuring its bid to the Government, that appellant's bid to the Government was the low bid and it was finally awarded the Government contract, the communication of such facts to respondents, the request for and the furnishing of a written confirmation of respondents' bid, nor the conversation in regard to placing of the reinforcements, nor all these circumstances together definitely manifested an intention to accept respondents' bid and be presently bound thereby. Each and all of these circumstances are as consistent with an intention and expectation only to negotiate a contract in the future as they are with a present intention to accept and

enter into a binding contract. Since the plaintiff has the burden of showing that an acceptance was more probable than not, we hold as a matter of law that it would be unreasonable to find from this evidence that an acceptance had been manifest prior to sending the proposed written contract from appellant's California office to the respondents. *James Baird Co. v. Gimbel Bros.*, 2 Cir., 64 F.2d 344. * * *

Appellant's proposed written contract was not an unconditional acceptance of respondent's offer, but was a rejection and counter-offer. To create a binding contract the acceptance must unconditionally agree to all the material provisions of the offer, and must not add any new material conditions, but all of the provisions of an offer need not be expressly stated therein—some may be implied from the surrounding circumstances. [Restatement, Contracts, §§ 58, 59, 60, here quoted.]

We hold that appellant's proposed written contract was a counter-offer and not an unconditional acceptance of respondents' bid.

The bid was for \$91,392.00 exclusive of the requirements of addendum No. 1. All the evidence is that Child did not see that addendum before he received the proposed written contract, and that the post-script requiring an additional \$175.00 for each fire door if filled was an additional cost for part of the additional specifications required by that addendum. Yet the proposed written contract expressly includes addendum No. 1, without providing the added compensation provided therefor in the bid. These provisions were on a material matter directly contrary to the bid, and constituted a counter-offer and not an acceptance of the bid. This is not remedied by the fact that the additional requirements of addendum No. 1 were not insisted on by the Government when the job was actually done for the proposed contract did make those additional requirements, and respondents had they executed it would have been bound to do the additional work without the extra compensation provided in their bid. They could not then know that the Government would waive performance of those specifications. So this bid was a counter-offer and not an acceptance of respondents' bid.

Appellant's proposed written contract is a printed form with blank spaces for names, dates and other matters typed in. One of such blanks contains the following:

"Time is the essence of this contract. General contract to be completed within 120 calendar days. \$50.00 per day penalty thereafter—sub-contractor to complete his work as scheduled."

Riding testified that on the evening of July 14, 1950, he called Child by telephone and arranged to take him to Ogden to meet the other sub-contractors and go over the work. Although Child had the proposed contract at that time, Riding claims he made no mention of it

in that conversation but that the next morning Child showed him the proposed written contract and objected to the above quoted provisions, and that he also complained that they were losing men on account of the Korean war and said that he and his brothers had met and decided to not go through with the contract. Riding said that he offered to strike out the \$50 per day penalty provision and initial it then and there. He further said that no schedule had been made but would have to be arranged in the future between him and the sub-contractors. Child agreed that Riding had called him on the evening of July 14, about going to Ogden the next day, but said he told him in that conversation that he had the proposed contract, objected to the above quoted provisions and told him that he and his brothers had decided to not sign up the job because the proposed contract did not conform with their proposals. He denied that Riding offered to strike out the penalty provision of the contract. In the later contract which appellant entered into with another contractor for this brick work, Riding wrote after the \$50 per day penalty provision, "This is not called for in Government specs." and initialed it "R.C.R."

Appellant argues that the above quoted provision merely recites the provisions of the general contract which were known to respondents that the general contract must be completed within 120 days with a \$50 per day penalty thereafter against the general contractor, but did not purport to provide for such a penalty against respondents, and it was implicit in the bid that time was the essence of the contract, and that the sub-contractors should complete their job within a reasonable schedule to be worked out so that the entire job could be completed within the 120-day limit.

This argument would have more force were it not for other related provisions of the proposed contract. Subdivision "Second" thereof provides that: "The Sub-contractor shall not be held responsible for any delays or interruptions caused by the neglect, delay or default of the Contractor, the Owner, the Architect or any other Sub-contractor, and the Sub-contractor hereby waives any and all claims upon the Contractor for damages for any act, omission or delay caused by the Contractor, the Owner, the Architect or any other Sub-contractor, and hereby undertakes the work subject to all conditions as they now exist or may arise." The first part of the quoted sentence is fair to all parties and would be implicit in the bid, but the waiver provision which follows is highly unfair to respondents' interest; particularly is this true since respondents' work would have to be sandwiched in between the work of many others. It does not seem improbable that respondents might suffer damages which it could not collect on account of this waiver provision, and still as will be later pointed out, respondents are held to strict liability for all damages which they might cause to others. This waiver provision was a material condi-

tion which was not expressly nor impliedly in respondents' bid and therefore constituted a rejection thereof and a counter-offer. [Additional provisions in the written form submitted are here omitted.]

The contention that respondents are estopped from denying that there was a contract needs little consideration. Here, as we have shown, appellant did not accept respondents' offer but submitted a counter-offer. Under such circumstances it did not rely on the offer but was seeking to get a better one. There is a recognized doctrine of promissory estoppel usually involving offers to make a gift, where although accepted, no binding contract results because there is no consideration. We know of no case where an offeror has been held to be bound by estoppel without an acceptance of his offer. See *Restatement of the Law of Contracts*, Secs. 86 to 90, *Williston on Contracts*, Revised Ed., Secs. 692 and 693. In *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879, where the facts were somewhat similar to our case, it was held that where the offer was accepted and agreed to but no binding contract resulted on account of lack of consideration, the offeror was bound by estoppel. In *James Baird Co. v. Gimbel Bros., Inc.*, 2 Cir., 64 F.2d 344, 345, a similar case except that the offer was not accepted until after the general contract had been awarded and the offer had been withdrawn, and there was no question of lack of consideration, the court held that there was no estoppel until the offer was accepted which came too late after the offer had been withdrawn. There the court said "the plaintiff might in advance have secured a contract conditional upon the success of its bid" and that the "contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures" and on that account refused to apply the doctrine of promissory estoppel in this kind of a case. Both of these cases are more favorable to the doctrine of promissory estoppel than ours. The last one holds that under the facts of that case there is no estoppel to withdraw a bid at any time before there is an acceptance. Under that doctrine there was no promissory estoppel here, for respondents' bid was not accepted.

Judgment is affirmed. Costs to respondents.

QUESTIONS:

1. Would the plaintiff have won this case if it had not submitted the written draft?
2. Could an oral contract be made, conditional on the Government's award of the general contract?
3. Can an offer be made irrevocable by action in reliance on it, so that acceptance would be possible even after notice of revocation?

Chapters 1, 2, and 14

INDEFINITENESS; STATUTE OF FRAUDS

HUNT v. HAMMONDS et al.

Supreme Court of Alabama, 1952. 257 Ala. 586, 60 So.2d 355.

FOSTER, Justice. The question on this appeal is the sufficiency of each of the two counts of the complaint tested by demurrer. The court sustained the demurrer to both counts, and plaintiff took a nonsuit, and assigns as error the ruling as to each count, separately.

The substance of each count, so far as important in considering the demurrer, is that there was a breach by defendants of a contract between them, not alleged to be verbal or in writing, whereby plaintiff was to furnish about eight acres of land located along the Albertville-Boaz paved highway, upon which defendants were to erect a drive-in-theatre as a place of amusement; that they were to erect a place in connection therewith to serve as a cafe, of which plaintiff was to be the manager at a stipulated weekly salary and was also to receive one-fifth of the net proceeds of the entire business; that defendants were to furnish the money to build the places of business, and plaintiff was to furnish the land and be the manager of the business; that in furtherance of said agreement defendants erected a small shop building on plaintiff's land; and that although plaintiff has complied with his part of the agreement defendants have failed to comply with any of the provisions of the agreement and have wholly breached it. Special, general and punitive damages are claimed.

Count 2 alleged, in addition to the foregoing, that final details of the agreement were to be made in writing, and the business was to be incorporated,—all to be done in a few days.

The grounds of demurrer are (1) that the alleged agreement as set out is void for uncertainty; (2) that the description of the land is so vague and indefinite as to render the agreement void; (3) no definite and certain agreement is described, and (4) that the complaint shows that the agreement is void under the statute of frauds. In sustaining the demurrer to each count separately, the court did not specify the grounds he thought went to the defect he had in mind.

Appellee insists in brief upon each of the grounds of demurrer as being well assigned. The two chief defects contended for are that the contract is void for an insufficient description of the land proposed to be furnished by plaintiff, and because the allegations of each count, especially the second, show by a fair interpretation that the

contract was verbal, and that the alleged contract is so indefinite as to be void for uncertainty.

With respect to the statute of frauds, we may assume for the sake of argument that the averments of the complaint, especially count 2, show a verbal contract rather than a written one. But the alleged contract is not for the sale of an interest in land. Section 3(5), Title 20, Statute of Frauds, Code. The legal effect of the contract is to enter into a joint adventure, to which plaintiff was to supply the use of land on which defendants, at their own expense, were to erect certain improvements from which profits were in contemplation. *Saunders v. McDonough*, 191 Ala. 119, 67 So. 591. Such an agreement is not within the statute of frauds, *supra*. 37 C.J.S., Statute of Frauds, § 119(e), p. 615. Nor is it required by any other statute to be in writing. • • •

While the statute of frauds does not here apply, the principle does apply that executory contracts wanting in mutuality are not enforceable. A contract is void for uncertainty when it agrees to supply eight acres of land of an uncertain description in a certain locality on which defendants agree to erect a drive-in-theatre. The contract does not require plaintiff to supply any certain land but only an eight acre tract in the named locality. This does not stand the test of *Alabama Mineral Land Co. v. Jackson* [121 Ala. 172, 25 So. 709]. It is not mutual in that it is not binding on plaintiff.

We also think the contract is subject to the objection that it is indefinite and uncertain as to the details of what defendants agreed to do. There is no sort of description of the buildings and other structures which defendants obligated themselves to erect. The contract in respect to the obligations assumed by both of the parties, respectively, is void for uncertainty. The demurrer taking that point was properly sustained.

Affirmed.

Chapters 10 and 11

THIRD PARTY BENEFICIARIES; ASSIGNMENT

MERRILL et al. v. PREBILT CO.

Supreme Judicial Court of Massachusetts, 1952. 107 N.E.2d 433.

LUMMUS, Justice. On January 14, 1946, the defendant, a corporation, entered into a written agreement with all the stockholders of Nashua Milling Corporation to buy 300 shares, being all the outstanding stock, of the latter corporation at \$600 a share, to be transferred on February 14, 1946. The plaintiffs, Merrill and Donovan were brokers who had brought the parties together. By the agreement the defendant agreed to "assume and pay any and all brokerage commissions due or that may be due as a result of the purchase and sale of the above shares," and to obtain from the plaintiffs releases releasing each of the said stockholders from any liability to the plaintiffs. * * *

In one count the plaintiffs, as assignees of such stockholders, claim damages for breach by the defendant of its contract to buy the stock. In another count the plaintiffs, as assignees of such stockholders, claim damages for breach by the defendant of its contract to buy the stock and to assume and pay brokerage commissions.

There was evidence to the following effect. The stockholders agreed to pay the plaintiffs a commission of five per cent, or \$9,000, on the price of \$180,000. * * * The defendant did not perform its contract to buy the stock. The stockholders then sold their stock to R. S. Robie Company for \$165,000, paying a commission of \$2,000 to a broker. The Robie offer was the best offer they could get after much effort. Ten acres of land worth \$1,000 were excluded from the sale to R. S. Robie Company. The plaintiffs claimed their commission of \$9,000 from the stockholders. As a result, on July 15, 1947, the stockholders gave the plaintiffs an assignment of "all claims and demands which we now have against The Prebilt Co., a Massachusetts corporation, by reason of the breach by the latter corporation of its contract dated January 14, 1946." On the same day, July 15, 1947, the stockholders entered into a written agreement with the plaintiffs, which referred to that assignment and provided that the proceeds of the prosecution of the claims assigned should be divided among the assignors and assignees in specified proportions, and provided also that the assignees, the present plaintiffs, "do hereby release, discharge and forever hold harmless the said assignors, individually and jointly, and the Nashua Milling Corporation, from any and all claims which we, jointly or individually, might now have for brokers' commission

against the said assignors or the corporation with reference to the contract above referred to between the said assignors and the Prebilt Company."

A judge of the Superior Court, sitting without a jury, found that the plaintiffs were entitled under the assignment to recover a commission of \$9,000, and also the difference between the agreed price of the proposed sale to the defendant, \$180,000, and what was obtained from the sale to R. S. Robie Company, \$163,000, less \$1,000 for the land reserved in the sale to R. S. Robie Company. In other words, he found for the plaintiffs for \$25,000. To that sum he added interest amounting to \$7,500. * * *

In its brief the defendant attacks only the inclusion of the plaintiffs' claim for a commission of \$9,000 in the damages awarded. Other possible questions are thereby waived. * * * In its brief the defendant concedes that the plaintiffs earned a commission payable by the stockholders, and by its contract with the stockholders the defendant assumed the payment of that commission. The plaintiffs could sue in their own names under G.L.(Ter.Ed.) c. 231, § 5, "subject to all defences * * * to which the defendant would have been entitled had the action been brought in the name of the assignor." *Edmund Wright Ginsberg Corp. v. C. D. Kepner Leather Co.*, 317 Mass. 581, 585, 586, 59 N.E.2d 253.

The only ruling requested by the defendant that relates to the only question now open, was that "the plaintiffs having released the sellers of the stock of Nashua Milling Corporation from any and all claims for commission on account of the proposed sale of said stock, the plaintiffs cannot recover the said commission in this action." That ruling the judge refused to give.

By the agreement of January 14, 1946, the defendant assumed the payment of the brokerage commission to the plaintiffs, and became the party primarily liable therefor. *Pappone v. Masters*, 325 Mass. 437, 90 N.E.2d 907. The stockholders became only secondarily liable, like sureties. The defendant owed to the stockholders the duty of paying the commission and relieving them from liability. *Ricker v. Ricker*, 248 Mass. 549, 551, 143 N.E. 539. The stockholders could recover the amount of the commission from the defendant, even though they had not paid it to the plaintiffs. *Locke v. Homer*, 131 Mass. 93; *Walton v. Ruggles*, 180 Mass. 24, 61 N.E. 267; *Schneider v. Armour & Co.*, 323 Mass. 28, 80 N.E.2d 34; *Williston, Contracts* (Rev.Ed.1936) §§ 392, 1408. The release of the stockholders did no harm to the defendant, for if the defendant had paid the commission to the plaintiffs it could not have recovered over against the stockholders, in the face of its own contract to assume the payment of that commission. It is well settled that the release of a surety does not discharge the principal debtor. * * *

We think that the ruling requested by the defendant could not properly have been given, and that no error appears upon the record. Exceptions overruled.

QUESTIONS:

1. Did the plaintiffs have any right as third party beneficiaries against the Prebilt Company?
2. Did the assignment by the Nashua stockholders create any rights in the plaintiffs against the Prebilt Company?
3. Why did not the release of the Nashua stockholders by the plaintiffs extinguish their right to a commission?

Chapters 9, 10 and 11

THIRD PARTY BENEFICIARIES; ASSIGNMENT; DISCHARGE

BROWN et ux. v. BOWERS CONST. CO. et al.

Supreme Court of North Carolina, 1952. 236 N.C. 462, 73 S.E.2d 147.

The plaintiffs, Brown and wife, were lessees of a warehouse owned by the Westall Trust and had stored goods therein. This warehouse was on land that was necessary for the construction of a bridge across the French Broad River in the city of Asheville, a bridge that the State Highway Commission desired to build.

By a contract between Westall and the Highway Commission, Westall gave permission to remove the warehouse, the Commission promising to locate it on other land belonging to Westall, without prejudice to the occupancy and rights of the tenants (the plaintiffs herein).

The Highway Commission then entered into a contract with the Bowers Const. Co. (a defendant herein) for the building of the bridge. In this contract, the Bowers Const. Co. expressly promised to remove the warehouse and its contents. The terms of this promise are stated in the opinion of the court.

The Bowers Const. Co. thereupon entered into a subcontract with one Crouch, in which Crouch made the following promises: "I agree to furnish all tools, labor, materials, supervision, compensation and liability insurance to move [the warehouse]. I also agree to carry out all the provisions in doing the work that are set forth in your contract with the State Highway Commission."

Crouch was a reputable independent contractor; but in the removal process he failed to protect the contents of the warehouse against fire and they were destroyed.

The plaintiffs thereupon brought suit for damages against the Bowers Const. Co. and Crouch, for loss of the goods valued at \$9,214.37.

Both Bowers and Crouch moved for a nonsuit on the above facts. The lower court entered judgment of nonsuit in favor of Bowers and refused it against Crouch. The plaintiffs then entered a voluntary nonsuit against Crouch and appealed from the judgment in favor of Bowers.

On appeal, the court considered two questions: 1. Was the contract between Westall and the Highway Commission relevant evidence

in the case? 2. Did the court err in nonsuiting the case as to defendant Bowers Const. Co.?

[The foregoing statement is substituted for that in the report of the case.]

WINBORNE, Justice. * * * We are of opinion that upon consideration of the record and case on appeal both questions merit an affirmative answer.

The language of these provisions [in the contract between Westall and Bowers] is plain, and, by fair interpretation, clearly shows an intent upon the part of the Trustees of the J. M. Westall Trust to act in the interest, and for the benefit of their tenants—these plaintiffs.

And, by reference to the contract between the State Highway and Public Works Commission and Bowers Construction Company it clearly appears that the State Highway and Public Works Commission projected therein special provisions, of like character, intended to be in the interest, and for the benefit of the Westall tenants, who are the plaintiffs.

And it is a well-settled principle of law in this State that where a contract between two parties is made for the benefit of a third person, or party, the latter is entitled to maintain an action for its breach.

* * *

The parties do not debate in this Court the question as to sufficiency of the evidence, offered on the trial below, to take the case to the jury as to the defendant G. E. Crouch. Hence the sole question here for decision is whether or not there is evidence tending to show obligation on the part of Bowers Construction Company to observe the special provisions of the general contract with the State Highway and Public Works Commission assumed by it in respect to removal and relocation of the buildings and contents of buildings, after it had sublet to defendant G. E. Crouch the performance of the work of removing and relocating the buildings. This is a matter of law to be determined upon proper interpretation of the special provisions of the general contract.

By referring to the "Special Provisions" of the general contract it appears under heading "3-1. Construction Methods" that "Buildings or structures shall be prepared for, removed, and be placed in their new locations, * * * left plumb and level and in as good condition in all respects as they were before moving * * *"; and that "the contents of all buildings or structures shall be moved and relocated along with the building or structure to its new site"; and that "in the event that it is not feasible or possible to move the building or structure together with the contents therein, the contents shall be

removed from the building or structure at its original location and same replaced in the relocated building or structure"; and that "such precautions as necessary shall be taken to prevent damage or loss of any kind to the contents thereof".

A further special provision under heading "5-1. Basis of Payment" is that "Payment will not be made for this item until an owner's release is secured from the property owner or owners, certifying that the work has been performed to the property owner's satisfaction and that the State Highway and Public Works Commission and the contractor are released from all responsibility in connection with this work * * *".

And it is further provided under heading "Required Contract Provisions for Federal Aid Projects" that "no portion of the contract shall be sublet, assigned or otherwise disposed of except with the written consent of the contracting officer or his authorized representative * * *"; and that "consent to sublet, assign or otherwise dispose of any portion of the contract shall not be construed to relieve the contractor of any responsibility for the fulfillment of the contract".

In the light of these provisions a legal duty is assumed by, and, by operation of law, imposed upon Bowers Construction Company which it cannot escape by assignment. And this is true whether the performance required is a personal performance or not. Corbin on Contracts, Vol. 4, Sec. 865. See also *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.*, 147 N.C. 368, 61 S.E. 185, 23 L.R.A.,N.S., 223; *North Carolina Bank & Trust Co. v. Williams*, 201 N.C. 464, 160 S.E. 484; *Virginia Trust Co. v. Webb*, 206 N.C. 247, 173 S.E. 598.

Appellees however point to the allegations of the complaint of plaintiffs purporting, as they contend, to allege another and special contract between G. E. Crouch and plaintiffs by which he agreed "that the said property would be moved in said buildings to the new location in as good condition as if the same had never been moved", and that the buildings, after removal, would be "left plumb and level, and in as good condition in all respects as they were before moving".

True there are such allegations in the complaint. But the complaint also sets forth the special provisions of the general contract. And, in view of the fact that the special agreement attributed to Crouch is in effect a repetition of the special provisions of the general contract, it may be fairly taken as supplemental thereto and not in substitution for the special provisions of the general contract.

The assumption of the assignor's duty by the assignee merely gives to the other party a new and added security. Corbin on Contracts, Vol. 4, Sec. 866.

Since there must be another trial, it is not deemed necessary to expressly consider other assignments of error. The matters to which they relate may not then recur.

For reasons stated above the judgment from which this appeal is taken, is reversed.

QUESTIONS:

1. Is Brown's action for breach of contract or for a tort? Is it "in equity" or "at law"?
2. What kind of a beneficiary is Brown, "donee," "creditor," or "incidental"?
3. Was the performance of removing the warehouse by Bowers a "personal" performance?
4. Did Bowers, by making a subcontract with Crouch, commit a breach of its contract with the Highway Commission?
5. Why was not Bowers discharged by Brown's entering a "voluntary nonsuit" against Crouch?
6. Could Bowers make a valid assignment to Crouch of any part of its compensation promised by the Highway Commission?



